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## **Continuity of Operations (COOP) in the Executive Branch: Issues in the 109<sup>th</sup> Congress**

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# Continuity of Operations (COOP) in the Executive Branch: Issues in the 109<sup>th</sup> Congress

## Summary

Spurred in part by occasional warnings of potential terrorist threats in the post-9/11 era, some policymakers have intensified their focus on continuity of operations (COOP) issues. COOP planning is a segment of federal government contingency planning linked to continuity of government (COG). Together, COOP and COG are designed to ensure survival of a constitutional form of government and the continuity of essential federal functions. This report focuses primarily on executive branch COOP activities.

Broadly, COOP planning refers to the internal effort of an organization, such as a branch of government, department, or office, to assure that the capability exists to continue essential operations in response to a comprehensive array of potential operational interruptions. In the executive branch, COOP planning is regarded as a “good business practice,” and part of the fundamental mission of agencies as responsible and reliable public institutions.

In the 109<sup>th</sup> Congress, policy questions and issues might arise as Congress examines the status of COOP planning within the executive branch of the federal government and the implications of that planning for overall agency emergency preparedness. Some of the issues surrounding COOP planning are discussed in this report, including authority to activate and implement COOP plans; defining essential activities to be maintained by a COOP plan; budgeting for COOP activities; congressional committee jurisdiction; and attention to COOP and preparedness matters.

This report is one of several CRS products related to government contingency planning, and will be updated as events warrant. Further discussion of executive branch COOP activities is provided in CRS Report RL31857, *Continuity of Operations (COOP) in the Executive Branch: An Overview*, by R. Eric Petersen. COOP planning in Congress is addressed in CRS Report RL31594, *Congressional Continuity of Operations (COOP): An Overview of Concepts and Challenges*, by R. Eric Petersen and Jeffrey W. Seifert. Contingency planning in the federal judiciary is discussed in CRS Report RL31978, *Emergency Preparedness and Continuity of Operations (COOP) Planning in the Federal Judiciary*, by R. Eric Petersen. CRS Report RL31739, *Federal Agency Emergency Preparedness and Dismissal of Employees*, by L. Elaine Halchin, discusses pre-COOP activities relating to the safeguarding of federal personnel and evacuation of federal buildings. For a more comprehensive analysis of continuity of government (COG), see CRS Report RS21089, *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

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# Continuity of Operations (COOP) in the Executive Branch: Issues in the 109<sup>th</sup> Congress

Spurred in part by occasional warnings of potential terrorist threats in the post-9/11 era, some policymakers have intensified their focus on continuity of operations (COOP) issues. COOP planning is a segment of federal government contingency planning linked to continuity of government (COG). Together, COOP and COG are designed to ensure survival of a constitutional form of government and the continuity of essential federal functions. In the executive branch, COG planning efforts focus on preserving the line of presidential succession, by safeguarding officials who would succeed the President. This report does not discuss COG planning beyond any direct relationship to COOP planning.<sup>1</sup>

Continuity of operations (COOP) planning refers to the internal effort of an organization, such as a branch of government, department, or office, to assure that the capability exists to continue essential operations in response to a comprehensive array of potential operational interruptions.<sup>2</sup> In the executive branch, COOP planning is regarded as a “good business practice,” and part of the fundamental mission of agencies as responsible and reliable public institutions. Continuity planning professionals assert that the perception of a changing threat environment and the potential for no-notice emergencies, including localized acts of nature, accidents, technological emergencies, and military or terrorist attack-related incidents, have increased the need for COOP capabilities and plans that enable agencies to continue their essential functions across a broad range of potential emergencies. COOP planning is multi-disciplinary in nature, because it attempts to incorporate all facets of organizational operation. Professionals in emergency management, information technology, physical security, human resources, facility management and other specialities could contribute to COOP planning, or lead recovery efforts during an incident.

