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Presidential Transitions: Issues Involving Outgoing and Incoming Administrations

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Summary

The crux of a presidential transition is the transfer of executive power from the incumbent to the President-elect. Yet the transition process encompasses a host of activities, beginning with pre-election planning and continuing through inauguration day. The process ensures that the federal government provides resources to presidential candidates' transition teams, and, eventually, the President-elect's team; and includes close coordination between the outgoing and incoming Administrations. The Presidential Transition Act (PTA) of 1963, as amended, established formal mechanisms to facilitate presidential transitions and authorizes the Administrator of General Services to provide facilities and services to eligible presidential candidates and the President-elect. A presidential transition facilitates the establishment of a new Administration and prepares it to govern. Additionally, as noted by the Senate Committee on Homeland Security and Governmental Affairs in a report on S. 1172 (114th Congress, Presidential Transitions Improvements Act of 2015), planning for a presidential transition helps to ensure the nation's security.

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

The President's authority to exercise power begins immediately upon being sworn into office and continues until he is no longer the officeholder. By the same token, while congressional oversight of the executive branch is continuous, some activities may take on special significance at the end or beginning of an Administration. The disposition of government records (including presidential records and vice presidential records), protections against "burrowing in" (which involves the conversion of political appointees to career status in the civil service), the granting of pardons, and the issuance of "midnight rules" are four activities associated largely with the outgoing President's Administration. The incumbent President may also submit a budget to Congress, or he may defer to his successor on this matter. Continuing this transition process, the first actions of a new President generally focus on establishing the priorities and leadership of the Administration. These can include executive orders, appointments to positions that require Senate confirmation as well as those that do not, and efforts to influence the pace and substance of agency rulemaking.

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

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Introduction

At its heart, a presidential transition is the transfer of executive power from the incumbent President to his or her successor. A single step—taking the oath of the office of President—accomplishes this transfer. However, a successful transition between the incumbent Administration and the incoming Administration begins with pre-election planning and continues through inauguration day. It involves key personnel from the outgoing and incoming Presidents' staffs, requires resources, and includes a host of activities, such as vetting candidates for positions in the new Administration, helping to familiarize the incoming Administration with the operations of the executive branch, and developing a comprehensive policy platform. The importance of a well-organized, coherent transition has been underscored by the ongoing security concerns following the terrorist attacks of September 11, 2001. In 2015, the Senate Committee on Homeland Security and Governmental Affairs (HSGAC) acknowledged the importance of presidential transition planning in “prevent[ing] disruptions that can create vulnerabilities to the nation’s security,” adding that “[t]he challenges and risks identified by the Committee have only increased since 2010.”¹

Over the years, presidential administrations’ commitment to and involvement in transition activities have varied. As the Partnership for Public Service has noted

For much of American history, presidential transitions were carried out without very much advance planning or even cooperation from the sitting chief executive. A president-elect was not expected to come to the nation’s capital until the inauguration and had few if any substantial policy or procedural discussions with the outgoing administration.²

Additionally, presidential candidates generally have eschewed pre-election planning. Their reluctance to begin transition activities prior the general election appears to stem from, at least in part, a concern that the appearance of presuming victory could lead to criticism or possibly even a backlash at the polls. Other possible reasons why they might defer transition activities until after the election include concerns that such activities “could tax limited resources, [or] distract or conflict key campaign staff....”³

Growing recognition of the necessity of a well-planned, organized, and coordinated transition to a new Administration’s ability to assume responsibility on inauguration day for governing has shifted stakeholders’ perspectives. Contributing to the impetus for a more robust transition with a longer lead time (i.e., pre-election planning) was the realization that the period of time between the date of the general election and inauguration day is insufficient for accomplishing necessary tasks and activities given the complexity of a presidential transition and the federal government. In its report on legislation that subsequently was enacted as P.L. 111-283, Pre-Election Presidential Transition Act of 2010, HSGAC wrote: “By codifying Congress’s view that candidates should start transition planning before the election, this legislation seeks to remove the

¹ U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Presidential Transitions Improvements Act of 2015*, report to accompany S. 1172, 114th Cong., 1st sess., July 27, 2015, S.Rept. 114-94 (Washington: GPO, 2015), pp. 2-3.

² Partnership for Public Service, *Ready to Govern: Improving the Presidential Transition*, January 2010, p. 1.

³ U.S. Congress, Senate Homeland Security and Governmental Affairs Committee, *Pre-Election Presidential Transition Act of 2010*, report to accompany S. 3106, 111th Cong., 2nd sess., August 2, 2010, S.Rept. 111-239 (Washington: GPO, 2010), p. 3.

stigma related to it and make pre-election transition planning an accepted part of a successful transition process.”⁴

Establishing a Presidential Transition Framework

The passage and implementation of the Presidential Transition Act (PTA) of 1963 and subsequent amendments led to the provision of services and facilities to transition teams and the establishment of formal mechanisms to facilitate presidential transitions while legitimizing pre-election planning by candidates.⁵ Under this statute, the Administration is authorized to provide pre-election transition support to eligible candidates, required to establish a White House Transition Coordinating Council and an Agency Transition Directors Council, and authorized to provide transition-related facilities and services to the incoming Administration. This commitment of resources on the part of the federal government (particularly the White House), as well as on the part of the presidential candidates, and, ultimately, the President-elect, highlights the importance of the presidential transition to the continuity of operations of the federal government. A successful transition facilitates the formation of a new Administration, familiarizes top-level personnel (who may not have prior public service experience) with the operations of the federal government generally or particular agencies, and prepares the incoming Administration to govern.

Governing presents its own challenges to a new Administration. The Partnership for Public Service notes that an incoming President “is responsible for making more than 4,000 appointments and managing an organization with a budget of nearly \$4 trillion and more than 2 million civilian employees performing missions as diverse as national defense, securing our borders, conducting medical research and reducing homelessness.”⁶ The number of federal agencies and the variety of their missions serve as a proxy for the complexity of the federal government. The 15 executive departments alone are responsible for a broad range of missions, policies, functions, and programs, yet they represent a small percentage of the hundreds of federal government entities.⁷ As suggested above, reviewing the staffing needs of a new Administration provides another perspective on the complexity of the federal government. Bradley Patterson estimated that, in 2008, 7,854 positions were to be filled by the President and the White House staff.⁸ This figure included 1,756 presidential appointees requiring Senate confirmation, 2,530 presidential appointees that did not require Senate confirmation, 400 federal judicial appointees,

⁴ Ibid.

⁵ P.L. 88-277, Presidential Transition Act of 1963; P.L. 100-398, Presidential Transition Effectiveness Act of 1988; P.L. 106-293, Presidential Transition Act of 2000; Section 7601 of P.L. 108-458, Intelligence Reform and Terrorism Prevent Act (IRTPA) of 2004; P.L. 111-283, Pre-Election Presidential Transition Act of 2010; and P.L. 114-136, Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015. The Presidential Transition Act of 1963, as amended, may be found in 3 U.S.C. §102 note. For information regarding the Presidential Transition Act, as amended, see CRS Report RS22979, *Presidential Transition Act: Provisions and Funding*, by (name redacted).

⁶ Center for Presidential Transition, Partnership for Public Service, *Presidential Transition Guide*, April 2016, 2nd ed., p. 10.

⁷ The executive departments are Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs. See <https://www.usa.gov/federal-agencies/a> for a list of federal government organizations.

⁸ Martha Joynt Kumar, *Before the Oath: How George W. Bush and Barack Obama Managed a Transfer of Power* (Baltimore: Johns Hopkins University Press, 2015), p. 19.

944 White House staff positions, and 2,224 noncareer Senior Executive Service and Schedule C positions.⁹

Presidential Transitions and National Security

In light of the terrorist attacks of September 11, 2001, recent terrorist incidents in the United States and abroad, and the threat of a terrorist attack on the 2009 inauguration, an overarching issue for presidential transitions is national security. During the hours leading up to the January 20, 2009, inauguration of Barack Obama, the Federal Bureau of Investigation (FBI) briefed senior officials with the Bush Administration and the President-elect's team on a threat involving a possible attack on the National Mall during the ceremony.¹⁰ An attack did not materialize, but the identification of a threat emphasized the need for both the outgoing and incoming Administrations to be "well prepared for the events of the day ahead of them" to ensure everyone's safety.¹¹ The 2009 threat might indicate that, despite the robust nature of the federal government (including, notably, the Department of Defense [DOD] and the Department of Homeland Security [DHS]), America's adversaries may perceive that the United States could be particularly vulnerable during a presidential transition.

Amendments to the PTA have addressed, in part, the need to bolster the federal government's readiness for possible transition-related incidents and the need for the incoming Administration to be prepared to take responsibility for national security immediately following the inauguration. The most recent amendment to the PTA, P.L. 114-136, required the Secretary of Homeland Security to submit a report no later than February 15, 2016, to HSGAC, the House Committee on Organization and Government Reform, and the House Committee on Homeland Security on the "threats and vulnerabilities facing the United States during a presidential transition."¹² Another amendment to the PTA requires the appropriate government officials to provide a summary of "specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force" to the President-elect.¹³

Overview of Issues Related to Presidential Transitions

For a sitting President who is not reelected (and barring any electoral disputes), or is concluding a second term, election day marks the beginning of the end of his presidency. While some commentators would argue that a lame duck President can accomplish little during the 11 weeks between election day and inauguration day, William G. Howell and Kenneth R. Mayer offer an alternative perspective:

Portraits of outgoing presidents going quietly into the night overlook an important feature of American politics, and of executive power—namely, the president's ability to unilaterally set public policy.... Using executive orders, proclamations, executive agreements, national security directives, memoranda, and other directives, presidents

⁹ Bradley H. Patterson, James P. Pfiffner, and David E. Lewis, *The White House Office of Presidential Personnel*, The White House Transition Project, Report 2009-27, 2008, p. 5, at <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP-2009-27-Presidential-Personnel.pdf>.

¹⁰ *Ibid.*, p. 3.

¹¹ *Ibid.*

¹² Section 6(a) of P.L. 114-136. The Office of Intelligence and Analysis, Department of Homeland Security, produced the report, *Analysis of Threats and Vulnerabilities During the Presidential Transition*, which is dated August 8, 2016.

¹³ Section 7601 of P.L. 108-458 (a)(1).

have at their disposal a wide variety of means to effectuate lasting and substantive policy changes, both foreign and domestic.¹⁴

Howell and Mayer also note that an outgoing President's level of activity during his final months in office is influenced by the party of his successor. An outgoing President whose successor is from the same political party "has little cause to hurry through a slew of last-minute directives."¹⁵ When the opposing party is poised to regain control of the White House, however, the sitting President might "exercise these powers with exceptional zeal, making final impressions on public policy in the short time" available before inauguration day.¹⁶ Moreover, the incumbent might use the transition period to enact policies and effect changes that might stymie his successor.

A curious thing happens during the last one hundred days of a presidential administration: political uncertainty shifts to political certitude. The president knows exactly who will succeed him—his policy positions, his legislative priorities, and the level of partisan support he will enjoy within the new Congress. And if the sitting president (or his party) lost the election, he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor's hands.¹⁷

During the 20th and 21st centuries, beginning with Theodore Roosevelt, who took office in 1901, there have been 18 presidential transitions, 11 of which were interparty transitions. The Presidents who came into office and replaced a President of another party include the following: Woodrow Wilson, Warren G. Harding, Franklin D. Roosevelt, Dwight D. Eisenhower, John F. Kennedy, Richard M. Nixon, Jimmy Carter, Ronald W. Reagan, William J. Clinton, George W. Bush, and Barack H. Obama.

Regardless of an incumbent President's intentions, however, his decisions and actions in several areas—as well as the activities of his Administration—could affect his successor, and could be a cause for congressional concern. Acting unilaterally, a President can issue executive orders,

¹⁴ William G. Howell and Kenneth R. Mayer, "The Last One Hundred Days," *Presidential Studies Quarterly*, vol. 35 (2005), p. 537. Notable examples of "last-minute presidential actions" include the following:

It was President John Adams's 'Midnight' appointments, which [his successor Thomas] Jefferson refused to honor, that prompted the landmark *Marbury v. Madison* Supreme Court decision. Grover Cleveland created a twenty-one-million-acre forest reserve to prevent logging, an act that led to an unsuccessful impeachment attempt and the passage of legislation annulling the action. Then, in response to the congressional uprising, 'Cleveland issued a pocket veto and left office'.... Jimmy Carter negotiated for the release of Americans held hostage in Tehran, implementing an agreement on his last day in office with ten separate executive orders, many of which sharply restricted the rights of private parties to sue the Iranian government for expropriation of their property.... In late December 1992, George Bush pardoned six Reagan administration officials who were involved in the Iran-Contra scandal, a step that ended Independent Counsel Lawrence Walsh's criminal investigation. '[In] a single stroke, Mr. Bush swept away one conviction, three guilty pleas, and two pending cases, virtually decapitating what was left of Mr. Walsh's effort, which began in 1986'.... [D]uring his final days in office Clinton 'issued scads of executive orders' on issues ranging from protecting the Hawaiian Islands Coral Reef Ecosystem Reserve to prohibiting the importation of rough cut diamonds from Sierra Leone to curbing tobacco use both domestically and abroad. *Ibid.*, pp. 534-535.

¹⁵ *Ibid.*, p. 538.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 533. On the other hand, the incumbent Administration might be a significant resource for the President-elect and his team: "One of the most important transition opportunities an incoming President and his team has is the outgoing administration. They are a source of valuable information on personnel positions and can be used to take some actions smoothing the path of the incoming administration." Martha Joynt Kumar et al., *Meeting the Freight Train Head On: Planning for the Transition to Power*, The White House 2001 Project, White House Interview Program, Report No. 2, August 18, 2000, p. 9.

appoint individuals to positions that do not require Senate confirmation (PA positions), and make recess appointments. Additionally, the President can appoint individuals to positions which require Senate approval (PAS positions); the Administration can influence the pace of agency rulemaking; significant decisions regarding presidential and vice presidential records may be made; and some political appointees might be converted to civil service positions in a practice known as “burrowing in.”

Depending upon the timing, frequency, content (in the case of executive orders and regulations), and other salient features of certain presidential or Administration actions or decisions, some may question the propriety of an outgoing Administration’s actions during the presidential transition period. Certain decisions or actions could affect the incoming President, “forcing [him] to choose between accepting objectionable policies as law or paying a steep political price for trying to change them.”¹⁸

In addition to the possibility of having to address certain actions taken by the outgoing Administration, a new President and his staff have to deal with “the challenges of moving from a campaign to a governing stance,” which can include handling “the issues of staffing, management, agenda setting, and policy formulation....”¹⁹ Eager to hit the ground running, an incoming President can use the same tools his predecessor did during the transition period—for example, executive orders, agency rulemaking, and political appointments—to establish his policy agenda, populate the executive branch with his appointees, and possibly overturn or modify some of his predecessor’s policies and actions. If the sitting President defers to his successor regarding the submission of a budget, this is an additional task for the newly elected President. Alternatively, if the incumbent submits a budget, his successor may revise it.

In sum, the significance of the transition period for the President-elect cannot be overstated: “Since the advent of the modern presidency under Franklin D. Roosevelt, the actions that presidents-elect undertake before inauguration day have been seen by scholars, journalists, other observers, and even presidents themselves as critical in determining their successes—and failures—once in office.”²⁰

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

Even though, generally, overlap exists among presidential transition-related topics and issues, the sections in this report are grouped into three categories. Issues that primarily or solely involve the outgoing Administration include personnel (political-to-career conversions), government records, and executive clemency. Cybersecurity and national security are related to the actual transition. The remaining category includes issues that span the outgoing and incoming Administrations:

¹⁸ Howell and Mayer, “The Last One Hundred Days,” p. 535.

¹⁹ Ibid.

²⁰ John P. Burke, *Becoming President: The Bush Transition, 2000-2003* (Boulder, CO: Lynne Rienner Publishers, 2004), p. 1.

agency rulemaking, executive branch appointments, judicial branch appointments, executive orders, and submission of the President's budget.

Personnel—Political-to-Career Conversions (“Burrowing In”)²¹

Some individuals, who are serving in appointed (noncareer) positions in the executive branch, convert to career positions in the competitive service, the Senior Executive Service (SES), or the excepted service.²² This practice, commonly referred to as “burrowing in,” is permissible when laws and regulations governing career appointments are followed. While such conversions may occur at any time, frequently they do so during the transition period when one Administration is preparing to leave office and another Administration is preparing to assume office.

