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Presidential Transitions: Executive Branch Political Appointment Status

The status of incumbent political appointees during presidential transitions has often been of interest to Congress. In some instances, appointees of an outgoing President have continued to serve into a new Administration. These appointees might not share the new President's policy preferences or readily implement the new Administration's policy agenda. This dynamic has usually arisen when the tenure of a confirmed political appointee extends into a new Administration as a result of fixed-term provisions intended to insulate the appointee from the policy preferences of the President. In other cases, appointees have been installed in such positions in the waning days of a presidency through a recess appointment, although this practice has not been used since 2000.

Who Must Go?

In recent years, the leadership of the federal bureaucracy has numbered more than 7,000 appointees. Approximately 3,700 of these are political appointees. Most others are career members of the Senior Executive Service (SES). Career appointees typically remain in their positions across Administrations, unless they are transferred to other SES positions.

Political appointments generally fall into one of four categories:

1. Presidential appointments with the advice and consent of the Senate (PAS),
2. Presidential appointments not requiring confirmation (PA positions),
3. Noncareer SES appointments, and
4. Schedule C appointments.

Unless otherwise specified in law, political appointees to executive branch positions usually serve at the pleasure of the President. That is, they serve for indeterminate periods of time and can be removed by the sitting President at any time for any reason (or no stated reason).

Most political appointees step down when the appointing President leaves office. Sometimes, an incoming President has asked a political appointee in the outgoing Administration to continue to serve. This is more likely to happen where the incoming and outgoing Presidents are of the same party, but it has occasionally happened when the two are of different parties. For example, Robert Gates was appointed to be Secretary of Defense by President George W. Bush in 2006, and, at the request of President Barack Obama, he continued to serve in that role until 2011. Those political appointees who continue to serve across Administrations do not need to be reappointed.

Who May Stay?

Congress has sometimes set a specific term of office for a particular position, restricted the President's power of removal for a particular position, or both. Some removal restrictions require only that the President inform Congress of reasons for removing an official, whereas others require that a specified process be used or a specified threshold be met, such as "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." The use of fixed terms and removal restrictions has been more common for positions on regulatory boards—where Congress has tried to establish a greater independence from the President—than for positions in departments and single-headed agencies. Although the President may remove inspectors general under statutorily prescribed congressional notification procedures, recent incoming Presidents have followed a tradition of leaving them in office.

In a 2020 decision, the U.S. Supreme Court held that a "for cause" removal restriction provision pertaining to the director of the Consumer Financial Protection Bureau was unconstitutional. In a 2021 decision, the Court held that a similar statutory "for cause" removal restriction applying to the director of the Federal Housing Finance Agency was also unconstitutional. Both of these cases involved executive branch agencies headed by a single director. The impact of this decision on similar provisions pertaining to other agencies—particularly collegially headed agencies—is not clear.

In general, 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. Statutory removal protections might prohibit a President from attempting to remove the appointee simply for policy disagreements. Even when an appointee to a fixed-term position is not protected from removal, however, 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 an incoming President might entail an expenditure of political capital or distract attention from the President's post-inaugural legislative agenda.

Recess Appointments

The Constitution empowers the President to unilaterally make a temporary appointment to a PAS position if the position is vacant and the Senate is in recess. Such an appointment, termed a *recess appointment*, expires at the end of the following session of the Senate. 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.

Outgoing Presidents have sometimes made recess appointments during their final months in office. 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: The appointee typically leaves office with the appointing President but may stay on at the request of the incoming President. A recess appointee to a position with a fixed term and removal protection, however, might be able to continue to serve into a new Administration if the term of the position permits it. This would enable a President, at the end of his presidency, to 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.

Developments over the past decade have decreased the likelihood that a departing President could install a Senate-opposed appointee using the recess appointment power, particularly when one or 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 to preclude the President from making recess appointments by preventing a Senate recess of sufficient length for the President to be able to use his recess appointment authority. In a 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."

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