In the executive branch, COOP planning has continued to evolve following the 2001 terrorist attacks, subsequent biological weapon incidents, and occasional warnings of potential man made or natural threats. In the 109<sup>th</sup> Congress, policy

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<sup>1</sup> For a more comprehensive discussion of COG, see CRS Report RS21089, *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

<sup>2</sup> For an overview of executive branch COOP activities, see CRS Report RL31857, *Continuity of Operations (COOP) in the Executive Branch: An Overview*, by R. Eric Petersen. Congressional COOP planning is discussed in CRS Report RL31594, *Congressional Continuity of Operations (COOP): An Overview of Concepts and Challenges*, by R. Eric Petersen and Jeffrey W. Seifert. For an overview of COOP issues related to the federal judiciary see CRS Report RL31978, *Emergency Preparedness and Continuity of Operations (COOP) Planning in the Federal Judiciary*, by R. Eric Petersen.

questions and issues might arise as Congress examines the status of COOP planning within the executive branch of the federal government and the implications of that planning for overall agency emergency preparedness. Some of the issues regarding COOP planning include

- considering authority to activate and implement COOP plans;
- defining essential activities to be maintained by a COOP plan;
- budgeting for COOP activities;
- congressional committee jurisdiction; and
- attention to COOP and preparedness matters.

## **COOP Authorities**

Three presidential documents currently govern contingency planning activity. The oldest of these, Executive Order (E.O.) 12656, issued in 1988 remains valid, although it arose from the context of the Cold War. The more recent Presidential Decision Directive (PDD) 67 and Executive Order 13286 were prepared in 1998 and 2003, respectively, within the context of terrorism. Lending further detail to COOP planning is Federal Preparedness Circular (FPC) 65, issued by the Federal Emergency Management Agency (FEMA) in 2004.<sup>3</sup>

### **Executive Directives**

Three executive branch entities appear to oversee COOP planning. Under E.O. 12656, the National Security Council (NSC) oversees consideration of national security emergency preparedness policy. The Homeland Security Council (HSC) which was created by executive order<sup>4</sup> in the immediate aftermath of the September 11, 2001 attacks, and established as a statutory entity of the Executive Office of the President (EOP) in the Homeland Security Act of 2002.<sup>5</sup> The President, the Vice President, the Secretary of Homeland Security, the Attorney General, the Secretary of Defense, and such other individuals as designated by the President comprise the membership of HSC. The council's statutory mandate includes the oversight and

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<sup>3</sup> A more detailed discussion of the requirements of E.O. 12656, PDD 67, and E.O. 13286 is available in CRS Report RL31857, *Continuity of Operations (COOP) in the Executive Branch: An Overview*, by Harold C. Relyea.

<sup>4</sup> E.O. 13228, October 8, 2001, 66 FR 51812-51817.

<sup>5</sup> P.L. 107-296, Nov. 25, 2002, 116 Stat. 2135. A brief discussion of the of HSC prior to enactment of the Homeland Security Act is available in CRS Report RL31357, *Federal Interagency Coordinative Mechanisms: Varied Types and Numerous Devices*, by Frederick M. Kaiser.

review of the homeland security policies of the federal government.<sup>6</sup> E.O. 12656 mandates the Director of FEMA to “serve as an advisor to the National Security Council on issues of national security emergency preparedness, including ... continuity of government, technological disasters, and other issues, as appropriate.” While it is not a directive issued by the President, Federal Preparedness Circular 65 identifies Presidential Decision Directive (PDD) 67 as the authority establishing FEMA as the lead agency for executive branch COOP activities.

**E.O. 12656, *Assignment of Emergency Preparedness Responsibilities*.** E.O. 12656 was issued by President Ronald Reagan on November 23, 1988.<sup>7</sup> It assigns national security emergency preparedness responsibilities to federal departments and agencies, subject to policy established by the President. E.O. 12656 defines a national security emergency as “any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States.”<sup>8</sup> Although the order does not explicitly refer to continuity of operations, it specifies preparedness functions and activities to include the development of policies, plans, procedures, and readiness measures that enhance the ability of the federal government to mobilize for, respond to, and recover from a national security emergency. E.O. 12656 designates the NSC as the principal forum for consideration of national security emergency preparedness policy. The order requires the director of the Federal Emergency Management Agency (FEMA) to “serve as an advisor to the National Security Council on issues of national security emergency preparedness, including mobilization preparedness, civil defense, continuity of government, technological disasters, and other issues, as appropriate.” FEMA is also required to assist in the implementation of preparedness policies by coordinating with the other federal departments and agencies and with state and local governments.