Generally, these appointees were selected noncompetitively and are serving in such positions as Schedule C,²³ noncareer SES, or limited tenure SES²⁴ that involve policy determinations or require a close and confidential relationship with the department or agency head and other top officials. Many of the Schedule C appointees receive salaries at the GS-12 through GS-15 pay levels.²⁵ The noncareer and limited tenure members of the SES receive salaries under the pay schedule for senior executives that also covers the career SES.²⁶ Career employees, on the other hand, are to be selected on the basis of merit and without political influence following a process that is to be fair and open in evaluating their knowledge, skills, and experience against that of other applicants. The tenure of noncareer and career employees also differs. The former are generally limited to the term of the Administration in which they are appointed or serve at the pleasure of the person who appointed them. The latter constitute a workforce that continues the operations of government without regard to the change of Administrations. In 2007, Paul Light, a professor of government at New York University who studied appointees over several

²¹ Prepared by (name redacted), Analyst in American National Government, Government and Finance Division.

²² Appointments to career competitive service positions include requirements for approved qualification standards, public announcement of job vacancies, rating of applicants, and completion of a probationary period and three years of continuous service; career SES positions include review by the Office of Personnel Management (OPM) and certification of a candidate's ability by a Qualifications Review Board (QRB); and career excepted service positions allow agencies to establish their own hiring procedures, but require those systems to conform to merit system principles and veterans preference. During agency head transitions, OPM suspends the processing of QRB cases under the authority of 5 C.F.R. §317.502(d). For the policy during the current transition, see U.S. Office of Personnel Management, Memorandum from Beth Cobert, Acting Director, Office of Personnel Management to Agency Heads and Chief Human Capital Officers, “Governmentwide Moratorium on Senior Executive Service (SES) Qualifications Review Board (QRB) Cases,” November 18, 2016, available at <https://www.chcoc.gov/content/governmentwide-moratorium-senior-executive-service-ses-qualifications-review-board-qrb-cases>.

²³ 5 C.F.R. §213.3301.

²⁴ Appointments to SES positions that have a limited term may be for up to 36 months, and those that are to meet an emergency (unanticipated or urgent need) may be for up to 18 months (5 U.S.C. §3132(a)(5)(6)).

²⁵ GS refers to the General Schedule, the pay schedule that covers white-collar employees in the federal government. As of January 2017, the salaries from GS-12, step 1, to GS-15, step 10, in the Washington, DC, pay area ranged from \$79,720 to \$161,900.

²⁶ Salaries for members of the SES are determined annually by agency heads “under a rigorous performance management system,” and range from the minimum rate of basic pay for a senior level (SL) employee (120% of the minimum basic pay rate for GS-15; \$124,406, as of January 2017; to either EX Level III (\$172,100, as of January 2017); in agencies whose performance appraisal systems have not been certified by OPM as making “meaningful distinctions based on relative performance,” or EX Level II (\$187,000, as of January 2017); in agencies whose performance appraisal systems have been so certified.

Administrations, indicated that the pay, benefits, and job security of career positions underlie the desire of individuals in noncareer positions to “burrow in.”²⁷

Beyond the fundamental concern that the conversion of an individual from an appointed (noncareer) position to a career position may not have followed applicable legal and regulatory requirements, “burrowing in” raises other concerns. When the practice occurs, the following perceptions (whether valid or not) may result: that an appointee converting to a career position may limit the opportunity for other employees (who were competitively selected for their career positions, following examination of their knowledge, skills, and experience) to be promoted into another career position with greater responsibility and pay; or that the individual who is converted to a career position may seek to undermine the work of the new Administration whose policies may be at odds with those that he or she espoused when serving in the appointed capacity. Both perceptions may increase the tension between noncareer and career staff and hinder the effective operation of government which relies on career staff to provide the continuity and expertise that underpins it. Public administration literature emphasizes the importance of effective working relationships between noncareer and career staff. In August 2016, for example, the Senior Executives Association (SEA) published a handbook for federal career executives which underscored that members of the SES “are the interface or link between policy and implementation” and stressed that, “An effective working relationship between political appointees and career executives is key to carrying out new initiatives, reforms and improvements of existing programs, and ensuring increased attention to priority services.”²⁸ In addition, SEA’s Distinguished Executives Advisory Network developed a series of webinars entitled “Strategies and Best Practices for Managing the Transition to a New Administration, a Webinar Series of Guidance for Career Senior Executives.”²⁹

Appointments to Career Positions

Appointments to career positions in the executive branch are governed by laws and regulations that are codified in Title 5 of the *United States Code* and Title 5 of the *Code of Federal Regulations*, respectively. For purposes of both, appointments to career positions are among those activities defined as “personnel actions,” a class of activities that can be undertaken only in accordance with strict procedures. In taking a personnel action, each department and agency head is responsible for preventing prohibited personnel practices; for complying with, and enforcing, applicable civil service laws, rules, and regulations and other aspects of personnel management; and for ensuring that agency employees are informed of the rights and remedies available to

²⁷ Christopher Lee, “Political Appointees ‘Burrowing In,’” *Washington Post*, October 5, 2007, p. A19.

²⁸ Senior Executives Association, “A Handbook on Presidential Transition for Federal Career Executives,” Version 2.0, (Washington, Senior Executives Association, [August 10, 2016], p. 5, at <https://seniorexecs.org/images/TransitionHandbook.pdf>. Other resources that discuss noncareer and career staff in the federal government include Robert Maranto, *Beyond a Government of Strangers: How Career Executives and Political Appointees Can Turn Conflict to Cooperation* (Lanham: Lexington Books, 2005); Chapters 2, 3, and 7 in Mark A. Abramson and Paul R. Lawrence (eds.), *Learning the Ropes: Insights for Political Appointees* (Lanham: Rowman and Littlefield Publishers, Inc., 2005); G. Edward DeSeve, *Speeding Up the Learning Curve: Observations From a Survey of Seasoned Political Appointees* (Washington: National Academy of Public Administration and the IBM Center for the Business of Government, 2009); Paul R. Lawrence and Mark A. Abramson, *Paths to Making a Difference Leading in Government* (Lanham: Rowman and Littlefield Publishers, Inc., 2011); and Partnership for Public Service, Center for Presidential Transition, “Presidential Transition Guide,” January 20, 2016, at <http://presidentialtransition.org/publications/viewcontentdetails.php?id=845>.

²⁹ The website for the webinars is <https://seniorexecs.org/693-second-webinar-online-what-agencies-are-required-to-do-and-are-doing-now-to-prepare-for-transition>.

them. Such actions must adhere to the 9 merit principles and 13 prohibited personnel practices that are codified at 5 U.S.C. §2301(b) and §2302(b), respectively. These principles and practices are designed to ensure that the process for selecting career employees is fair and open (competitive), and free from political influence.

Department and agency heads also must follow regulations, codified at Title 5 of the *Code of Federal Regulations*, that govern career appointments. These include Civil Service Rules 4.2, which prohibits racial, political, or religious discrimination, and 7.1, which addresses an appointing officer's discretion in filling vacancies. Other regulations provide that Office of Personnel Management (OPM) approval is required before employees in Schedule C positions may be detailed to competitive service positions, public announcement is required for all SES vacancies that will be filled by initial career appointment, and details to SES positions that are reserved for career employees (known as Career-Reserved) may only be filled by career SES or career-type non-SES appointees.³⁰

During the period June 1, 2016, through January 20, 2017, which is defined as the Presidential Election Period, certain appointees are prohibited from receiving financial awards.³¹ These appointees, referred to as senior politically appointed officers, are (1) individuals serving in noncareer SES positions; (2) individuals serving in confidential or policy-determining positions as Schedule C employees; and (3) individuals serving in limited-term and limited emergency positions.

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

Office of Personnel Management Approval

A November 5, 2009, memorandum on "Political Appointees and Career Civil Service Positions," issued by then OPM Director John Berry to the heads of departments and agencies, established the policies that govern OPM's oversight of conversions of employees from appointed positions to career positions. The memorandum, citing Section 1104(b)(2) of Title 5, *United States Code*, and Section 5.2 of Title 5, *Code of Federal Regulations*, reiterated that "OPM requires Federal agencies to seek our approval before selecting a political appointee for a competitive service position during a Presidential election year" and "conducts merit staffing reviews of proposed SES appointments whenever they occur."³² It also noted that, "if the proposed civil service job is below the SES level, OPM's review ha[d] been limited only to competitive service appointments and only those appointments that take place during a Presidential election year."³³

In a significant change to this policy, the memorandum announced that departments and agencies "must seek prior approval from OPM before they can appoint a current or recent political appointee to a competitive or non-political excepted service position at any level." This policy

³⁰ These regulations are codified at 5 C.F.R. §300.301(c), 5 C.F.R. §317.501, and 5 C.F.R. §317.903(c), respectively.

³¹ 5 U.S.C. §4508 and 5 C.F.R. §451.105.

³² U.S. Office of Personnel Management, Memorandum for Heads of Departments and Agencies, from John Berry, Director, *Political Appointees and Career Civil Service Positions*, November 5, 2009.

³³ *Ibid.*

became effective on January 1, 2010. A written authorization from OPM is required whenever an department or agency appoints:

[a] current political Schedule A or Schedule C Executive Branch employee or a former political Schedule A or Schedule C Executive Branch employee who held the position within the last five years to a competitive or non-political excepted service position under title 5 of the U.S. Code; or

[a] current Non-career SES Executive Branch employee or a former Non-career SES Executive Branch employee who held the position within the last five years to a competitive or non-political excepted service position under title 5 of the U.S. Code.

According to the memorandum, the central personnel agency “will continue to conduct merit staffing reviews for all proposed career SES selections involving a political Schedule A, Schedule C, or non-career SES political appointee before the SES selections are presented to OPM’s Qualifications Review Board (QRB) for certification of executive qualifications.” OPM reminded agencies “to carefully review all proposed SES selections to ensure they meet merit system principles before such cases are forwarded to the QRB.”³⁴

OPM Director John Berry explained the policy change by saying that the agency’s “responsibility to uphold the merit system is not limited to Presidential election years nor to competitive service appointments.”³⁵ He also said that he “delegated decisionmaking authority over these matters to career Senior Executives at OPM to avoid any hint of political influence.”³⁶ “Pre-Appointment Checklists” for Competitive Service Positions and Non-Political Excepted Service Positions were included as attachments to the OPM memorandum and list the documentation that a department’s or agency’s Director of Human Resources must submit to OPM along with a dated cover letter.

For the 2016 presidential election year, OPM reminded the heads of departments and agencies of this policy in a memorandum issued on January 11, 2016, by Acting Director Beth Cobert. In Attachment 3 of the memorandum, on the “Do’s and Don’ts” of the policy, OPM cautioned departments and agencies not to

[c]reate or announce a competitive or excepted service vacancy for the sole purpose of selecting a current or former political appointee, Schedule C employee or Noncareer SES employee; or

[r]emove the Schedule C or Noncareer SES elements of a position solely to appoint the incumbent into the competitive or excepted service.³⁷

The January 2016 memorandum also again stated the policies set forth in the November 2009 memorandum.

To assist departments and agencies, OPM also publishes the *Presidential Transition Guide to Federal Human Resources Management Matters*.³⁸ The most current edition, dated September

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ U.S. Office of Personnel Management, Memorandum for Heads of Departments and Agencies, from Beth Cobert, Acting Director, *Appointments and Awards During the 2016 Presidential Election Period*, January 11, 2016.

³⁸ U.S. Office of Personnel Management, *Presidential Transition Guide to Federal Human Resources Management Matters*, September 2016, at <https://www.opm.gov/about-us/our-people-organization/support-functions/executive-secretariat/presidential-transition-guide-2016.pdf>. OPM posted the document on the agency’s website on November 3, 2016.

2016, includes detailed guidance on standards of ethical conduct, appointments, and compensation for federal employees.

New Reporting Requirement for OPM

Section 4(b)(1) of P.L. 114-136 (S. 1172), the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvement Act of 2015, enacted on March 18, 2016,³⁹ requires the OPM Director to provide annual reports to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform on requests by agencies⁴⁰ to appoint political appointees⁴¹ or former political appointees⁴² to covered civil service positions.⁴³ The reports are to cover a calendar year. The law states the data requirements for the reports.

It also requires that certain of the reports be provided quarterly, cover each quarter of the year, and the last quarterly report cover January 1 through January 20 of the following year. Such quarterly reports are required in the last term of a President or in the last year of the second consecutive term of a President, as applicable.

The name or title of a political appointee or a former political appointee may be excluded from a quarterly report if the OPM Director determines that would be appropriate. This circumstance would occur for an appointee who was requested to be appointed to a covered civil service position and was not appointed to a covered civil service position; or to whom a request to be appointed to a covered civil service position is pending at the end of the period covered by the report.

Government Accountability Office Review

Oversight by the GAO focuses on periodic review, after the fact, and, at the request of Congress, of conversions from political to career positions. The agency’s most recent evaluation was published on September 30, 2016, and reported on a review of conversions at 30 agencies. The results of that audit covered the period January 1, 2010, through October 1, 2015, and provide the most current retrospective data. Twenty-eight agencies reported 69 conversions. Of that total, 34, or almost 50%, occurred in six agencies—the Departments of Homeland Security (9), Justice (7),

³⁹ Senator Tom Carper introduced S. 1172, the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, on April 30, 2015. The Senate Committee on Homeland Security and Governmental Affairs reported the bill (S.Rept. 114-94) on July 27, 2015. S. 1172 passed the Senate, with amendments, by unanimous consent on July 30, 2015. The House Committee on Oversight and Government Reform reported the bill (H.Rept. 114-384, Part I) on December 18, 2015. The bill had also been referred to the House Committee on Homeland Security which discharged it the same day. The House of Representatives passed S. 1172, amended, under suspension of the rules by voice vote on February 29, 2016. The Senate agreed to the House amendment to the Senate bill by unanimous consent on March 8, 2016.

⁴⁰ Agency means an Executive department, a Government corporation, or an independent establishment.

⁴¹ Political appointee means an individual serving in an appointment to a political position. The term political position means an Executive Schedule position, a noncareer appointment in the Senior Executive Service, or a Schedule C position of a confidential or policy-determining character.

⁴² Former political appointee means an individual who is not serving in an appointment to a political position, and served as a political appointee during the five-year period ending on the date of the request for an appointment to a covered civil service position in any agency.

⁴³ Covered civil service position means a position in the civil service that is not a temporary position; or a political position. The civil service consists of all appointive positions in the executive, judicial, and legislative branches, except positions in the uniformed services. 5 U.S.C. §2101.

Defense (5), the Treasury (5), and Health and Human Services (4) and the Federal Deposit Insurance Corporation (4). Twenty-two agencies had three or fewer conversions and two agencies made no conversions. The evaluation found that

[I]ndividuals were converted from the following categories of noncareer positions: 42 Schedule C positions, 23 noncareer SES positions, 2 presidential appointee positions, 1 limited-term SES position, and 1 administratively determined position.

[R]eported conversions were made to the following categories of career positions: 25 competitive service positions, 29 career SES positions, and 15 career excepted service positions.

Eight agencies converted 17 political appointees (almost 25% of conversions) to career positions without first obtaining OPM approval. Agency officials said they did not seek prior approval from OPM before converting political appointees to career positions because of difficulty understanding OPM's policy for prior approval of political conversions.⁴⁴

Congressional Oversight

As part of its oversight of government operations, Congress also monitors conversions of employees from noncareer to career positions. Such oversight occurred just before and immediately after the presidential election of 2008, and remains ongoing for the presidential election of 2016. During the latter portion of the 114th Congress and the early months of the 115th Congress, oversight included collecting information from federal agencies about hiring during the last two months of the administration of President Barack Obama and appointments that involved conversions from appointed positions to career positions during that administration.

115th Congress

On February 16, 2017, Representative Ken Buck introduced H.R. 1132, the Political Appointee Burrowing Prevention Act, which was referred to the House Committee on Oversight and Government Reform.⁴⁵ The bill would establish a two-year prohibition on certain appointees in noncareer positions from accepting positions in the career Civil Service. It seeks to ensure that “federal civil service hiring standards remain solely merit-based, rather than based on political favors.”⁴⁶

In January 2017, Representative Jason Chaffetz, Chairman of the House Committee on Oversight and Government Reform, sent letters to each of the Cabinet departments and the Environmental Protection Agency, the General Services Administration, the Office of Management and Budget, and the Small Business Administration. Each of the letters requested the same information: “(1) A

⁴⁴ U.S. Government Accountability Office, *Office of Personnel Management: Actions Are Needed to Help Ensure the Completeness of Political Conversion Data and Adherence to Policy*, GAO-16-859 (Washington: GAO, September 30, 2016), pp. 8 and 9, at <http://www.gao.gov/assets/690/680178.pdf>. The Department of Homeland Security had the highest number (6) of conversions made without OPM approval. For earlier GAO evaluations, see U.S. Government Accountability Office, *Personnel Practices: Conversions of Employees from Political to Career Positions May 2005-May 2009*, GAO-10-688, (Washington: GAO, June 2010) and U.S. Government Accountability Office, *Conversions of Selected Employees from Political to Career Positions at Departments and Selected Agencies*, GAO-10-356R, (Washington: GAO, January 29, 2010).

⁴⁵ Representatives Ted Lieu and Jared Polis cosponsored the bill.