**PDD 67, *Enduring Constitutional Government and Continuity of Government Operations*.** PDD 67 was issued by the Clinton Administration on October 21, 1998, and is classified by the National Security Council (NSC). An unclassified fact sheet on the directive, prepared by Homeland Security Council (HSC) staff,<sup>9</sup> describes contingency planning efforts as “a top national security

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<sup>6</sup> 6 U.S.C. 494.

<sup>7</sup> 53 FR 47491; Nov. 23, 1988.

<sup>8</sup> While the order defines “national security emergency” broadly, subsequent language excludes “those natural disasters, technological emergencies, or other emergencies, the alleviation of which is normally the responsibility of individuals, the private sector, volunteer organizations, State and local governments, and Federal departments and agencies unless such situations also constitute a national security emergency.”

<sup>9</sup> “Unclassified Provisions of PDD-67 (Enduring Constitutional Government and Continuity of Government Operations),” Homeland Security Council fact sheet, undated. No widely available official summary or other information about PDD 67 has been released. Some information regarding the directive may be obtained from the Federation of American Scientists (FAS) Intelligence Resources Program, which provides declassified materials and summaries of some current national security documents through the Internet. The FAS (continued...)

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priority ... to ensure all three branches of government, individually and collectively, continues (sic) to preserve the capability to govern; to continue leadership; to perform essential functions and services required to meet essential defense and civilian needs; and, if necessary, to reconstitute themselves against the entire range of evolving post-Cold War threats.”

The PDD 67 fact sheet describes a program designed to ensure survival of constitutional government and continuity of essential federal functions, centered around three policy concepts: enduring constitutional government (ECG), continuity of government (COG), and COOP. ECG is described as “a cooperative effort among the executive, legislative and judicial branches of government, coordinated by the President, to preserve the capability to execute constitutional responsibilities in a catastrophic emergency.” The fact sheet describes COG as “a coordinated effort within each branch to ensure the capability to continue its minimum essential responsibilities in a catastrophic emergency,” to relocate essential personnel and functions to alternate work sites, and to reasonably sustain the performance of minimum essential functions at the alternate work site until normal operations can be resumed.” The PDD 67 fact sheet indicates that COG is dependent on effective COOP plans and capabilities. COOP is described in fact sheet as “an internal effort within individual components of the executive, legislative and judicial branches of government to assure the capability exists to continue” operations in response to “a wide range of potential emergencies, including localized acts of nature, accidents, and technological and/or attack-related emergencies.

The PDD 67 fact sheet notes that all executive branch departments and agencies, including those within the Executive Office of the President (EOP), are to establish a viable COOP capability. Such a capability would provide a continuity program that, “ensures the emergency delegation of authority (where permissible, and in accordance with applicable law); the safekeeping of vital resources, facilities and records; the improvisation or emergency acquisition of the resources necessary for business resumption; and the capability to perform work at alternate work sites until normal operations can be resumed.”

**E.O. 13286, *Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security.*** E.O. 13286 was issued by President George W. Bush on February 28, 2003.<sup>10</sup> The order specifies the transfer of authorities to the Secretary of Homeland Security in a variety of policy areas, including those preparedness responsibilities assigned to the director of FEMA in E.O. 12656.

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<sup>9</sup> (...continued)

summary for PDD 67 is available at [<http://www.fas.org/irp/offdocs/pdd/pdd-67.htm>], visited Feb. 1, 2005.

<sup>10</sup> 68 FR 10619, Mar. 5, 2003.