⁴⁶ Representative Ken Buck, Press Release, “Buck and Lieu Introduce Bill to Prevent Burrowing into Federal Civil Service Positions,” February 16, 2017, at <https://buck.house.gov/media-center/press-releases/buck-and-lieu-introduce-bill-prevent-burrowing-federal-civil-service>.

list of all job openings, GS-13 and higher, announced since November 9, 2016;⁴⁷ (2) All documents submitted to OPM referring or relating to employee hiring after November 9, 2016, including any and all documents seeking Direct-Hire Authority or approval to convert non-career political staff to career positions; and (3) For each GS-13 position opening during calendar year 2015, the number of days between the vacancy announcement and the date the Department selected a candidate.”⁴⁸ Representative Chaffetz, citing a news report in the *Washington Post* that stated “Federal agencies are accelerating the hiring of civil service positions and compressing hiring timelines in anticipation of a possible hiring freeze in 2017,” said that “Hiring decisions must be legitimate, justified, and free from political influence.”⁴⁹

114th Congress

On December 2, 2016, Senator Ron Johnson, Chairman of the Senate Committee on Homeland Security and Governmental Affairs, and Senator Thom Tillis sent a letter to President Obama encouraging him to consider “the implementation of a hiring freeze on all career civil servant positions, except those that involve public health or safety, until the end of [his] term.” The letter stated that, “Not only is ‘burrowing in’ unfair to applicants without an inside connection, it further contributes to the possibility that federal workers may attempt to undermine the policies of the new president.” The Senators expressed the hope that, by taking such an action, the President would “set a precedent for future presidential transitions.”⁵⁰

Earlier, on November 21, 2016, Senator Johnson sent a letter to Acting OPM Director Beth Cobert requesting “(1) A list of all federal employees who have converted from political appointments to career positions during the period of June 30, 2016, and the date of your response,”⁵¹ and “(2) A weekly update of all conversions and requests for conversions from political appointments to career positions that occur between the date of your response, and January 20, 2017.”⁵² The letter expressed the Senator’s view that “we must guard against inappropriate hiring practices to ensure merit-based federal employment and protect the independence of the federal civil service.”⁵³

⁴⁷ The letter specified the information to be provided for each position: the job announcement, including name and grade of the position; the description of the position, including any necessary skills and qualifications; the number of applicants; whether the position was a competitive service position, and if so, the number of individuals that were on the certification list for each such position; and the date of hire.

⁴⁸ The letters requested that the information be provided by January 19, 2017. For example, Letter from Representative Jason Chaffetz to Sally Jewell, Secretary, Department of the Interior, January 10, 2017, at <https://oversight.house.gov/wp-content/uploads/2017/01/2017-01-10-JEC-to-18-Agencies-Agency-Hiring-due-1-19-18-letters.pdf>.

⁴⁹ *Ibid.*

⁵⁰ Letter from Senators Ron Johnson and Thom Tillis to President Barack Obama, December 2, 2016, at <https://www.tillis.senate.gov/public/index.cfm/press-releases?ID=EF043932-8E4A-4474-BF8B-F1284FED6C41>.

⁵¹ The letter specified the contents for the list as follows: employee’s full name and first date of employment at the department or agency; all job titles held by the employee throughout his or her tenure at the department or agency, and the dates of any title changes; all salaries received by the employee throughout his or her tenure at the department or agency and the dates of any salary changes; date on which the employee transitioned to a career position within the department or agency. In addition, for any conversions for which OPM conducts a post-appointment review, the letter requested that OPM provide: OPM’s findings from the review; recommendations provided by OPM to the violating agency; corrective actions taken by the violating agency; and whether the political appointee remained in the same career position. Senator Johnson requested a response by December 1, 2016.

⁵² The letter specified that the weekly update should include the same information as the initial list.

⁵³ Letter from Senator Ron Johnson to Acting OPM Director Beth Cobert, November 21, 2016, at <https://www.hsgac.senate.gov/media/majority-media/johnson-requests-that-opm-be-wary-of-political-appointees-burrowing-in-to-career-positions-during-transition>.

Also on February 16, 2016, Senator Orrin Hatch, Chairman of the Senate Finance Committee, and Representative Kevin Brady, Chairman of the House Ways and Means Committee, sent letters to the Department of Health and Human Services, the Department of the Treasury, the U.S. Trade Representative, and the Social Security Administration requesting information on personnel conversions of noncareer employees. Specifically, the letters requested information on “every non-career employee⁵⁴ who has converted from [a] non-career position to a career or non-political excepted service position” within the respective department or agency, from the respective department or agency to another government agency, or from another agency to the respective department or agency, from January 1, 2009, to the present.⁵⁵ The letters also requested that the departments and agencies “provide the Committees with a list of all corrective actions⁵⁶ requested by OPM as a result of the pre-employment review process and the status of those actions.”⁵⁷

Four Members of Congress requested the GAO review discussed above under the section on Government Accountability Office Review. In a November 30, 2015, letter to Eugene Dodaro, Comptroller General, Senator Johnson; Senator John Thune, chairman of the Senate Committee on Commerce, Science, and Transportation; Representative Fred Upton, chairman of the House Committee on Energy and Commerce; and Representative Chaffetz, had asked GAO to review political appointee conversions to career federal civil service positions from June 1, 2009, through October 1, 2015. The Members also asked GAO to review the implementation and effectiveness of the OPM policy that became effective on January 1, 2010. The letter included additional requirements for GAO’s review and suggested that “the GAO continue to conduct periodic reviews in the future to ensure consistent application of these rules.”⁵⁸ It noted that the Members requested the study because “The possibility that political appointees are ‘burrowing in’—through favoritism in the selection process, effectively taking civil positions that would otherwise be open to the public and awarded based on merit—may affect the integrity of the merit-based federal workforce.”⁵⁹

The next day, Timothy Dirks, then interim president of the Senior Executives Association, sent a letter to the Senators commending them for requesting the GAO review. According to Mr. Dirks:

SEA is particularly concerned about burrowing in to SES and equivalent positions. As you know, the positions that Senior Executives hold are some of the most difficult and complex in the federal government and require expertise that is built up from years of experience. We have seen some cases where political employees or candidates for employment are placed in Senior Executive positions for which they may be unqualified or less qualified than other candidates, or where their service as political appointees was given undue weight. Most of those experienced with the federal personnel system

⁵⁴ A noncareer employee includes, but is not limited to, a political appointee, Senior Executive Service employee, senior-level employee, and scientific or professional employee.

⁵⁵ The letters requesting the information are at U.S. Congress, Senate Committee on Finance, “Hatch, Brady Call on Federal Agencies to Prevent Political Employee ‘Burrowing,’” February 17, 2016, at <http://www.finance.senate.gov/chairmans-news/hatch-brady-call-on-federal-agencies-to-prevent-political-employee-burrowing>. (Hereinafter referred to as Hatch, Brady Letters.)

⁵⁶ 5 U.S.C. § 1103(a)(5) provides that the Director of the Office of Personnel Management is to execute, administer, and enforce the civil service rules and regulations and the laws governing the civil service.

⁵⁷ Hatch, Brady Letters.

⁵⁸ The letter requesting the review is available at U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, “Senate and House Leaders Seek GAO Review of Political Appointee Conversions to Federal Civil Service Positions,” November 30, 2015, at <https://www.hsgac.senate.gov/media/majority-media/senate-and-house-leaders-seek-gao-review-of-political-appointee-conversions-to-federal-civil-service-positions>.

⁵⁹ Ibid.

understand that this can be attempted through hiring actions with limited competitive areas of consideration, short announcement times and narrowly defined statements of required technical qualifications. Political influence and pressure can also contribute non-meritorious selections. We fully understand that some political appointees who make the switch to the career civil service may be the best candidates for the position, and believe that providing transparency and sunlight to the conversion process can aid in preventing its abuse.⁶⁰

Upon publication of GAO's September 30, 2016, findings, Representatives Upton and Chaffetz and Senators Thune and Johnson issued a joint press release on October 6, 2016, which stated, in part,

"Rules exist for a reason. The nonpartisan watchdog's findings that one out of every four political appointees who burrowed into the executive branch during this administration did not follow the rules is deeply troubling," said Upton. "GAO's guidance should help ensure proper procedures are followed so favoritism and bias are free from the inner workings of our government."

"Hiring decisions must be free from political interference, legitimate, and justified," said Chaffetz. "OPM should fully embrace GAO's recommendation for a more stringent process to verify all conversions are appropriate. Fair and open competition is central to the integrity of a merit-based federal workforce."

"One of the reasons the federal government has laws on merit-based hiring is to prevent cronyism and political favoritism," said Thune. "GAO's finding that the Obama administration hasn't consistently followed these rules is troubling."

"The practice of burrowing in threatens the integrity of the federal workforce, where employees need to be hired based on merit and not on partisan political beliefs," said Johnson. "I was particularly disappointed to see the Department of Homeland Security reporting the highest number of appointee-to-career employee conversions. It is critical that the administration take steps to ensure fairness and competition in federal service."⁶¹

Issues for Congressional Consideration

In assessing the current situation, Congress may decide that the existing oversight is sufficient. If Congress determines that additional measures are needed to ensure that conversions from appointed (noncareer) positions to career positions are conducted according to proper procedures and are transparent, OPM could be directed to report to Congress on the operation of its current policy governing pre-appointment reviews, including recommendations on whether Section 1104 of Title 5, *United States Code*⁶² should be amended to codify the policy. Congress also could direct the central personnel agency to report on whether any changes are needed, in the Presidential Election Period, that restrict financial awards to senior politically appointed officers.

⁶⁰ Letter from Timothy M. Dirks to Senator Ron Johnson, Chairman of the Senate Committee on Homeland Security and Governmental Affairs; Senator John Thune, Chairman of the Senate Committee on Commerce, Science, and Transportation; Representative Fred Upton, Chairman of the House Committee on Energy and Commerce; and Representative Jason Chaffetz, Chairman of the House Committee on Oversight and Government Reform, December 1, 2015, at https://seniorexecs.org/images/documents/policy_letters/SEALettertoChairmenonBurrowingIn00060860x87C30.pdf.

⁶¹ U.S. Congress, House Committee on Energy and Commerce, Press Release, "House and Senate Requestors Issue Statement on GAO Political 'Burrowing' Review Findings," October 3, 2016, at <https://energycommerce.house.gov/news-center/press-releases/house-and-senate-requestors-issue-statement-gao-political-burrowing>.

⁶² 5 U.S.C. §1104, in part, covers delegations of authority for personnel management from the President to the Director of the Office of Personnel Management and from the director to agency heads.

As discussed above, the dates of the Presidential Election Period are defined by law, and, in a presidential election year, cover the period from June 1 through the following January 20. Congress also could increase the penalties for violating civil service laws by “creat[ing] a misdemeanor offense for agency personnel who violate or contribute to the violation of the federal hiring statutes”⁶³ or examine whether Title 5 of the *United States Code* should be amended to prohibit conversion from political to career positions. Given the findings of GAO’s most recent evaluation that almost 25% of conversions to career positions occurred without agencies first obtaining OPM approval and that the agencies said that they did not seek such prior approval because of difficulty understanding OPM’s policy,⁶⁴ Congress could direct OPM or the Chief Human Capital Officers Council to provide training to federal managers and supervisors on the policy. With the continuing interest of Congress, and particularly the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs, in exercising oversight of conversions from appointed positions to career positions, Congress could consider directing OPM to provide standardized reports on a regular bases to Congress, or maintain such information where it could be easily and securely accessed by Congress.

Government Records⁶⁵

When a President leaves office, he and his Administration have likely generated millions of government records—some of which may be of long-term interest to Congress, federal agencies, incoming Presidents, researchers, and members of the general public. This section provides information on the laws and policies that govern these records. The section is divided into two topics—agency federal records and presidential records—because both types of records are generated during a presidential Administration and federal law places unique requirements on each.

Federal Records

Pursuant to the Federal Records Act (FRA; Chapters 21, 29, 31, and 33 of Title 44 of the U.S. Code), federal agency records in all three branches are to be created, retained, preserved, and accessed differently than records that qualify as presidential records, records of Congress, or Supreme Court records.⁶⁶ Responsibility for guiding and assisting the life-cycle management of federal government records rests with the Archivist of the United States, who is the head of the National Archives and Records Administration (NARA).

The transition from one presidential Administration to another may prompt concerns that some federal records could be lost, improperly destroyed, or removed.⁶⁷ These concerns are heightened

⁶³ Lauren Mendolera, “How to Stop a Mole: A Look at Burrowing in the Federal Civil Service,” *New York University Journal of Legislation and Public Policy*, Vol. 13:643, 2010, see pp. 665-671.

⁶⁴ U.S. Government Accountability Office, *Office of Personnel Management: Actions Are Needed to Help Ensure the Completeness of Political Conversion Data and Adherence to Policy*, GAO-16-859 (Washington: GAO, September 30, 2016), p. 9, at <http://www.gao.gov/assets/690/680178.pdf>.

⁶⁵ Prepared by (name redacted), Analyst in American National Government, Government and Finance Division.

⁶⁶ Laws and policies that govern presidential records are discussed in the section below.

⁶⁷ A 1989 General Accounting Office (GAO) report found that some senior Cabinet officials sought to remove federal records upon leaving office. See U.S. General Accounting Office, *Federal Records: Removal of Agency Documents by Senior Officials Upon Leaving Office*, GAO/GGD-89-91, July 1989, at <http://gao.gov/assets/150/148058.pdf>. Proper management of federal records, regardless of the election cycle remains a concern for both NARA and the Government (continued...)

by the increasing number of platforms on which records can be created (e.g., Facebook, Instagram, iTunes, Flickr, Google+, Twitter, YouTube) and the increasing storage volume of records.⁶⁸ Since the most recent presidential transition in January 2009, several changes have occurred that directly affect the collection and retention of federal agency records. Among these changes were the enactment of a new definition of federal records and the Administration's release of various policy documents instructing executive branch agencies on various recordkeeping requirements.

A New Definition for Federal Records

Of particular concern for the 2016 transition is the updated definition of federal records, as amended by the Presidential and Federal Records Act Amendments of 2014 (P.L. 113-187).⁶⁹ The new definition of federal *records* reads as follows:

Records includes all recorded information,⁷⁰ regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.

According to the congressional reports to accompany P.L. 113-187, the amended definition of federal records seeks to “shift the emphasis away from the physical media used to store information to the actual information being stored, regardless of form or characteristic.”⁷¹

(...continued)

Accountability Office. In 2008, for example, GAO determined that “e-mail records were not being appropriately identified and preserved” at certain federal agencies. U.S. Government Accountability Office, *Federal Records: Agencies Face Challenges in Managing E-Mail*, GAO-08-699T, April 23, 2008, preliminary findings, at <http://www.gao.gov/assets/120/119711.pdf>. In April 2010, NARA published a report on agencies' self-assessments of their recordkeeping Administration. The report found that 95% of agencies were rated as having moderate to high risk of improper records management. National Archives and Records Administration, *2010 Records Management Self-Assessment Report*, Washington, DC, February 22, 2011, p. 5, at <http://www.archives.gov/records-mgmt/pdf/rm-self-assessment.pdf>. The study included 251 respondent agencies and found a 25% to 27% error rate in certain survey responses, which NARA stated “raises questions more about the accuracy of the scores for individual agencies than for the results of the overall survey.” Ibid., p. 2. In June 2010, GAO testified that federal records management “has received low priority within the federal government.” U.S. Government Accountability Office, *Information Management: The Challenges of Maintaining Electronic Records*, GAO-10-838T, June 17, 2010, p. 17, at <http://www.gao.gov/assets/130/124883.pdf>. In June 2011, GAO found that many agencies lacked a formal policy on how to capture and maintain federal records created on social media. U.S. Government Accountability Office, *Social Media: Federal Agencies Need Policies and Procedures for Managing and Protecting Information They Access and Disseminate*, GAO-11-605, June 2011, at <http://gao.gov/assets/330/320244.pdf>.

⁶⁸ In its *Electronic Records Project, Summary Report for FY2005-FY2009*, NARA wrote that “[w]ith the volume and complexity of e-records increasing each year, it continues to be a challenge for both NARA and [f]ederal agencies to keep pace with the requirements to identify, schedule, and transfer to NARA all existing records.” National Archives and Records Administration, *NARA's Electronic Records Project, Summary Report FY2005-FY2009*, p. 13, Washington, DC, June 15, 2010, at <http://www.archives.gov/records-mgmt/resources/e-records-report.pdf>.

⁶⁹ For more details on the Presidential and Federal Records Act Amendments of 2014, see CRS Report R43072, *Common Questions About Federal Records and Related Agency Requirements*, by (name redacted) .

⁷⁰ *Recorded information* is further defined in 44 U.S.C. §3301 as “all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.”

⁷¹ U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Presidential and Federal Records Act Amendments of 2014*, 113th Cong., 2nd sess., July 23, 2014, S.Rept. 113-218 (Washington: GPO, 2014), p. 5.

Previously, the statutory definition of records included references to certain types of materials or platforms on which records could be created or captured, such as “books, papers, photographs” and “machine-readable formats.” The amended definition, instead, refers more generically to “recorded information.”

Federal agency staff will have to ensure that records that meet this new definition are appropriately captured and retained for as long as necessary, pursuant to law, regulation, and internal agency policies. The transition to a new President may not appear to directly affect the collection and retention of federal records at executive branch agencies because laws governing federal records, as defined above, are not contingent upon the start and end of presidential tenures. At the end of any presidential Administration, however, many political appointees in federal agencies will leave their positions. Upon their departure from federal service, these appointees will have to ensure that the federal records they have created are properly managed and preserved pursuant to the Federal Records Act.⁷²

Those appointed to political positions at federal agencies within the new Administration will also have to apply the provisions of the Federal Records Act to information they generate as part of their job responsibilities. Additionally, the Obama Administration is the first to have used such a varied array of electronic platforms, making collection, retention, and future access to records created by and during the Obama Administration more complex. This complexity manifests in the release of various records collection and retention guidance issued during the Obama Administration, which will be described in greater detail below.

Administration Recordkeeping Guidance and Requirements

In addition to implementing the new statutory definition of a federal record, federal government agencies will also be responsible for applying NARA’s records management guidance, directives, and bulletins to existing and new federal records. Many of the NARA policy documents have addressed concerns related to the rapid growth of records in an increasing variety of electronic formats.

Among the more prominent policies published during the Obama Administration was the 2012 “Managing Government Records Directive.” This directive, issued jointly by NARA and OMB, required, among other things, that all executive branch agencies must manage all email records in an electronic format by the end of 2016, and manage all permanent electronic records electronically by 2019.⁷³ The directive also called on federal officials to work with private industry to “produce economically viable automated records management” options, including technologies that would be “suitable approaches for the automated management of email, social media, and other types of digital record content.”⁷⁴ In May 2015, GAO released a report stating that of the 24 agencies examined, 5 had yet to meet the directive’s requirements.⁷⁵

⁷² FRA; 44 U.S.C. Chapters 21, 29, 31, and 33.

⁷³ In 2014, a majority of federal agencies (73%, 188 agencies) reported using a “print and file” method of manage email records. See U.S. National Archives and Records Administration, “Records Management Self-Assessment 2014,” p. Appendix II-29, at <http://www.archives.gov/records-mgmt/resources/self-assessment-2014.pdf>.

⁷⁴ See Jeffrey D. Zients and David S. Ferriero, *Managing Government Records Directive*, U.S. Office of Management and Budget and National Archives and Records Administration, M-12-18, Washington, DC, August 24, 2012, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>.

⁷⁵ U.S. Government Accountability Office, *Information Management: Additional Actions Are Needed to Meet Requirements of the Managing Government Records Directive*, GAO-15-339, May 2015, at <http://gao.gov/assets/680/670195.pdf>.

In 2013, NARA established the Capstone approach to help agencies meet the 2016 deadline for managing email electronically.⁷⁶ The Capstone approach suggests that agencies may manage email collection and retention based on the email account holder, rather than by the individual content of the email records. The approach calls for the automated capture of the email accounts of senior agency officials, thereby treating their emails presumptively as permanent records. Under this approach, other agency employee email accounts would be maintained as generating temporary records for a set period of time, for example, seven years. In 2013 and 2014, NARA also released guidance concerning the unlawful removal of records,⁷⁷ managing social media records,⁷⁸ and managing email records.⁷⁹

NARA's Administration Transition Bulletins

In previous presidential election years, NARA issued a bulletin reminding agency heads of the regulations regarding proper records management.⁸⁰ Previous NARA bulletins have focused on which records are to remain in the custody of executive departments and agencies, and which ones may be removed by the outgoing Administration.

The 2008 bulletin, for example, stated that departing officials and employees could remove extra copies of records when they left their agencies “with the approval of a designated official of the agency, such as the agency’s records officer or legal counsel.”⁸¹ The bulletin, however, reminded readers that if such materials were otherwise restricted—for example, because they contained personally identifiable information or classified material—they “must be maintained in accordance with the appropriate agency requirements.”⁸² The bulletin provided additional guidance detailing how to identify a federal record, how to properly store or dispose of qualifying records, and how to respond to the unauthorized removal of records. Criminal penalties can be

⁷⁶ National Archives and Records Administration, *Guidance on a New Approach to Managing Email Records*, NARA Bulletin 2013-02, April 29, 2013, at <http://www.archives.gov/records-mgmt/bulletins/2013/2013-02.html>.

⁷⁷ National Archives and Records Administration, *Guidance for Agency Employees on the Management of Federal Records, Including Email Accounts, and the Protection of Federal Records from Unauthorized Removal*, NARA Bulletin 2013-03, September 9, 2013, at <http://www.archives.gov/records-mgmt/bulletins/2013/2013-03.html>. This guidance superseded Allen Weinstein, *Protecting Federal Records and Other Documentary Materials from Unauthorized Removal*, National Archives and Records Administration, NARA Bulletin 2008-02, Washington, DC, February 4, 2008, at <http://www.archives.gov/records-mgmt/bulletins/2008/2008-02.html>.

⁷⁸ National Archives and Records Administration, *Guidance on Managing Social Media Records*, NARA Bulletin 2014-02, October 25, 2013, at <http://www.archives.gov/records-mgmt/bulletins/2014/2014-02.html>.

⁷⁹ David Ferriero, National Archives and Records Administration, *Guidance on Managing Email*, NARA Bulletin 2014-06, September 15, 2014, at <http://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html>; National Archives and Records Administration, *Guidance on Managing Email*.

⁸⁰ As stated in the first line of the 2008 bulletin, which was issued on February 4, 2008, its purpose “is to remind heads of Federal agencies that official records must remain in the custody of the agency.” National Archives and Records Administration, *Protecting Federal Records and Other Documentary Materials from Unauthorized Removal*, NARA Bulletin 2008-02, February 4, 2008, at <http://www.archives.gov/records-mgmt/bulletins/2008/2008-02.html?template=print>. NARA did not release such a bulletin in 2012, a presidential election year in which President Obama was reelected.

⁸¹ National Archives and Records Administration, *Protecting Federal Records and Other Documentary Materials from Unauthorized Removal*, NARA Bulletin 2008-02, February 4, 2008, at <http://www.archives.gov/records-mgmt/bulletins/2008/2008-02.html?template=print>.

⁸² *Ibid.*

levied for the unauthorized removal or destruction of, concealment of,⁸³ and unauthorized disclosure of federal records.⁸⁴

In February 2016, NARA re-issued its long-standing guidance on “Documenting Your Public Service” to assist federal employees in the proper management of federal records. This guidance also stated that “It is important for agencies to ensure employees are aware of their records management responsibilities, especially as we approach the upcoming Presidential transition.”⁸⁵

Presidential Records

For almost two centuries, the official papers of Presidents were considered their personal property, which they could take with them when they departed from office. That practice changed with the Presidential Records Act of 1978 (PRA), which establishes that all presidential records created on or after January 20, 1981, were automatically government property that would transfer into the legal and physical control of the Archivist when a President leaves office.⁸⁶ The statute also covers the official records of the Vice President.⁸⁷ Pursuant to the PRA, incumbent Presidents are responsible for managing their records during the tenure of their Administrations. The act applies to the records of Presidents dating back to President Reagan.⁸⁸ A 2008 article written by NARA’s Director of the Presidential Materials Staff stated that

NARA works with White House and vice presidential counsels, the White House Office of Records Management, the National Security Council, the White House Gifts Office, and other White House offices and the Office of the Vice President to receive approval to move early and to coordinate on what records and artifacts can move when. Additionally, throughout the presidential administration, these offices have worked to establish initial control and arrangement over the records and artifacts, provide preliminary descriptions at the folder, box, or artifact level, and to ready these materials for eventual transfer to NARA.⁸⁹

The PRA defines *presidential records* as “documentary materials . . . created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President.”⁹⁰ In turn, the term *documentary materials* includes

all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not

⁸³ 18 U.S.C. §2071.

⁸⁴ 5 U.S.C. §552a(i); 18 U.S.C. §793-794, 798.

⁸⁵ National Archives and Records Administration, “Documenting Your Public Service,” at <http://www.archives.gov/records-mgmt/publications/documenting-your-public-service.html>.

⁸⁶ 44 U.S.C. §§2201-2207. The records for President Ronald Reagan were the first records governed by the Presidential Records Act.

⁸⁷ 44 U.S.C. §2207.

⁸⁸ All presidential records in federal presidential libraries dedicated to the records of Presidents who served prior to Ronald Reagan (Herbert Hoover through Jimmy Carter) are materials donated to the libraries’ collections. Those records are released according to the dictates of the applicable President (if he is living) or the dictates of the families of the former President (if he is deceased). For more information on presidential libraries, see CRS Report R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries*, by (name redacted), (name redacted), and (name redacted).

⁸⁹ Nancy Kegan Smith, “Escorting a Presidency into History: NARA’s Role in a White House Transition,” *Prologue Magazine*, Winter 2008, vol. 40, no. 4, at <http://www.archives.gov/publications/prologue/2008/winter/transitions.html>.

⁹⁰ 44 U.S.C. §2201(2).

limited to, audio, audiovisual, or other electronic or mechanical recordings, whether in analog, digital, or any other form.⁹¹

The statute further states, “Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.”⁹² This provision constituted a recognition of the President’s historical, constitutionally based privilege to exercise discretion regarding the provision of information sought by another co-equal branch of the federal government—that is, executive privilege.⁹³

For FY2017, the Executive Office of the President’s Office of Administration requested \$7.6 million “for data migration services for processing of records of the department President and Vice President ... and for other transition-related administrative expenses.”⁹⁴

Amendments to the Presidential Records Act

Successive presidential Administrations have interpreted the PRA differently.⁹⁵ In November 2014, Congress enacted and President Obama signed into law the Presidential and Federal Records Act Amendments of 2014 (P.L. 113-187), which codifies some parts of the PRA that have historically been interpreted in various ways by incumbent Presidents.

The law, among other things, amended the PRA to explicitly provide a 60-day review period to the incumbent and applicable former President any time the Archivist intends to publicly release previously unreleased presidential records. The review period can be extended for an additional 30 days if the Archivist receives a statement from the incumbent or former President that “such an extension is necessary to allow an adequate review of the record.”⁹⁶ The law also codified the requirement that any claim of executive privilege must be made by the applicable former President or by the incumbent President.⁹⁷ P.L. 113-187 also prohibits anyone convicted of inappropriately using, removing, or destroying NARA records from accessing presidential records.

Growth in Records and Volume

Pursuant to the PRA, presidential records are provided to NARA at the end of each presidential Administration.⁹⁸ As a result, NARA has tracked the increasing volume and varied electronic formats employed by each Administration.

In June 2010, GAO submitted testimony to the House Committee on Oversight and Government Reform’s Subcommittee on Information Policy, Census, and National Archives on “The

⁹¹ 44 U.S.C. §2201(1).

⁹² 44 U.S.C. §2204(c)(2).

⁹³ See (name redacted) *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004); and Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 2nd ed., rev. (Lawrence, KS: University Press of Kansas, 2002).

⁹⁴ Executive Office of the President, *Congressional Budget Submission: Fiscal Year 2017*, Washington, DC, 2016, p. AS-3, at <https://www.whitehouse.gov/sites/default/files/docs/fy2017eopbudgetfinalelectronic.pdf>.

⁹⁵ See E.O. 12667; E.O. 13233; and E.O. 13489.

⁹⁶ 44 U.S.C. §2208(a)(3)(B).

⁹⁷ H.R. 1144 and H.R. 3071, both introduced in the 112th Congress, included similar provisions.

⁹⁸ 44 U.S.C. §§2201-2207. NARA is to be provided the universe of qualifying presidential records at the end of each Administration.

Challenges of Managing Electronic Records.” GAO stated that the “[h]uge volumes of electronic information” were a “major challenge” in agency record management.⁹⁹

Electronic information is increasingly being created in volumes that pose a significant technical challenge to our ability to organize it and make it accessible. An example of this growth is provided by the difference between the digital records of the George W. Bush administration and that of the Clinton administration: NARA has reported that the Bush administration transferred 77 terabytes¹⁰⁰ of data to the [National] Archives [and Records Administration] on leaving office, which was about 35 times the amount of data transferred by the Clinton administration.¹⁰¹

On April 25, 2013, a NARA blog post provided additional details on the records being transferred to the George W. Bush Library and Museum in Dallas, TX—“more than 70 million pages of textual records, 43,000 artifacts, 200 million emails (totaling roughly 1 billion pages), and 4 million digital photographs (the largest holding of electronic records of any of our libraries).”¹⁰²

Pursuant to the PRA, NARA is responsible for the custody, control, and preservation of the records of former Presidents. NARA has worked with incumbent Presidents as they prepare to leave office to ensure the capture and preservation of records generated through social media. Examples may be found in the preserved *whitehouse.gov* content available through the websites of the Clinton and George W. Bush Libraries.¹⁰³

In 2015, Archivist David Ferriero stated in a NARA blog about the forthcoming Barack Obama Presidential Library that

[t]he transfer of electronic records is one of the most complex and challenging parts of a presidential transition since the volume and variety of records generated or received by presidential administrations has increased exponentially.¹⁰⁴

⁹⁹ U.S. Government Accountability Office, *Information Management: The Challenges of Managing Electronic Records*, GAO-10-838T, June 17, 2010, p. 10, at <http://gao.gov/assets/130/124883.pdf>.

¹⁰⁰ A terabyte is about 1 trillion bytes, or 1,000 gigabytes.

¹⁰¹ U.S. Government Accountability Office, *Information Management: The Challenges of Managing Electronic Records*, p. 10. GAO stated in its written testimony that it did not independently verify these reported volumes of records.

¹⁰² National Archives and Records Administration, “Prologue: Pieces of History,” April 25, 2013, at <http://blogs.archives.gov/prologue/?p=12073>. The George H.W. Bush Presidential Library and Museum, by comparison, contains 1 million photographs and 10,000 videotapes. See George H.W. Bush Presidential Library and Museum, “FAQs,” at <http://bushlibrary.tamu.edu/research/faq.php>.

¹⁰³ Information provided electronically to the author by NARA on March 21, 2014. The George W. Bush websites archive is at <http://georgewbush-whitehouse.archives.gov>, and the William J. Clinton websites archive is at http://clintonlibrary.gov/_previous/archivesearch.html.

¹⁰⁴ David Ferriero, “Creating the Obama Library,” *Prologue Magazine*, vol. 47, no. 3 (Fall 2015), at <https://www.archives.gov/publications/prologue/2015/fall/archivist.html>. For more on the establishment of a presidential library for President Obama, see CRS Report R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries*, by (name redacted), (name redacted), and (name redacted).

Executive Clemency¹⁰⁵

Background

Article II of the Constitution provides the President with the explicit authority to “grant Reprieves and Pardons for Offences against the United States.” The general term for this authority is executive clemency, of which the more commonly used term, presidential pardon, is but one form. Executive clemency may also take the form of commutation, which is the reduction of a prison sentence; remission, which is the reduction of a fine or mandated restitution; or reprieve, which delays the imposition of punishment.¹⁰⁶

The President has few restrictions on how and when executive clemency may be exercised, other than it may only apply to violations of federal laws—thereby precluding state criminal or civil proceedings from its scope—and it may not be used to interfere with Congress’s power to impeach.¹⁰⁷ Clemency in the form of a pardon, for example, may be granted at any time, even before charges have been filed.¹⁰⁸ In addition, while not frequently done, a President may bestow clemency on groups, as President Abraham Lincoln did when he issued a pardon to all persons who participated in the “rebellion” against the United States (with a number of conditions and exceptions).¹⁰⁹

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

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

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

¹⁰⁵ Prepared by (name redacted), Specialist in American National Government, Government and Finance Division.

¹⁰⁶ U.S. Department of Justice, Office of the Pardon Attorney, at <http://www.usdoj.gov/pardon/>.

¹⁰⁷ CRS Report RS20829, *An Overview of the Presidential Pardoning Power*, by (name redacted), available upon request.

¹⁰⁸ *Ibid.*

¹⁰⁹ U.S. President (Lincoln), “The Proclamation of Amnesty and Reconstruction,” December 8, 1863, at <http://www.history.umd.edu/Freedmen/procamn.htm>.

President	Prior to Final Four Months of Administration	Final Four Months of Administration
George W. Bush	2 per month	8 per month
Barack Obama	8 per month	300 per month

Source: U.S. Department of Justice, Office of the Pardon Attorney, at <http://www.usdoj.gov/pardon/>.