## FEMA Guidance

**Federal Preparedness Circular 65, Federal Executive Branch Continuity of Operations (COOP).** Federal Preparedness Circular (FPC) 65, issued by FEMA on June 15, 2004, identifies PDD-67 as the authority establishing FEMA as the “as the lead agency for federal executive branch COOP.”<sup>11</sup> According to the circular, this authority was transferred to the Department of Homeland Security (DHS) on March 1, 2003, and then delegated to the Emergency Preparedness and Response Directorate (FEMA). FEMA’s Office of National Security Coordination (ONSC) has been designated as the department’s lead agent for the executive branch COOP program. FPC 65 describes FEMA’s responsibilities to include formulating guidance and establishing common standards for executive branch agencies to use in developing viable, executable COOP plans; facilitating interagency coordination; and overseeing and assessing the status of COOP capabilities in executive branch agencies. The circular notes that each executive branch agency is responsible for appointing a senior federal government executive as an emergency coordinator to serve as the program manager and agency point of contact for coordinating agency COOP activities, which include planning, programming, and budgeting for a viable and executable COOP program that conforms to FEMA guidance. The circular does not appear to carry authority for FEMA to compel action by other executive branch agencies.

## Issues of Possible Concern for Congress

The authorities governing executive COOP planning raise several issues that might be examined by Congress. These include the capacity of existing executive authorities to effectively govern COOP planning and the implementation of such plans.

Authorities governing COOP activities, E.O. 12656, PDD 67 and E.O. 13286 have been issued by three different presidential administrations. Some observers suggested that each policy directive was issued at different times in response to disparate threat conditions. For example, E.O. 12656 is a continuation of Cold War-era contingency policies that assume a nuclear confrontation with a single state, the former Soviet Union. A continuity planning assumption from this era is the potential for a decapitating strike on the national leadership, including the President, cabinet, and congressional leaders.

By contrast, observers note that, when PDD 67 and E.O. 13286 were issued, the threat environment was evolving from a single state model to one characterized by the advent of threat from hostile states and loose organizations of non-state actors with the capacity to launch small scale attacks using non-traditional weapons. Such attacks may not disrupt senior leadership in its entirety, but have the potential to impair the operations of key government functions and programs. The PDD 67 fact

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<sup>11</sup> Department of Homeland Security, Federal Emergency Management Agency, Office of National Security Coordination, Federal Preparedness Circular 65, “Federal Executive Branch Continuity of Operations (COOP),” June 15, 2004, available at [[http://www.fema.gov/onsc/docs/fpc\\_65.pdf](http://www.fema.gov/onsc/docs/fpc_65.pdf)], visited Feb. 1, 2005.

sheet, as well as guidance issued by FEMA in Federal Preparedness Circular 65, recognize the enhanced threat of potential attack by hostile states or terrorists, as well as hazards occasioned by potential natural and technological disasters. A document that defines the potential threat environment, and that legally compels executive agencies to prepare plans to withstand such incursions, however, is not evident.

Moreover, it is not clear from publicly available documents what legal authority exists to implement COOP plans. E.O. 13286 is silent on the matter; section 102 (b) of E.O. 12656 notes explicitly that the order does not authorize the implementation of COOP plans, and that any such plans “may be executed only in the event that ... such execution is authorized in law.”<sup>12</sup> The PDD 67 fact sheet notes that “with warning, the National Security Council process shall be used to reach deliberate decisions regarding the alerting or activation of government-wide COOP and COG plans and capabilities.” The fact sheet does not, however, identify the legal authority under which such a process could be initiated, or by which COOP plans could be activated.

Observers of presidential powers and authorities suggest that such an authorization could be found in broad national emergency powers that have been exercised by the President in times of crisis.. Typically, national emergency powers have been invoked in response to threats of the loss of life, property, or public order.<sup>13</sup> Following the attacks on Washington and New York on September 11, 2001, federal government COG and COOP plans were reportedly activated.<sup>14</sup> It does not appear, however, that declarations of emergency pursuant to the National Emergencies Act<sup>15</sup> would necessarily actuate statutory provisions granting the President the authority to activate COOP plans in response to threats or attack against government, or detailing the ability of the executive branch to carry out its statutory missions and programs.<sup>16</sup>

Finally, experts in public administration and management might suggest that the attenuated stream of authorities governing executive branch COOP planning could lead to confusion regarding which agencies of the executive branch oversee planning activities. E.O. 13286 requires that the Director of FEMA and the heads of departments and agencies must ensure that their preparedness plans and activities are “consistent with current presidential guidelines and policies.” Under E.O. 12656, the NSC was responsible for establishing guidelines and policies. Following the creation of the Homeland Security Council, it appears that, while the NSC retains broad national security responsibilities, including those related to COOP, as specified in

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<sup>12</sup> 53 FR 47492.