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

Controversial acts of clemency may be among those granted in the final months of an Administration, such as President G. H.W. Bush’s pardon of key figures in the Iran-Contra affair on Christmas Eve, 1992—less than four weeks before the end of his term—and President Clinton’s pardon of commodities trader Marc Rich, which was issued on President Clinton’s last day in office.¹¹⁰

Possible Congressional Concerns

Acts of Clemency Might Restrict Oversight of the Executive Branch

Ongoing investigations into the conduct of executive branch officials may be impeded or effectively ended by acts of clemency. As previously noted, President G.H.W. Bush pardoned six former officials from President Reagan’s Administration for their roles in the Iran-Contra affair, including two officials who had been indicted but had not yet been to trial. These pardons essentially ended the Independent Counsel’s criminal investigation, which had begun six years earlier.

Acts of Clemency Might Have Implications for U.S. Foreign Relations

In one of his last acts before leaving office, President G.W. Bush commuted the sentences of two U.S. Border Patrol agents convicted of shooting a Mexican citizen who had crossed illegally into Texas. The government of Mexico, which has been highly critical of what it deems “the excessive use of force” by American border authorities, was opposed to any clemency for the agents.¹¹¹ Mexico’s assistant foreign minister for North American affairs criticized the commutation, describing it as “a very bad and difficult to understand message” that appeared to put “demands by anti-immigrant groups” ahead of “the efforts of the Mexican government.”¹¹² It has also been suggested President G.W. Bush, prior to leaving office, considered clemency for soldiers convicted of crimes committed while serving at Abu Ghraib prison in Iraq.¹¹³

¹¹⁰ Eric Lichtblau and Davan Maharaj, “Clinton Pardon of Rich a Saga of Power, Money and Influence,” *Los Angeles Times*, February 18, 2001, at <http://articles.latimes.com/2001/feb/18/news/mn-27173>.

¹¹¹ “Mexico Slams Border Shooting, US Congress for Failing to Pass Immigration Bill,” *New York Times*, Global Edition, August 9, 2008, at <http://www.iht.com/articles/ap/2007/08/10/america/LA-GEN-Mexico-Immigration.php>.

¹¹² Todd J. Gillman and Laura Isenee, “Bush Commutes Sentences of Border Patrol Agents,” *Dallas Morning News*, January 20, 2009, at <http://www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories/012009dnnatborder.cb9616f.html>.

¹¹³ Keith Koffler, “Stevens Case Puts Spotlight on Pardons,” *Roll Call Newspaper Online*, October 28, 2008, at <http://www.rollcall.com/news/29610-1.html>.

Cybersecurity Issues¹¹⁴

The increasing importance of maintaining U.S. cybersecurity has made it a critical element of the nation's broader national security apparatus. The 2015 National Security Strategy highlights "cyber" as a "shared space" (akin to oceans, air, and space) and an element of national security.¹¹⁵ Additionally, the Director of National Intelligence (DNI) included an assessment of cyberspace-based threats in the 2016 *Worldwide Threat Assessment of the US Intelligence Community*.¹¹⁶

Although cybersecurity is an ongoing concern, the presidential transition period may present its own set of challenges in this area. Cybersecurity concerns may be heightened if a cybersecurity incident occurs during the transition, or positions (including PAS and non-PAS) with cybersecurity responsibilities are not filled in a timely manner.

Cybersecurity Incident Coordination

An architecture that allows federal agencies to coordinate their responsibilities for cybersecurity incidents is vital to the federal government's capability to prepare for, respond to, or recover from a cybersecurity incident. On July 26, 2016, President Obama released Presidential Policy Directive 41 (PPD-41), "United States Cyber Incident Coordination," which provides a unifying architecture for a coordinated cyber incident response among federal departments and agencies.¹¹⁷

PPD-41 establishes incident response principles which are shared by the victim entity and any entity which may assist them (whether a private security firm or federal agency). When responding to an incident, federal government agencies are to be guided by the following principles: (1) the relevant federal agencies, private sector, and individuals share responsibility for responding to the incident; (2) the federal government's response is to be based on a risk assessment; (3) the federal government is to safeguard incident details, privacy, civil liberties, and sensitive information, to the extent permitted by law; (4) the federal government's response is to be unified; and (5) the federal response is to be carried out in a way that facilitates the recovery and restoration of the entity that experienced the incident.¹¹⁸

The directive also establishes federal agency lines of effort and the lead agency for each line of effort.

- *Threat Response* includes activities related to law enforcement and national security investigations to gather evidence and identify the actor(s) responsible for the incident. The Department of Justice (DOJ), acting through the Federal Bureau

¹¹⁴ Prepared by (name redacted), Analyst in Cybersecurity Policy, Government and Finance Division.

¹¹⁵ The White House, *National Security Strategy*, Washington, DC, February 2015, https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf.

¹¹⁶ U.S. Congress, Senate Committee on Armed Services, *Worldwide Threat Assessment of the US Intelligence Community*, Statement for the Record, prepared by James R. Clapper, Director of National Intelligence, 114th Cong., 2nd sess., February 9, 2016, at https://www.dni.gov/files/documents/SASC_Unclassified_2016_ATA_SFR_FINAL.pdf.

¹¹⁷ U.S. President (Obama), Presidential Policy Directive 41, "United States Cyber Incident Coordination," July 26, 2016, at <https://www.whitehouse.gov/the-press-office/2016/07/26/presidential-policy-directive-united-states-cyber-incident>; U.S. President (Obama), Annex for PPD-41, United States Cyber Incident Coordination, "Federal Government Coordination Architecture for Significant Cyber Incidents," July 26, 2016, at <https://www.whitehouse.gov/the-press-office/2016/07/26/annex-presidential-policy-directive-united-states-cyber-incident>.

¹¹⁸ Obama, Presidential Policy Directive 41, "United States Cyber Incident Coordination."

of Investigation (FBI) and the National Cyber Investigative Joint Task Force (NCIJTF), is the government lead for this line of effort.

- *Asset Response* includes providing technical assistance to the victim entity to mitigate the impacts of the incident and restore functionality. The Department of Homeland Security (DHS), acting through the National Cybersecurity and Communications Integration Center (NCCIC), is the federal lead for this line of effort.
- *Intelligence Support* includes activities related to intelligence collection in support of threat and asset response activities and analysis. The Office of the Director of National Intelligence (ODNI), acting through the Cyber Threat Intelligence Integration Center (CTIIC), is the federal lead for this line of effort.

The Department of Defense (DOD) does not have the lead for a line of effort, but it is identified as the lead for the Defense Industrial Base critical infrastructure sector and is required to participate in national response planning.

Although the stated aim of this policy is to help stakeholder communities understand how the U.S. government will respond to a cybersecurity incident, it does not discuss the allocation of agencies' responsibilities. Specifically, PPD-41 does not address the matter of agencies' unique responsibilities and shared (or overlapping) responsibilities for cybersecurity beyond the duration of time when agencies are responding to an incident.

The intelligence community (IC) provides an intelligence briefing to each party's presidential candidate. The topics and issues covered in these briefings reportedly align with the Director of National Intelligence's "Worldwide Threat Assessment" report to Congress.¹¹⁹ The Worldwide Threat Assessment for 2016 began with a discussion of cybersecurity and technology threats, to include challenges presented by the Internet of Things, artificial intelligence, integrity of information, infrastructure weaknesses, targeting of personally identifiable information, and deterrence in cyberspace.¹²⁰ The assessment also identified Russia, China, Iran, North Korea, and nonstate actors as the greatest threat actors in cyberspace.¹²¹

Positions with Cybersecurity Responsibilities

Another possible issue involves the cybersecurity qualifications of executive branch political appointees, particularly agency heads, and the implications for the federal government and the nation, if some positions are not filled in a timely manner.¹²²

Some agency heads, such as the Secretaries of Defense and Homeland Security, lead organizations that have cybersecurity missions. However, all federal agency heads have a cybersecurity responsibility for their agencies' systems, data, and networks. Per the Federal Information Security Management Act (FISMA; P.L. 113-283), each agency head is responsible for

¹¹⁹ Justin Fischel, "Classified Intelligence Briefings For Presidential Candidates: Questions Answered," *ABC News*, August 5, 2016, at <http://abcnews.go.com/Politics/classified-intelligence-briefings-presidential-candidates-questions-answered/story?id=41145433>.

¹²⁰ Clapper, *Worldwide Threat Assessment of the US Intelligence Community*, statement for the record.

¹²¹ *Ibid.*

¹²² CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by (name redacted) and (name redacted).

providing information security protections commensurate with the risk and magnitude of the harm resulting from unauthorized access, use, disclosure, disruption, modification, or destruction of information collected or maintained by or on behalf of the agency; and information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of an agency.¹²³

In recent years, Congress has included agency heads in hearings over cybersecurity incidents. For example, in April 2016, the Senate Finance Committee included the Commissioner of the Internal Revenue Service (IRS) on a panel during a hearing on cybersecurity.¹²⁴ Because of their overarching managerial responsibilities (namely, with budget and resource prioritization), agency heads have cybersecurity responsibilities incumbent in their positions, regardless of the overall agency's cybersecurity roles and responsibilities.

Other cybersecurity responsibilities may belong to other officials within federal agencies. Chief Information Security Officers (CISOs) have explicit responsibilities for the security of an agency's information technology in the Clinger-Cohen Act of 1996 and the Federal Information Technology Acquisition Reform Act (FITARA).¹²⁵

In the event a nationally significant cybersecurity incident occurs while one or more cybersecurity positions are vacant, the possible implications are unknown. Agencies are responsible for planning for vacancies and devolving responsibilities to career employees.¹²⁶ Furthermore, PPD-41 establishes a Cyber Response Group (CRG) to coordinate national policy and a Cyber Unified Coordination Group (Cyber UCG) to coordinate national operations. Through these coordination mechanisms, federal agencies would have an opportunity to become aware of key vacancies and adjust their policy or operational responses accordingly.¹²⁷

National Security Considerations and Options¹²⁸

A presidential transition period¹²⁹ is a unique time in America and holds the promise of opportunity, as well as a possible risk to the nation's security interests. While changes in Administration during U.S. involvement in national security-related activities are not unique to the 2016-2017 election period, many observers suggest that the current security environment may portend a time of increased risk. Whether the enemies of the United States choose to undertake action that may harm the nation's security interests during the 2016-2017 election transition period, or the new President experiences a relatively peaceful period during the transition, many foreign policy and security challenges will await the new Administration. Collaboration and

¹²³ 44 U.S.C. §3554.

¹²⁴ U.S. Congress, Senate Committee on Finance, *Cybersecurity and Protecting Taxpayer Information*, 114th Cong., 2nd sess., April 12, 2016.

¹²⁵ The Clinger-Cohen Act, otherwise known as the Information Technology Management Reform Act of 1996, was included in the National Defense Authorization Act of 1996, P.L. 104-106. FITARA is P.L. 113-291.

¹²⁶ 3 U.S.C. §102 note; PTA, §4(f)(2).

¹²⁷ U.S. President (Obama), Presidential Policy Directive 41, "United States Cyber Incident Coordination"; U.S. President (Obama), Annex for PPD-41, United States Cyber Incident Coordination, "Federal Government Coordination Architecture for Significant Cyber Incidents."

¹²⁸ Prepared by (name redacted), Specialist in Terrorism and National Security, Foreign Affairs, Defense and Trade Division. For a thorough explanation of national security considerations and options during presidential transitions, see CRS Report R42773, *2012-2013 Presidential Election Period: National Security Considerations and Options*, by (name redacted).

¹²⁹ The presidential *election* period encompasses all pre- and post-election day transition-related issues and activities whereas the presidential *transition* period ranges from the day of the election to the inauguration.

coordination during the presidential election period between the current Administration and the new one may have a long-lasting effect on the new President's ability to effectively safeguard U.S. interests and may affect the legacy of the outgoing President.

On a given day the outgoing Administration has the ability to change the policies of a nation and possibly affect the international security environment, yet the following day the President and the national security leadership team may be replaced by a new set of leaders who could have different strategy and policy goals.¹³⁰ This political dynamic, coupled with the inherent uncertainty accompanying a presidential transfer of power, may provide an opportunity for those who wish to harm U.S. security interests. Unlike other man-made incidents that may occur with little warning, the presidential transition period offers a broadly defined time frame in which an enemy of the United States may decide to undertake an incident of national security significance¹³¹ in an attempt to manipulate the nation's foreign and domestic policies.¹³²

Risks Accompanying the Presidential Transition Period

Many national security observers speculate that extremist groups and some foreign powers might prefer to take action just prior to or after election day. However, the timing of such acts may be solely based on the convergence of an entity attaining a desired capability with a perceived best opportunity to successfully complete its objective. Furthermore, an attack or event that occurs at any time during the presidential transition period could affect the transition and the Administration's policies.¹³³

Presidential Transition Period Considerations

Many presidential historians argue that, during the early days of a new Administration, decisionmaking activities will, in part, be based on information provided by the outgoing Administration. Specifically, some scholars state that "enhanced cooperation and communication between the two Administrations is demanded by national security and foreign policy

¹³⁰ William P. Marshall and Jack M. Beermann, "The Law of Presidential Transitions," Boston University School of Law Working Paper No. 05-15, 2005, pp. 1 - 2. "The outgoing President retains all the formal legal powers of the presidency, yet his last electoral success is four years removed and his political capital is at low ebb... [H]e may also affirmatively want to create obstacles to prevent his successor from too quickly achieving political and policy success." Ibid. "The incoming president, on the other hand, will be focused on beginning her own initiatives and ... may desire to expeditiously reverse the policies of the previous president." Ibid., p. 2. "When the two Presidents are from opposing parties, the conflicts during the transition period, certainly, will be even more acute." Ibid.

¹³¹ While an "incident of national security significance" could entail a catastrophic natural disaster, this term, for purposes of this report, is used to describe foreign and domestic security-related man-made acts, including a terrorist attack (in the United States, against interests overseas, or against an ally), significant offensive action against troops deployed overseas, assassination of a U.S. or foreign leader, seizure or attacking of an embassy or consulate, a change in the political environment where the United States is undertaking stabilization activities, significant foreign power nuclear-related activity, or a foreign power or extremist group taking military action against a U.S. ally.

¹³² Transitions in American government power are not reserved for the executive branch. Congressional elections and changes in state and local leadership are also occasions where individuals wishing to harm U.S. national security interests could place the nation at risk. While the focus of this section is on security implications during a presidential transition, it is acknowledged that planning, prevention, preparedness, response, and recovery activities could also be hampered should an incident of national security concern occur during a congressional or nonfederal government election period.

¹³³ For example, while the terrorist attacks of March 2004 did appear to have an effect on the election outcome and the Spanish government's support of military actions in Iraq, the new prime minister actually increased Spain's commitment to counterterrorism military efforts in Afghanistan. It is speculated that while the tactical operation may have been a success, the long-term results of the attack were counter to the strategic desires of the terrorist group.

concerns.”¹³⁴ It is further observed that, “as the world becomes more dangerous and the risks to harm more immediate, the need for effective and seamless transitions becomes correspondingly greater.”¹³⁵

To further complicate matters, modern presidential transition activities are no longer constrained to the time between the election and inauguration.¹³⁶ Some presidential historians argue that, “history tells us that any winning candidate who has not started [transition efforts] at least six months before the election will be woefully behind come the day after the election day.”¹³⁷ While the exact time period and phases of a presidential transition are not statutorily or constitutionally defined, the presidential transition period could be seen as comprising five phases, extending from presidential campaign activities to the new President’s establishment of a national security team and development of accompanying strategies and policies.¹³⁸

Congressional and Executive Branch Options

The executive branch is not alone in attempting to ensure the country passes power from one Administration to the next in a safe and thoughtful manner.¹³⁹ However, the outgoing and incoming Administrations are viewed as being primarily responsible for addressing risks to the nation and taking actions to prevent and respond to any incident that may affect transition-related processes. How the newly elected President recognizes and responds to these challenges will “depend heavily upon the planning and learning that takes place during the transition from one Administration to another.”¹⁴⁰ During past presidential transitions, the current and incoming Administrations and Congress have traditionally undertaken numerous activities to facilitate a smooth transfer of executive branch power. Some of the actions often taken during presidential transitions include

- consulting with government and private sector experts who have presidential transition expertise,
- providing information to the President-elect after the election and prior to the inauguration,
- offering operational briefings on ongoing national security matters to prospective presidential nominees and their staff,

¹³⁴ Todd J. Zywicki, “The Law of Presidential Transitions and the 2000 Election,” *Brigham Young University Law Review*, vol. 1573, 2001, p.1.

¹³⁵ *Ibid*; Marshall and Beermann, “The Law of Presidential Transitions,” p. 9.

¹³⁶ Glenn P. Hastedt and Anthony J. Eksterowicz, “Perils of Presidential Transition,” *Seton Hall Journal of Diplomacy and International Relations*, vol. II, no. 1, Winter/Spring 2001, p. 67.

¹³⁷ John Kamensky, “One Year and Counting,” IBM Center for The Business of Government Weblog, November 6, 2007, at <https://transition2008.wordpress.com/2007/11/06/one-year-and-counting/>.