<sup>13</sup> See Harold C. Relyea, “Emergency Powers,” in Katy J. Harriger, ed., *Separation of Powers: Documents and Commentary* (Washington: CQ Press, 2003), pp. 80-97.

<sup>14</sup> “The Armageddon Plan,” *Nightline*, ABC News, originally broadcast Apr. 7, 2004, transcript retrieved through nexis.com.

<sup>15</sup> 50 U.S.C. 1601-1651.

<sup>16</sup> A list of declared national emergencies invoked under the National Emergencies Act is available in CRS Report 98-505, *National Emergency Powers*, by Harold C. Relyea.

PDD 67,<sup>17</sup> executive branch COOP activities now are overseen primarily by the HSC. Notably, guidelines related to essential COOP functions, described below, have recently been approved by Homeland Security Council staff. The council has communicated those guidelines directly to executive departments and agencies,<sup>18</sup> and through FEMA. No publicly identifiable document explicitly vesting the council with such authority over COOP planning has been identified.

The sensitive nature of government contingency planning likely precludes a public discussion of the criteria for implementing COOP plans. Enactment of statutory authority to establish an entity to oversee and implement such plans, however, might address concerns regarding the apparent lack of clear authority to activate such plans. Any such authority would likely vest the lead executive branch entity with overall programmatic responsibility. Further, any such authority would likely be carried out in a timely manner appropriate to the threat environment. Finally, implementing authority could be publicly available through access to an executive order or statute. Congress might opt to consider legislative options to establish clear authorities for the formulation, management, and implementation of executive branch COOP planning.

## **Essential COOP Functions**

COOP planners suggest that identification and prioritization of essential functions is a prerequisite for COOP because such an effort establishes the planning parameters that drive an agency's efforts in all other planning and preparedness areas. Essential functions are those that the executive branch agencies must be able to perform without significant interruption. Homeland Security Council guidance mandates the development of procedures that must be in place to enable each function to be performed regardless of the disruption that is occurring or has occurred.<sup>19</sup> If COOP plans are activated, continuous performance of essential functions should enable agencies to provide vital services, exercise civil authority, maintain the safety and well being of the general populace, and sustain the industrial economic base of the nation in an emergency.

### **Level of Essential Functions**

Executive branch COOP planners identify three levels of essential government functions that are subject to continuity planning: national essential functions (NEF), priority mission essential functions (PMEF), and secondary mission essential functions (SMEF). In the event of an emergency that necessitated the activation of

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<sup>17</sup> For example, the National Security council is the classifying authority for PDD 67.

<sup>18</sup> Frances Fragos Townsend, "Continuity Policy/Department and Agency Essential Functions," memorandum for distribution from the Assistant to the President for Homeland Security, Jan. 10, 2005.

<sup>19</sup> Homeland Security Council, "Background Paper on Essential Functions Concept and Implementation and Recommended Guidelines for Submitting Department/Agency Priority Mission Essential Functions Information," Jan. 10, 2005.

COOP or COG plans, national essential functions would be the primary concern of the President and the national leadership. Priority mission essential functions would comprise those department and agency activities that directly support national essential functions. Secondary mission essential functions responsibilities lie in departments and agencies. Depending on the nature and duration of the event, some secondary functions would generally support agency primary mission essential functions, while others could support some national essential functions.

**National Essential Functions.** The Homeland Security Council defines national essential functions as those necessary to lead and sustain the country during an emergency, and that must be supported through department and agency continuity capabilities. These functions are expected to be the primary focus of the President and the national leadership during and following an emergency. National essential functions might be performed by one or more department or agency, and are not new authorities, requirements, or functions, but those that are routinely carried out during normal operating conditions. The Homeland Security Council identifies eight national essential functions that must be supported throughout an operational interruption.<sup>20</sup> These include the capacity to

- **preserve the constitutional form of government.** Department and agency functions should include activities that respect and implement checks and balances among the three branches of the federal government. An example is the preservation of essential communications between the executive, legislative, and judicial branches of government during an incident.
- **provide leadership visible to the nation and the world, and to maintain the trust and confidence of the American people.** Executive branch departments and agencies are expected to demonstrate that the federal government is viable, functioning, and effectively addressing the emergency. Activities in support of this function could include communicating with the American people and providing information to state and local governments, or communicating with foreign leaders.
- **defend the country against all enemies, foreign or domestic, and to prevent or interdict future attacks.** In addition to the protection and defense of the worldwide interests of the United States against foreign or domestic enemies, departments and agencies are to honor security agreements and treaties with allies, and maintain military readiness and preparedness in furtherance of national interests and objectives.
- **maintain and foster effective relationships with foreign nations.** Departments and agencies are responsible for ensuring the ability of the federal government to communicate and interact with foreign

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<sup>20</sup> National essential functions definitions and examples are based on Homeland Security Council, “Background Paper on Essential Functions Concept and Implementation.”

governments; share intelligence and identify threats in cooperation with foreign governments; and bring to justice perpetrators of crimes or attacks against the United States, its citizens or interests. Examples identified by the Homeland Security Council include maintaining the security of the nation's borders against unlawful or hostile entry; ensuring the safety of commercial transportation; and conducting law enforcement investigations of federal crimes.

- **provide rapid and effective response to and recovery from the domestic consequences of an attack or other incident.** In the event of an incident, departments and agencies are to implement response and recovery plans, including, but not limited to, the National Response Plan (NRP).<sup>21</sup> Agency actions could include the collection and dissemination of incident and threat related information, or the provision of medical care to populations affected by the attack or incident.
- **protect and stabilize the nation's economy, and to ensure confidence in financial systems.** It is essential that department and agency functions minimize the economic consequences of an attack or other incident both nationally or internationally. Relevant executive branch department or agency activities could include coordinating the re-opening of financial markets, or facilitating the movement of goods and services across borders to support economic activity.
- **provide for critical federal government services that address the health, safety, and welfare needs of the nation.**<sup>22</sup> The activities of departments and agencies must ensure that the critical national needs of the nation are met during an emergency. Examples could include maintenance of the safety and efficiency of the nation's food supply, air traffic continuance, or the provision of timely and accurate severe storm warning information to the public.

## Priority Mission Essential Functions

Unlike the national essential functions, priority mission essential functions are to be identified by departments and agencies respectively. The guidance provided by the Homeland Security Council directs that primary mission essential functions must be performed to support or implement national essential functions before, during, and

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<sup>21</sup> According to the Department of Homeland Security, The National Response Plan (mandated by 6 U.S.C. 312 (6)) establishes a comprehensive all-hazards approach to enhance the ability of the United States to manage domestic incidents. The National Response Plan is available from the department's website at [[http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0566.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0566.xml)], visited Feb. 1, 2005.

<sup>22</sup> HSC guidance notes that "this NEF is strictly limited to critical functions of the federal government with a national level consequence; it not does apply to general well-being and welfare of the nation."

in the immediate aftermath of an emergency. Generally, these functions are to be uninterrupted, or resumed, during the first 24-48 hours after the occurrence of an emergency and continued through full resumption of all government activities.<sup>23</sup>

Each executive branch department and agency is responsible for identifying its priority mission essential functions based on the eight national functions; describing those functions succinctly; determining the associated national essential functions for each; establishing a minimum time period for performing the function during an emergency; and identifying other departments and agencies upon which they depend in order to perform their functions.