¹³⁸ For a complete explanation of the five phases of the presidential transition period and accompanying national security considerations, see CRS Report R42773, *2012-2013 Presidential Election Period: National Security Considerations and Options*, by (name redacted).

¹³⁹ Congress and state and local governments provide support to various aspects of the presidential transition. Other government and nongovernmental entities that offer advice and assistance to presidential transition related activities include the General Services Administration, National Archives and Records Administration, Office of Government Ethics, Congressional Research Service, Government Accountability Office, Center for the Study of the Presidency, Council for Excellence in Government, Mandate for Leadership Project, Presidential Appointment Initiative, Reason Public Policy Institute, and the Transition to Governing Project.

¹⁴⁰ Hastedt and Eksterowicz, “Perils of Presidential Transition,” p. 67.

- preparing briefing books and policy memos detailing the issues of most concern to the current Administration, and
- expediting security clearances for President-elect transition team members.

Agency Rulemaking¹⁴¹

When Congress enacts a statute, it often delegates rulemaking authority to one or more federal agencies to implement the statute. Agencies are required to follow certain procedures when they issue those rules. For example, under the Administrative Procedure Act (APA), agencies are generally required to publish a notice of rulemaking in the *Federal Register*, take comments on the proposed rule, and publish a final rule in the *Federal Register*.¹⁴² Because regulations carry the force of law and may have significant policy effects, they are an important policymaking tool for the federal government and for a presidential Administration.

Overview of Midnight Rulemaking

During the final months of recent presidential Administrations, federal agencies have issued an increased number of regulations.¹⁴³ This phenomenon is often referred to as “midnight rulemaking.” Various scholars and public officials have documented evidence of midnight rulemaking by several recent outgoing Administrations, especially for those outgoing Administrations that will be replaced by an Administration of a different party.¹⁴⁴

One general concern raised about midnight rulemaking is that an outgoing Administration may have less political accountability compared to an Administration faced with the possibility of reelection, and that agencies may not have sufficient time to review and digest public comments taken during the comment period.¹⁴⁵ Another concern is that the quality of the regulations may suffer during the midnight period, because the departing Administration may issue rules quickly, and, as a result, the rules may not receive adequate review within the agency itself or from the Office of Management and Budget (OMB).¹⁴⁶ Finally, some have argued that the task of

¹⁴¹ Prepared by (name redacted), Specialist in Government Organization and Management, Government and Finance Division.

¹⁴² The APA is at 5 U.S.C. §551 *et seq.* For additional information on the rulemaking process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by (name redacted).

¹⁴³ See CRS Report R42612, *Midnight Rulemaking: Background and Options for Congress*, by (name redacted).

¹⁴⁴ See, for example, Anne Joseph O’Connell, “Agency Rulemaking and Political Transitions,” *Northwestern University Law Review*, vol. 105, no. 2 (2011), pp. 471-534; Anne Joseph O’Connell, “Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State,” *Virginia Law Review*, vol. 94, no. 4 (June 2008), pp. 889-986.; and Patrick A. McLaughlin, “The Consequences of Midnight Regulations and Other Surges in Regulatory Activity,” *Public Choice*, vol. 147, no. 3/4 (June 2011), pp. 395-412.

¹⁴⁵ Jack M. Beermann, “Midnight Rules: A Reform Agenda,” draft report prepared for the consideration of the Administrative Conference of the United States, March 3, 2012, at <http://www.acus.gov/wp-content/uploads/downloads/2012/03/Revised-Draft-Midnight-Rules-Report-3-13-12.pdf>. Beermann cited an example in which an agency had to review 300,000 comments in one week to issue a rule on time.

¹⁴⁶ Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) reviews most agencies’ significant rules before they are published in the *Federal Register*, both at the proposed rule stage and final rule stage. This includes a review of the rule itself and the agency’s cost-benefit analysis of the rule, if one is required. See Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. For more information about OIRA’s role in this process, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by (name redacted).

evaluating a previous Administration's midnight rules can potentially overwhelm a new Administration.¹⁴⁷

On the other hand, a 2012 study for the Administrative Conference of the United States (ACUS) concluded that many midnight regulations were "relatively routine matters not implicating new policy initiatives by incumbent administrations," and that the "majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency's control (such as year-end statutory or court-ordered deadlines)."¹⁴⁸

Regulatory Moratoria and Postponements

One approach previous Presidents have used to control rulemaking at the start of their Administrations has been the imposition of a moratorium on new regulations from executive departments and independent agencies. Such moratoria have sometimes been accompanied by a requirement that the departments and agencies postpone the effective dates of certain rules that were issued at the end of the previous President's term.¹⁴⁹ Also, any proposed rules that have not been published in the *Federal Register* as final rules by the time the outgoing President leaves office can be withdrawn by a new Administration. However, once final rules have been published in the *Federal Register*, the only way for a new Administration to eliminate or change them is to go through the rulemaking process again.¹⁵⁰

A few weeks after he took office in 1981, President Reagan issued Executive Order 12291, which, among other things, generally required covered agencies to "suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective."¹⁵¹ In 1993, the incoming Clinton Administration imposed a moratorium on rules issued at the end of the G. H. W. Bush Administration.¹⁵² Similarly, on January 20, 2001, the incoming G. W. Bush Administration issued a memorandum delaying the implementation of many rules issued in the last months of the Clinton Administration.¹⁵³ Most recently, on January 20, 2009, Rahm Emanuel, then-assistant to President Obama and chief of staff, sent a memorandum to the heads of executive departments and agencies requesting that they generally (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) consider postponing for 60 days the effective dates of rules that had been published in the *Federal Register* but had not yet taken effect.¹⁵⁴

¹⁴⁷ See, for example, the testimony of Michael Abramowicz, U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Midnight Rulemaking: Shedding Some Light*, 111th Cong., 1st sess., February 4, 2009, H. Hrg. 111-2 (Washington: GPO, 2009), pp. 236-242.

¹⁴⁸ Beermann, "Midnight Rules," pp. 1-2.

¹⁴⁹ Such presidential moratoria on rulemaking have generally exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines.

¹⁵⁰ Under the APA, "rulemaking" is defined as "formulating, amending, or repealing a rule," meaning that an agency must follow the rulemaking procedures set forth by the APA to change or repeal a rule (5 U.S.C. §551(5)). Such procedures apply even for a change to a rule's effective date.

¹⁵¹ Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 17, 1981.

¹⁵² U.S. Office of Management and Budget, "Regulatory Review," 58 *Federal Register* 6074, January 22, 1993.

¹⁵³ Executive Office of the President, "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies," 66 *Federal Register* 7702, January 24, 2001.

¹⁵⁴ Executive Office of the President, "Memorandum for the Heads of Executive Departments and Agencies," 74 (continued...)

Recent outgoing Administrations have attempted to protect rules issued in their final months from the possibility of being rendered ineffective by establishing an effective date prior to the advent of the new Administration. For example, President G. W. Bush’s Chief of Staff, Joshua B. Bolten, issued a memorandum encouraging agencies to issue their proposed rules no later than June 1, 2008, and final regulations no later than November 1, 2008.¹⁵⁵ Similarly, on December 17, 2015, President Obama’s OIRA Administrator, Howard Shelanski, wrote a memorandum to deputy secretaries asking them to “strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review.”¹⁵⁶

Options for Congress: Oversight of Midnight Rules

Congress may examine the issuance of proposed and final midnight regulations at the end of an Administration and conclude that they should be allowed to go forward. Should Congress conclude otherwise, though, various options are available—even for rules that have already taken effect. First, Congress can use its legislative power to overturn or change a regulation that has been issued by an agency. Congress can also use its legislative power to amend the statutory authority underlying a regulation. A change in the underlying statutory authority could force an agency to amend a regulation that has already been issued, or it could provide additional instruction to an agency while a rule is under development and before it has been finalized.

In addition, Congress may use the expedited procedures provided in the Congressional Review Act (CRA) to disapprove agency rules, including, in some cases, rules issued during a previous session of Congress and by the previous Administration. Alternatively, Congress can add provisions to agency appropriations bills to prohibit certain rules from being implemented or enforced. These two options are discussed in detail below.

Congressional Review Act¹⁵⁷

Congress may use its general legislative powers to overturn agency rules by regular legislation. The CRA, enacted in 1996, was an attempt by Congress to reassert control over agency rulemaking by establishing a special set of expedited or “fast track” legislative procedures for this purpose, primarily in the Senate.¹⁵⁸

In short, the CRA requires that all final rules (including rules issued by independent boards and commissions) be submitted to both houses of Congress and to the Government Accountability Office (GAO) before they can take effect. Members of Congress have 60 “days of continuous

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Federal Register 4435, January 26, 2009.

¹⁵⁵ Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies, May 9, 2008.

¹⁵⁶ Memorandum from Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, to Deputy Secretaries, December 17, 2015.

¹⁵⁷ For an overview of the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by (name redacted) and (name redacted).

¹⁵⁸ The following discussion is a synopsis of more detailed information provided in other CRS reports. For a detailed discussion of CRA disapproval procedures, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by (name redacted). For a discussion of the “carryover” procedures, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by (name redacted) and (name redacted).

session” to introduce a joint resolution of disapproval beginning on the date a rule has been received by Congress (hereinafter referred to as the “initiation period”).¹⁵⁹ The Senate has 60 “session days” from the date the rule is received by Congress and published in the *Federal Register* to use expedited procedures to act on a resolution of disapproval (hereinafter referred to as the “action period”).¹⁶⁰ For example, once a joint resolution has reached the floor of the Senate, the CRA makes consideration of the measure privileged, prohibits various other dilatory actions, disallows amendments, and limits floor debate to a maximum of 10 hours. If passed by both houses of Congress, the joint resolution is then presented to the President for signature or veto. If the President signs the resolution, the CRA specifies not only that the rule “shall not take effect” (or shall not continue if it has already taken effect), but also that the rule may not be reissued in “substantially the same form” without subsequent statutory authorization.¹⁶¹ Also, the act states that any rule disapproved through these procedures “shall be treated as though such rule had never taken effect.”¹⁶² If, on the other hand, the President vetoes the joint resolution, then (as is the case with any other bill) Congress can override the President’s veto by a two-thirds vote in both houses of Congress.

Under most circumstances, it is likely that the President would veto such a resolution in order to protect rules developed under his own Administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Of the over 71,000 final rules that have been submitted to Congress since the legislation was enacted in 1996, the CRA has been used to disapprove one rule—the Occupational Safety and Health Administration’s November 2000 final rule on ergonomics.¹⁶³ The March 2001 rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. Because of the structure of the periods during which Congress can take action under the CRA, there may be a period at the beginning of each new Administration during which rules issued near the end of the previous Administration would be eligible for consideration under the CRA. Such a period is often considered the most likely time in which Congress would be able to overturn a rule successfully using the CRA.

Appropriations Provisions

Along with one use of the CRA to overturn an agency rule, Congress has frequently added provisions to agency appropriations bills to affect rulemaking and regulations, and Congress could choose to apply such provisions to midnight rules. Frequently, such provisions prohibit the use of funds for certain rulemaking-related purposes.¹⁶⁴ This could include, for example,

¹⁵⁹ “Days of continuous session” excludes all days when either the House of Representatives or the Senate is adjourned for more than three days, that is, pursuant to an adjournment resolution.

¹⁶⁰ “Session days” include only calendar days on which a chamber is in session. Once introduced, resolutions of disapproval are referred to the committees of jurisdiction in each house of Congress. The House of Representatives would consider the resolution under its general procedures, likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, however, if the committee has not reported a disapproval resolution within 20 calendar days after the regulation has been submitted and published in the *Federal Register*, then the committee may be discharged and the resolution placed on the Senate calendar if 30 Senators submit a petition to do so.

¹⁶¹ 5 U.S.C. §801(b)(2).

¹⁶² 5 U.S.C. §801(f).

¹⁶³ U.S. Department of Labor, Occupational Safety and Health Administration, “Ergonomics Program,” 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

¹⁶⁴ Provisions in appropriations acts that affect rulemaking may also require agencies to take certain actions. For (continued...)

prohibitions on the use of funds for the development or finalization of proposed or final rules, or prohibitions on the use of funds for implementation or enforcement of rules that have already been finalized.

Restrictions on the use of funds in appropriations bills can enable Congress to have a substantial effect on agency rulemaking and regulatory activity beyond the introduction of joint resolutions of disapproval pursuant to the CRA. However, unlike CRA joint resolutions of disapproval, these types of appropriations provisions do not nullify the force or effect of an existing regulation.¹⁶⁵ Therefore, any final rule that has taken effect and been codified in the *Code of Federal Regulations* will continue to be binding—even if language in the relevant regulatory agency’s appropriations act prohibits the use of funds to enforce the rule. Regulated entities are still required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies.

There may be additional limits on the ability to influence agency rulemaking through restrictions on the use of funds. For example, restrictions on the use of funds in appropriations acts, unless otherwise specified, are binding only for the period of time covered by the measure (i.e., a fiscal year or a portion of a fiscal year).¹⁶⁶ The provisions are generally applicable only to the agencies funded by that appropriations measure, unless otherwise specified. Some provisions are worded to affect agencies that are funded in other appropriations bills (e.g., those that prohibit the use of funds in “this or any other Act”), or they may be designated as “general provisions” that are “government-wide” and therefore are applicable to virtually all federal agencies.¹⁶⁷ In addition, some federal regulatory agencies derive a substantial amount of their operating funds from sources other than congressional appropriations (e.g., user fees), and the use of those funds to develop, implement, or enforce rules may not be legally constrained by language preventing the use of appropriated funds.¹⁶⁸ Finally, when federal regulations are primarily implemented or enforced by state or local governments (e.g., many of those issued by the Environmental Protection Agency and the Occupational Safety and Health Administration), those governments

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example, agencies may be directed to develop rules in particular areas or enforce existing rules in particular ways. This section does not discuss these types of provisions. For general information on appropriations restrictions, see CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by (name redacted) and (name redacted) .

¹⁶⁵ Provisions have been included in appropriations acts that directly affect the substance of existing or future regulations, but these are not drafted as funding prohibitions.

¹⁶⁶ See GAO, *Principles of Appropriations Law, Third Edition, Volume I*, GAO-04-261SP, January 2004, p. 2-34, which states that, “Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent.”

¹⁶⁷ See GAO, *Principles of Appropriations Law*, p. 2-33, which says that a general provision “may apply solely to the act in which it is contained (‘No part of any appropriation contained in this Act shall be used ...’), or it may have general applicability (‘No part of any appropriation contained in this or any other Act shall be used ...’).” For example, for FY2012, Title VII of Division C of the Consolidated Appropriations Act was designated as “General Provisions—Government-Wide.”

¹⁶⁸ Others, however, take the view that even these nonappropriated funds must be at least figuratively deposited into the Treasury, and that “all spending in the name of the United States must be pursuant to legislative appropriation.” Kate Stith, “Congress’ Power of the Purse,” *The Yale Law Journal*, vol. 97 (1988), p. 1345.

may have sources of funding that are independent of the federal funds that can be restricted by the appropriations provisions.¹⁶⁹

Executive Branch Political Appointments into the Next Presidency¹⁷⁰

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

Appointment Authority for Officers of the United States

In general, the President and the Senate share the power to fill the top nonelected offices of the U.S. government. As part of its system of checks and balances, the Constitution provides a general framework for appointments to these positions:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹⁷¹

In practice, the appointment process has three phases: (1) the President selects, vets, and nominates an individual, with or without input from Senators; (2) the Senate considers the nomination, with or without further action; and (3) if the nomination is confirmed by the Senate, the President signs a commission, and the appointee is sworn in.¹⁷²

The Constitution also empowers the President unilaterally to make a temporary appointment to such a position if it is vacant and the Senate is in recess.¹⁷³ Such an appointment, termed a recess appointment, expires at the end of the following session of the Senate.¹⁷⁴ At the longest, a recess appointment made in early January, after the beginning of a new session of the Senate, would last until the Senate adjourns sine die at the end of the following year, a period that could be nearly two years in duration.

Developments over the last decade have decreased the likelihood that a departing President could install a Senate-opposed appointee using the recess appointment power, particularly where one or

¹⁶⁹ See GAO, *Principles of Federal Appropriations Law, Third Edition, Volume II*, GAO-06-382, February 2006, which says that, unless stated otherwise, expenditures by recipients of federal grants “are not subject to all the same restrictions and limitations imposed on direct expenditures by the federal government. For this reason, grant funds in the hands of a grantee have been said to largely lose their character and identity as federal funds.”

¹⁷⁰ Prepared by (name redacted), Specialist in American National Government, Government and Finance Division.

¹⁷¹ Art. II, §2, cl. 2.

¹⁷² For detailed information about the appointment process, see CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by (name redacted) and (name redacted); and CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by (name redacted).

¹⁷³ Article 2, §2, clause 3 reads, “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”

¹⁷⁴ Each Congress covers a two-year period, generally composed of two sessions.

both chambers are led by the party in opposition to the President. From the 110th Congress onward, it has become common for the Senate and House to use certain scheduling practices as a means of precluding the President from making recess appointments.¹⁷⁵ The practices do this by preventing the occurrence of a Senate recess of sufficient length for the President to be able to use his recess appointment authority. In a June 26, 2014, opinion, the U.S. Supreme Court held that the President’s recess appointment power may be used only during a recess of 10 days or longer except under “some very unusual circumstance.”¹⁷⁶

Tenure during a Transition for a Confirmed Appointee

Unless otherwise specified in law, appointees to executive branch positions usually serve at the pleasure of the President. That is, they serve for an indeterminate period of time and can be removed by the President at any time for any reason (or no stated reason).¹⁷⁷ By tradition, appointees to these positions usually step down when the appointing President leaves office, unless asked to stay by the President-elect.

Congress has periodically elected to set a specific term of office for a particular position, restrict the President’s power of removal for a particular position, or both. Some removal restriction provisions require only that the President inform Congress of his reasons for removing an official, while others require that a certain threshold, such as “neglect of duty, or malfeasance in office, or for other good cause shown,” be met.¹⁷⁸ The use of fixed terms and removal restrictions has been more common for positions on regulatory and other boards and commissions, for which Congress has elected to establish a greater level of independence from the President, than for positions in executive departments and single-headed agencies.¹⁷⁹ An appointee to a position with a fixed term and protection from removal may serve during more than one presidency and is not required to step down when the appointing President leaves office; the incoming President may not remove the appointee unless the grounds for such removal would meet the threshold established in statute. An appointee to a position with a fixed term but no specified protection from removal may be protected from removal nonetheless, based on case law.¹⁸⁰ Even where an appointee to

¹⁷⁵The evolution of this use of scheduling practices is discussed in greater detail in CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by (name redacted).

¹⁷⁶ *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, at 2567 (2014). The opinion gave as an example of an unusual circumstance an instance such as “a national catastrophe ... that renders the Senate unavailable but calls for an urgent response” and further noted that “political opposition in the Senate would not qualify as an unusual circumstance.”

¹⁷⁷ It has long been recognized that “the power of removal [is] incident to the power of appointment.” (*Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).)

¹⁷⁸ There appears to be no standard clarifying under what circumstances the thresholds set by these statutory terms regarding removal might be met. (See Marshall J. Breger and Gary J. Edles, “Established by Practice: The Theory and Operation of Independent Federal Agencies,” *Administrative Law Review*, vol. 52 (2000), p. 1111, at pp. 1144-1145.) A Senate committee has asserted, however, that a removal for good cause must be based on “some type of misconduct,” as opposed to the refusal to carry out a presidential order. (See U.S. Congress, Senate Committee on Governmental Affairs, *Independent Counsel Reauthorization Act of 1987*, report to accompany S. 1293, 100th Cong., 1st sess., S.Rept. 100-123 (Washington: GPO, 1987), pp. 12-13.)

¹⁷⁹ Although fixed terms and removal protections for department and single-headed agency positions are unusual, notable examples do exist. The position of Commissioner of Social Security, for example, has a six-year term, and “[a]n individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.” (42 U.S.C. §902(a).) Similar provisions are associated with leaders of the Office of Special Counsel (5 U.S.C. §1211), the Federal Housing Finance Agency (12 U.S.C. §4512), and the Consumer Financial Protection Bureau (12 U.S.C. §5491).

¹⁸⁰ See, for example, *S.E.C. v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 681 (10th Cir. 1988), in which the Court of (continued...)

such a position is not protected from removal, it could be argued that the fixed term establishes the expectation that the incumbent will be able to serve for a certain period. Removal of such an appointee by the incoming President might entail an expenditure of political capital.

Tenure during a Transition for a Recess Appointee

At times in the past, outgoing Presidents have made recess appointments, during their final months in office, to each of the kinds of positions described above. The potential tenure for recess appointees to positions without removal protections is the same as it would be if the appointee had been confirmed by the Senate; they typically leave with the appointing President. Recess appointees to positions with fixed terms and removal protection, however, may serve until the expiration of the term to which they were appointed or the expiration of the recess appointment, whichever occurs earlier.¹⁸¹ A President could, at the end of his presidency, use a recess appointment to bypass the Senate and fill a fixed-term position for a period that would outlast his time in office by a year or more. As noted above, even an appointee without explicit statutory removal protection might prove difficult or costly for an incoming President to remove.

In some cases, recess appointees who serve past the end of an Administration might be “consensus appointees,” who have the support of the incoming President and the reconstituted Senate. In other cases, however, an outgoing President could install more controversial appointees, who would not be nominated by the new President or confirmed by the reconstituted Senate to the positions to which they are appointed. As previously noted, developments over the last decade have decreased the likelihood that a departing President could install a Senate-opposed appointee using the recess appointment power, particularly where one or both chambers are led by the party in opposition to the President.

Notwithstanding the low likelihood of a late-term recess appointment by the President within the current context,¹⁸² arguments could be advanced in support of, and opposition to, the practice. In support, it could be argued that the outgoing President carries the full constitutional authority of the office until his term is over, that he must be able to exercise that authority as he sees fit, and that he should not be expected to abstain from implementing his agenda until he leaves office. Furthermore, it might be argued, other recent Presidents have made recess appointments in their final months in office, and some of these recess appointments have been to positions with terms that carry over into the following Presidency. A counter argument might be made that, in making recess appointments to fixed term positions with removal protections, an outgoing President would be effectively circumventing the Senate and undermining the incoming President.

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Appeals for the Tenth Circuit stated that “it is commonly understood that the President may remove a commissioner only for ‘inefficiency, neglect of duty or malfeasance in office.’”

¹⁸¹ As previously noted, a recess appointment can last for as much as nearly two years. A full fixed term is usually of longer duration, but sometimes individuals are appointed to the final portion of an unexpired term that is already under way (e.g., the final year of a five-year term begun by another appointee).

¹⁸² Floor remarks by one Senator in early 2016 suggest that the majority intends, for the duration of President Obama’s time in office, to follow scheduling practices that would appear to preclude a recess of sufficient length to allow him to make a recess appointment. Senator James Lankford, “Comprehensive Addiction and Recovery Act of 2015,” remarks in the Senate, *Congressional Record*, daily edition, vol. 162, part 38 (March 9, 2016), p. S1359.

Judicial Branch Appointments¹⁸³

As with executive branch political appointees, the procedure for appointing federal judges is provided for by the Constitution in a few words. The Appointments Clause (Article II, Section 2, clause 2) states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court, and all other Officers of the United States,” including lower federal court judges (i.e., U.S. circuit and district court judges).¹⁸⁴

The appointment process for federal judges is similar to that of executive branch appointees in that the President is responsible for submitting a nomination to the Senate (which, in turn, may or may not act on the nomination). While the process of appointing federal judges has undergone some changes over two centuries, its most essential feature—the sharing of power between the President and the Senate¹⁸⁵—has remained unchanged: To receive appointment as a federal judge, one must first be formally selected (“nominated”) by the President¹⁸⁶ and then approved (“confirmed”) by the Senate.¹⁸⁷

Vacancies Awaiting a New President

At the onset of a new Administration, there are typically dozens of vacant lower federal court judgeships awaiting nominations by a new President.¹⁸⁸ It is, however, relatively rare for a vacancy on the Supreme Court to exist at the start of a new presidency. At present, there is a vacancy on the Court that may not be filled prior to a new President assuming office on January 20, 2017.¹⁸⁹

¹⁸³ Prepared by (name redacted), Analyst in American National Government, Government and Finance Division.

¹⁸⁴ The focus of this section is on vacant U.S. circuit and district court judgeships. Additionally, this section does not address vacancies on the U.S. Court of International Trade (a specialized court with nine authorized judgeships).

¹⁸⁵ One of the primary ways in which the Senate exercises its power in the judicial appointment process is through the “blue slip” procedure of the Judiciary Committee, a procedure which affords Senators the opportunity to convey to the President their views about candidates under consideration for judgeships in their states. In recent and many past Congresses, the Judiciary Committee’s blue slip procedure has reinforced Senators’ influence over judicial nominations in their state by permitting nominations to receive committee action only when both home state Senators have returned “positive” blue slips. Note that, generally, Senators exert less influence over a President’s selection of circuit court nominees than they do over his selection of district court nominees.

¹⁸⁶ A president may also make a recess appointment to a vacant U.S. circuit or district court judgeships. Such recess appointments, however, are relatively rare.

¹⁸⁷ The most common ways in which a judicial nomination fails to receive Senate confirmation include (1) the full Senate voting against the confirmation; (2) the President withdrawing the nomination because the Senate Judiciary Committee has voted against reporting the nomination to the Senate or has made clear its intention not to act on the nomination, or because the nomination, even if reported, is likely to face substantial opposition on the Senate floor, or because the nominee has requested that the nomination be withdrawn; and (3) the Senate, without confirming or rejecting the nomination, returning the nomination to the President under Rule XXXI, paragraph 6 of the *Standing Rules of the Senate* after it has adjourned or been in recess for more than 30 days.

¹⁸⁸ At the end of a Congress that coincides with the end of a presidency, the Senate typically returns any outstanding judicial nominations to the outgoing President (who does not then re-nominate individuals prior to leaving office on January 20). A relatively recent exception to this was during the final weeks of the Clinton presidency. The Senate, under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate, returned a number of circuit court nominations to the President in December 2000 at the conclusion of the 106th Congress. At the beginning of the 107th Congress, in January 2001, President Clinton resubmitted 9 of these nominations to the Senate prior to leaving office several weeks later on January 20. The nominations were eventually withdrawn by President G.W. Bush in March 2001.

¹⁸⁹ The current vacancy was created by the death of Antonin Scalia on February 13, 2016. As of this writing, Majority (continued...)

The relatively large number of vacant judgeships at the beginning of a new presidency is due, in part, to the Senate approving fewer judicial nominations during an outgoing President's final year in office (particularly if it is a President's eighth year in office).¹⁹⁰ Additionally, the Senate typically has not approved U.S. circuit court nominations during a presidential election year past June or July of the election year, regardless of whether it is the fourth or eighth year of a presidency.¹⁹¹

Beginning with President Ronald Reagan, the number of vacant circuit court judgeships¹⁹² on January 20 of a newly elected President's first year in office included 5 (1981); 10 for the George H.W. Bush presidency (1989); 18 for the Clinton presidency (1993); 26 for the George W. Bush presidency (2001); and 13 for the Obama presidency (2009).

The number of vacant district court judgeships¹⁹³ on January 20 of a newly elected President's first year in office included 29 at the start of the Reagan presidency (1981); 27 for the George H.W. Bush presidency (1989); 93 for the Clinton presidency (1993); 55 for the George W. Bush presidency (2001); and 45 for the Obama presidency (2009).

Timing of Nominations Made by a New President

Prior to a President nominating an individual to a lower federal court judgeship, there can be a lengthy pre-nomination evaluation of judicial candidates by staff in the White House Counsel's Office, as well as by the Department of Justice. Candidate finalists also undergo a confidential background investigation by the Federal Bureau of Investigation (FBI) and an independent evaluation by a committee of the American Bar Association. The selection process is completed when the President, approving of a particular candidate, signs a nomination message (which is then transmitted to the Senate).¹⁹⁴

Given the steps involved in the pre-nomination stage, it is often at least several months before the Administration submits its first circuit and district court nominations to the Senate for consideration. During the Reagan presidency, the first circuit court nomination was submitted on

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Leader Mitch McConnell (R-KY) has stated that the Scalia vacancy will not be filled until after President Obama's successor takes office. Senator Mitch McConnell, Press Release, "McConnell On Supreme Court Nomination," March 16, 2016, at http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=50492600-6758-4FC2-928D-302FAB54BEA8. Additionally, for further discussion of a President's selection of a nominee for the Supreme Court, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by (name redacted).

¹⁹⁰ For further discussion, see CRS Report R44353, *Final Senate Action on U.S. Circuit and District Court Nominations During a President's Eighth Year in Office*, by (name redacted).

¹⁹¹ For example, in 2012, the last circuit court nomination approved by the Senate during the calendar year was on June 12 (while the last district court nomination was approved during the lame duck session in December). In 2008, the last circuit court nomination approved by the Senate during the calendar year was on June 24 (while the last district court nomination was approved on September 26). In 2004, the last circuit court nomination approved during the calendar year was similarly on June 24 (while the last district court nomination was approved during the lame duck session in November). For further discussion of the processing of judicial nominations by the Senate during presidential election years, see CRS Report R42600, *Confirmation of U.S. Circuit and District Court Nominations in Presidential Election Years*, by (name redacted) and (name redacted).

¹⁹² U.S. circuit courts take appeals from U.S. district courts and are also empowered to review the decisions of many administrative agencies.

¹⁹³ U.S. district courts are the federal trial courts of general jurisdiction.

¹⁹⁴ For further discussion, see CRS Report R43762, *The Appointment Process for U.S. Circuit and District Court Nominations: An Overview*, by (name redacted).

July 16, 1981. During the G.H.W. Bush, Clinton, and G.W. Bush presidencies, the first circuit court nominations were submitted on February 28, 1989,¹⁹⁵ August 6, 1993, and May 9, 2001, respectively. During President Obama's first year in office, the first circuit court nomination was submitted on March 17, 2009.

Regarding district court nominations, the first nomination was submitted by President Reagan on July 8, 1981. During the G.H.W. Bush, Clinton, and G.W. Bush presidencies, the first district court nominations were submitted on February 28, 1989,¹⁹⁶ August 6, 1993, and May 17, 2001, respectively. During President Obama's first year in office, the first district court nomination was submitted on June 25, 2009.

Executive Orders¹⁹⁷

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

Executive orders are a significant vehicle for unilateral action by the President: they have the force and effect of law—unless voided or revoked by congressional, presidential, or judicial action—and they combine “the highest levels of substance, discretion, and direct presidential involvement.”¹⁹⁸ Being able to act unilaterally enables a President to establish control over policymaking. Presidents are sometimes aided in this endeavor by the proliferation and ambiguity of statutes, which increase their opportunities for justifying presidential action.¹⁹⁹ Another appealing feature of executive orders is that they allow Presidents to act “quickly, forcefully, and (if they like) with no advance notice.”²⁰⁰ Capitalizing on these features enables Presidents to seize the initiative on an issue, shape the national agenda, and force others to respond. For practical or political reasons, Presidents may choose to use executive orders to circumvent a Congress that they perceive as hostile to their policies, after considering whether the Congress is likely to overturn a particular executive order,²⁰¹ or as moving too slowly.²⁰²

Executive orders suit the needs of an outgoing President who wants to establish or change policy, or is striving to secure his legacy. Howell and Mayer have noted that when a President's

¹⁹⁵ President G.H.W. Bush renominated two circuit court nominees who had previously been nominated by President Reagan but whose nominations were not approved by the Senate prior to the end of the 100th Congress. President G.H.W. Bush submitted his third circuit court nomination on August 4, 1989.

¹⁹⁶ President G.H.W. Bush renominated three district court nominees who had been nominated by President Reagan but whose nominations were not approved by the Senate prior to the end of the 100th Congress. President G.H.W. Bush submitted his fourth district court nomination on August 4, 1989.

¹⁹⁷ Prepared by (name redacted), Specialist in American National Government, Government and Finance Division.

¹⁹⁸ Joel L. Fleishman and Arthur H. Aufses, “Law and Orders: The Problem of Presidential Legislation,” *Law and Contemporary Problems*, vol. 40 (1976), p. 5. Executive orders disposition tables, which list each President's executive orders from Franklin D. Roosevelt through the current President, are at <http://www.archives.gov/federal-register/executive-orders/disposition.html>.

¹⁹⁹ Terry M. Moe and William J. Howell, “The Presidential Power of Unilateral Action,” *Journal of Law, Economics, and Organization*, vol. 15 (1999), pp. 141 and 143.

²⁰⁰ *Ibid.*, p. 138.

²⁰¹ Christopher J. Deering and Forrest Maltzman, “The Politics of Executive Orders: Legislative Constraints on Presidential Power,” *Political Research Quarterly*, vol. 52 (1999), pp. 2 and 6.

²⁰² Paul C. Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Reagan* (Baltimore: Johns Hopkins University Press, 1991), p. 118.

successor belongs to the opposition political party, “he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor’s hands.”²⁰³ An outgoing President’s use of unilateral directives, such as executive orders, might be greeted with criticism from some quarters. Some scholars note that the “directives lack the sort of legitimacy that pre-election activity has, because by definition they are issued after a president (and, in many cases, his party) has been repudiated at the polls. Moreover, there are no opportunities for democratic accountability, because, again, voters do not have a subsequent chance to express their approval or disapproval.”²⁰⁴

An incoming President, who is eager to act quickly on his policy agenda, seeking to modify or overturn certain of his predecessor’s actions, or distinguish himself from his predecessor, particularly when they are from different parties, would find executive orders an effective way to accomplish these objectives.²⁰⁵ He might be stymied, though, in his efforts to amend his predecessor’s actions: “Occasionally, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation’s credibility, or confronting serious legal obstacles.”²⁰⁶

Timing and Volume of Executive Orders

Table 2 presents the number of executive orders issued by Presidents Obama, G.W. Bush, Clinton, G.H.W. Bush, Reagan, and Carter in each of three different transition periods.²⁰⁷ These three periods are comparable, but not equal, in duration, which means it is more meaningful to compare data within each column rather than across columns.

²⁰³ Howell and Mayer, “The Last One Hundred Days,” p. 533.

²⁰⁴ *Ibid.*, p. 551.

²⁰⁵ Kenneth R. Mayer, “Executive Orders and Presidential Power,” *Journal of Politics*, vol. 61 (1999), p. 451. For example, President Clinton signed E.O. 12834 on January 20, 1993, which required his senior political appointees to take an ethics pledge that would prohibit them from lobbying federal government officials for five years. President George W. Bush launched a major initiative early in his term with the signing of E.O. 13198 and E.O. 13199 on January 29, 2001, which directed the Attorney General and four cabinet secretaries to establish offices of faith-based and community initiatives, and which established a White House Office of Faith-Based and Community Initiatives, respectively.

²⁰⁶ Howell and Mayer, “The Last One Hundred Days,” p. 543. On the other hand, as the following examples show, several recent Presidents revoked, partly or completely, one or more executive orders issued by their immediate predecessor. President Reagan revoked two executive orders signed by President Carter, thus terminating certain aspects of the government’s wage and price program (E.O. 12288, January 29, 1981) and disbanding the Tahoe Federal Coordinating Council (E.O. 12298, March 12, 1981). President Clinton revoked (E.O. 12836, February 1, 1993) two of President Bush’s executive orders having to do with labor unions. President G.W. Bush signed four executive orders (Executive Orders 13201, 13202, 13203, and 13204), on February 17, 2001, that dealt with labor issues and that partially or completely revoked executive orders that had been signed by his predecessor.

²⁰⁷ For the sake of consistency within this report, the 41st President is identified as President George H.W. Bush or President G.H.W. Bush. However, he signed his executive orders as President George Bush or President Bush. His son, the 43rd President, is identified as President George W. Bush (his signature on executive orders) or President G.W. Bush.

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

President	Incoming: (First term) Jan. 20-Apr. 30	Pre-election: (Final term) Aug. 1-Election	Lame Duck: (Final term) Election-Jan. 20
Donald J. Trump	33 (2017)	—	—
Barack Obama	10 (2009)	6 (2012) 14 (2016)	17 (2016-2017)
George W. Bush	12 (2001)	10 (2004) 7 (2008)	11 (2008-2009)
William J. Clinton	13 (1993)	10 (1996) 11 (2000)	22 (2000-2001)
George H.W. Bush	11 (1989)	7 (1992)	14 (1992-1993)
Ronald Reagan	18 (1981)	7 (1984) 9 (1988)	12 (1988-1989)
Jimmy Carter	16 (1977)	20 (1980)	36 (1980-1981)

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

Note: Executive orders are categorized according to signing date.

As incoming Presidents, Obama, G.W. Bush, Clinton, G.H.W. Bush, Reagan, and Carter issued comparable numbers of executive orders. The range of executive orders issued was 10 (Obama) to 18 (Reagan). By signing 33 executive orders during the incoming period, Donald J. Trump nearly doubled the number of orders that were signed by Reagan. During the pre-election period, four of the Presidents also issued comparable numbers of executive orders, ranging from 7 (Reagan, G.H.W. Bush, and G.W. Bush) to 11 (Clinton). President Carter issued 20 executive orders during the pre-election period. The lame duck period shows the greatest variation. Reagan, G.H.W. Bush, G.W. Bush, and Obama each issued fewer than 20 executive orders: 12, 14, 11, and 17, respectively. Clinton issued 22, and Carter issued 36.²⁰⁸ However, nearly one-third of the

²⁰⁸ The quantity of orders President Carter signed during the pre-election and lame duck periods is consistent with the pace he maintained throughout his four-year term. President Obama issued an average of 32 executive orders per year; President G.W. Bush 36; President Clinton 46; President G.H.W. Bush 42; President Reagan 48; and President Carter 80. The figure for President Obama is an average for the years 2009-2015. National Archives and Records Administration, “Administration of Barack Obama (2009-Present),” at <http://www.archives.gov/federal-register/executive-orders/obama.html>; National Archives and Records Administration, “Administration of George W. Bush (2001-2009),” at <http://www.archives.gov/federal-register/executive-orders/wbush.html>; National Archives and Records Administration, “Administration of William J. Clinton (1993-2001),” at <http://www.archives.gov/federal-register/executive-orders/clinton.html>; National Archives and Records Administration, “Administration of George Bush (1989-1993),” at <http://www.archives.gov/federal-register/executive-orders/bush.html>; National Archives and (continued...)

executive orders President Carter signed at the end of his term had to do with the hostage crisis in Iran.

A study that examined executive orders issued between April 1936 and December 1995 found that, while the start of a new President's term does not result in a higher number of executive orders, the end of a President's term is notable for an increase in the quantity of executive orders issued.²⁰⁹ 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."²¹⁰ When party control of the White House did not change following a presidential election, there was "no corresponding increase in order frequency...."²¹¹ The author of this study asserts that these data are evidence that "executive orders have a strong policy component, as otherwise presidents would have little reason to issue such last-minute orders." Mayer also found that reelection plays a role in the number of executive orders signed and issued. Presidents who were running for reelection issued approximately 1.4 more executive orders per month—14 during campaign season from January 1 through the end of October—than when they were not running for reelection.²¹²

Content of Executive Orders

Executive orders range, in terms of their import for government management and operations and the principle of shared powers, and the scope of their impact, from the somewhat innocuous to the highly significant. Presidents use executive orders to recognize groups and organizations; establish commissions, task forces, and committees; and make symbolic statements. Presidents also use executive orders "to establish policy, reorganize executive branch agencies, alter administrative and regulatory processes, [and] affect how legislation is interpreted and implemented."²¹³

Unilateral action by Presidents during transition periods can, and does, result in a mixture of executive orders in terms of their significance and scope. President Carter established a committee charged with selecting a director for the FBI and closed the federal government on Friday, December 26, 1980.²¹⁴ President Bush designated the Organization of Eastern Caribbean States as a public international organization and delegated some disaster relief and emergency assistance functions from the President to the director of the Federal Emergency Management Agency.²¹⁵ Turning to executive orders with policy implications, President Reagan brought

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Records Administration, "Administration of Ronald Reagan (1981-1989)," at <http://www.archives.gov/federal-register/executive-orders/reagan.html>; National Archives and Records Administration, "Administration of Jimmy Carter (1977-1981)," at <http://www.archives.gov/federal-register/executive-orders/carter.html>.

²⁰⁹ Mayer, "Executive Orders and Presidential Power," p. 457.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid., p. 459.

²¹³ Ibid., p. 445.

²¹⁴ Executive Order 11971, "Establishing the Committee on Selection of the Director of the Federal Bureau of Investigation," 42 *Federal Register* 9155, February 15, 1977, and Executive Order 12255, "Providing for the Closing of Government Departments and Agencies on Friday, December 26, 1980," 45 *Federal Register* 80807, December 5, 1980, respectively.

²¹⁵ Executive Order 12669, "Organization of Eastern Caribbean States," 54 *Federal Register* 7753, February 23, 1989, and Executive Order 12673, "Delegation of Disaster Relief and Emergency Assistance Functions," 54 *Federal Register* 12571, March 23, 1989, respectively.

agency rulemaking under the control of OMB and required cost-benefit analyses be conducted for proposed rules.²¹⁶ Most notable among the executive orders signed by President Carter during a transition period was a package of executive orders relating to the negotiated release of American hostages being held in Iran.²¹⁷

Submission of the President's Budget in Transition Years²¹⁸

When a new Congress convenes in January, one of its first orders of business is to receive the annual budget submission of the President. Following receipt of the President's budget submission, Congress begins the consideration of the budget resolution and other budgetary legislation for the upcoming fiscal year, which starts on October 1.²¹⁹ The transition from one presidential Administration to another raises special issues regarding the annual budget submission. Which President—the outgoing President or the incoming one—is required to submit the budget, and how will the transition affect the timing and form of the submission? This section provides background information that addresses these questions.²²⁰

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

The Budget and Accounting Act of 1921, as amended, requires the President to submit a budget annually to Congress toward the beginning of each regular session.²²¹ This requirement first applied to President Warren Harding, for FY1923.

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

- in 1950, to “during the first 15 days of each regular session”;²²²

²¹⁶ Executive Order 12291, “Federal Regulation,” 46 *Federal Register* 13193, February 17, 1981.

²¹⁷ Executive Order 12276, “Direction Relating to Establishment of Escrow Accounts,” 46 *Federal Register* 7913, January 23, 1981; Executive Order 12277, “Direction to Transfer Iranian Government Assets,” 46 *Federal Register* 7915, January 23, 1981; Executive Order 12278, “Direction to Transfer Iranian Government Assets Overseas,” 46 *Federal Register* 7917, January 23, 1981; Executive Order 12279, “Direction to Transfer Iranian Government Assets Held by Domestic Banks,” 46 *Federal Register* 7917, January 23, 1981; Executive Order 12280, “Direction to Transfer Government Financial Assets Held by Non-banking Institutions,” 46 *Federal Register* 7921, January 23, 1981; Executive Order 12281, “Direction to Transfer Certain Iranian Government Assets,” 46 *Federal Register* 7923, January 23, 1981; Executive Order 12282, “Revocation of Prohibitions Against Transactions Involving Iran,” 46 *Federal Register* 7925, January 23, 1981; Executive Order 12283, “Non-prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere,” 46 *Federal Register* 7927, January 23, 1981; Executive Order 12284, “Restrictions on the Transfer of Property of the Former Shah of Iran,” 46 *Federal Register* 7929, January 23, 1981; Executive Order 12285, “President’s Commission on Hostage Compensation,” 46 *Federal Register* 7931, January 23, 1981.

²¹⁸ Prepared by (name redacted), Analyst in Government Organization and Management, Government and Finance Division.

²¹⁹ For more information on the federal budget process, see CRS Report 98-721, *Introduction to the Federal Budget Process*, coordinated by (name redacted).

²²⁰ For additional information on this topic, see CRS Report RS20752, *Submission of the President’s Budget in Transition Years*, by (name redacted). For information on the executive budget process generally, see CRS Report R42633, *The Executive Budget Process: An Overview*, by (name redacted).

²²¹ 31 U.S.C. §1105a; P.L. 67-13; 42 Stat. 20.

- in 1985, to “on or before the first Monday after January 3 of each year (or on or before February 5 in 1986)”,²²³ and
- in 1990, to “on or after the first Monday in January but not later than the first Monday in February of each year.”²²⁴

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

The 1990 change in the deadline made it possible for an outgoing President to leave the annual budget submission to his successor, an option which the three outgoing Presidents since then (G.H.W. Bush, Clinton, and G.W. Bush) have chosen. The most recent budget, for FY2017, was submitted by President Obama. If outgoing President Obama chooses the same option as his three predecessors, the submission of the FY2018 budget would be the responsibility of his successor.

Because President G.H.W. Bush chose not to submit a budget for FY1994 (and was not obligated to do so), President Clinton submitted the original budget for FY1994 rather than budget revisions. Similarly, the budget for FY2002 was submitted by the incoming President G.W. Bush, rather than by outgoing President Clinton, and the budget for FY2010 was submitted by incoming President Obama, rather than outgoing President G.W. Bush.

Transition Year Budgets: Deadlines and Timing of Recent Submissions

During the period beginning with the full implementation of the congressional budget process (in FY1977), six presidential transitions of Administration have occurred. During this time, the three outgoing Presidents required to submit a budget (Ford, Carter, and Reagan) did so on or before the statutory deadline. As mentioned above, the three Presidents who were not required to submit an outgoing budget (George H.W. Bush, Bill Clinton, and George W. Bush) chose to leave the budget submission to their respective successors.

In past years, Congress authorized the submission of a budget for a fiscal year after the statutory deadline by enacting a deadline extension in law. For example, the deadlines for submission of the budgets for FY1981, FY1984, and FY1986 were extended from mid-January to late-January or early-February by P.L. 96-186, P.L. 97-469, and P.L. 99-1, respectively. Beginning in the late 1980s, however, several original budgets were submitted late without authorization. For FY1991, the budget was submitted a week after a deadline that already had been extended by law (P.L. 101-228). For FY1989, the budget was submitted 45 days after the deadline without the consideration of any measure granting a deadline extension.

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²²² The 1950 change was made by the Budget and Accounting Procedures Act of 1950 (P.L. 81-784; 64 Stat. 832).

²²³ The 1985 change was made by the Balanced Budget and Emergency Deficit Control Act (P.L. 99-177; 99 Stat. 1038).

²²⁴ The 1990 change was made by the Budget Enforcement Act of 1990, which was included in the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508, Title XIII; 104 Stat. 1388-1573).

The three most recent transition-year budgets (FY1994, FY2002, and FY2010), were submitted 66, 63, and 98 days after the deadline, respectively, without consideration of a measure granting a deadline extension. Presidents Clinton and G.W. Bush submitted the original budgets for FY1994 and FY2002 (on April 8, 1993, and April 9, 2001, respectively). President Obama submitted an overview of his budget, “A New Era of Responsibility: Renewing America’s Promise” on February 26, 2009, two days after delivering an address on his economic and budget plan to a joint session of Congress. He submitted his *Appendix*, which contained detailed budget information on May 7, 2009, and additional supplemental volumes, including the *Analytical Perspectives* and the *Terminations, Reductions, and Savings* volume, on May 11, 2009.

Transition Year Budgets: Special Messages and Budget Revisions

Although Presidents Reagan, Clinton, G.W. Bush, and Obama did not submit detailed budget proposals until April or May of their first year in office, each of them advised Congress regarding the general contours of their economic and budgetary policies in special messages transmitted to Congress in February. In addition, each incoming President since Reagan has presented his special message on the budget to a joint session of Congress.²²⁵

Once the original budget for a fiscal year has been submitted, a President or his successor may submit revisions at any time. Since 1921, incoming Presidents, except for Warren Harding,²²⁶ Clinton, G.W. Bush, and Obama, assumed their position with a budget of their predecessor in place. Six incoming Presidents chose to modify their predecessor’s budget by submitting revisions shortly after taking office: Eisenhower, Kennedy, Nixon, Ford, Carter, and Reagan. Six incoming Presidents chose not to submit revisions: Calvin Coolidge, Herbert Hoover, Franklin D. Roosevelt, Truman, Johnson, and G.H.W. Bush.²²⁷

Since FY1977, two incoming Presidents (Carter²²⁸ and Reagan)²²⁹ submitted revisions of their predecessors’ budgets. Though President George H.W. Bush did not submit an official revision of President Reagan’s FY1990 budget, he submitted a document to Congress to coincide with his first State of the Union Address that contained many of the same elements as budget revisions that had been submitted by previous incoming Presidents.²³⁰

²²⁵ While not technically State of the Union Addresses, these presentations contain many of the same elements and serve much the same purpose as the State of the Union. As such, they are frequently counted as State of the Union Addresses by scholars. For additional information, see CRS Report R40132, *The President’s State of the Union Address: Tradition, Function, and Policy Implications*, by (name redacted) .

²²⁶ Warren G. Harding was the first President required to submit a consolidated federal budget to Congress. For additional information, see CRS Report R43163, *The President’s Budget: Overview of Structure and Timing of Submission to Congress*, by (name redacted) .

²²⁷ Presidents Coolidge and Hoover each assumed office with a reduced opportunity of time to submit budget revisions. President Coolidge assumed office on August 3, 1923, following the death of President Harding, which effectively prevented him from submitting budget revisions prior to the start of the fiscal year in July. President Hoover was the final President elected prior to the ratification of the Twentieth Amendment in 1933. Consequently, his term did not begin until March.

²²⁸ The budget revisions are transmitted along with a short Presidential Message, which is noted in the *Congressional Record*. Presidential Message, *Congressional Record*, vol. 123, part 4 (February 22, 1977).

²²⁹ President Reagan submitted two budget revisions for FY1982. See Presidential Message, *Congressional Record*, vol. 127, part 3 (March 10, 1981), p. 3928, and Presidential Message, *Congressional Record*, vol. 127, part 5 (April 7, 1981), p. 6627.

²³⁰ President G.H.W. Bush submitted a 193-page document titled *Building a Better America* to Congress which contained select modifications of the FY1990 budget as well as legislative proposals to reform the budget process. See Presidential Message, *Congressional Record*, vol. 135, part 2 (February 9, 1989), p. 2081.

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