## **Secondary Mission Essential Functions**

Those activities that a department or agency determines must be performed in order to bring about full resumption of its normal functions, but that are not primary mission essential functions, are defined as secondary mission essential functions. According to Homeland Security Council guidelines, resumption of secondary functions “may need to occur within a very short period of time or only after several days, depending on the nature of the agency mission and the nature of the disruption to normal agency functions.” As with priority mission essential functions, secondary mission essential functions are identified by each executive branch department or agency. They are to be used within their respective organizations for continuity and related planning. Agency-identified secondary functions will not be collected, reviewed, or approved at the national level.<sup>24</sup>

## **Defining Essential Functions of Executive Branch Departments and Agencies**

In Federal Preparedness Circular 65, FEMA states that the “identification and prioritization of essential functions is a prerequisite for COOP because it establishes the planning parameters that drive the agency’s efforts in all other planning and preparedness areas.”<sup>25</sup> The Homeland Security Council has provided guidance on identifying sources of executive branch department and agency-essential functions, and has provided several examples of resources that agencies might use to identify their primary- and secondary-mission essential functions.<sup>26</sup> These include the following:

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<sup>23</sup> Primary mission essential function definitions and examples are based on Homeland Security Council, “Background Paper on Essential Functions Concept and Implementation.”

<sup>24</sup> Ibid.

<sup>25</sup> Department of Homeland Security, Federal Preparedness Circular 65, “Federal Executive Branch Continuity of Operations (COOP),” p. 5.

<sup>26</sup> Homeland Security Council, “Background Paper on Essential Functions Concept and Implementation,” unnumbered. Also, examples of potential primary and secondary mission essential functions are found in materials provided in the Essential Functions Workshop, presented by the Homeland Security Council, FEMA, and Interagency COOP Working Group staff, Jan. 12, 2005.



**The House of Representatives and Senate Explained**

# Congressional Procedure

**A Practical Guide to the Legislative Process in the U.S. Congress**

**Richard A. Arenberg**



- agency strategic plans that directly support national essential functions;
- lines of business<sup>27</sup> as defined in the business reference model materials agencies submitted to the Office of Management and Budget (OMB) in conjunction with its federal enterprise architecture planning program;<sup>28</sup>
- submissions provided to various authorities under the Government Performance Results Act (GPRA);<sup>29</sup>
- critical infrastructure protection plans prepared pursuant to Homeland Security Presidential Directive (HSPD) 7;<sup>30</sup>
- presidential decision directives, executive orders, particularly E.O. 12656; and
- legislation.<sup>31</sup>

Several observers suggest that in addition to these resources agency-essential functions could derive from statutory language that establish agencies and define or modify programs and functions carried out by the agencies, or committee or conference report language accompanying annual legislation appropriating agency funds.<sup>32</sup> Congress could ultimately act to consider legislative options intended to

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<sup>27</sup> OMB uses the term “lines of business” to refer to the activities carried out by a department or agency. External lines of business describe the services and products the government provides to its customers and stakeholders, while internal lines of business describe the inter-and intra-agency administrative and support activities that enable the government to operate.

<sup>28</sup> Generally, enterprise architecture refers to a blueprint of the business functions of an organization and the technology needed to support them. According to its website, the OMB “is developing the Federal Enterprise Architecture (FEA)” as “a business-based framework for Government-wide improvement” [<http://www.feapmo.gov/fea.asp>]. The business reference model is the first component of FEA. “OMB Releases New Business Reference Model to Improve Agency Management,” July 24, 2002 [<http://www.whitehouse.gov/omb/pubpress/2002-50.pdf>]. Both sites visited Feb. 1, 2005.

<sup>29</sup> P.L. 103-62; 107 Stat. 285.

<sup>30</sup> Homeland Security Presidential Directive 7, *Critical Infrastructure Identification, Prioritization, and Protection*, Dec. 17, 2003, available at [<http://www.whitehouse.gov/news/releases/2003/12/20031217-5.html>], visited Feb. 1, 2005.

<sup>31</sup> Resources for identifying agency mission essential functions are based on materials provided in the Essential Functions Workshop, Jan. 12, 2005.

<sup>32</sup> See Martha Derthick, *Policymaking for Social Security* (Washington: The Brookings Institution, 1979); I. M. Destler, “Delegating Trade Policy,” in Paul E. Peterson, ed., *The President, The Congress and the Making of Foreign Policy* (Norman, OK: University of Oklahoma Press, 1994), pp. 228-246; and CRS Report 98-558, *Appropriations Bills: What is Report Language?*, by Sandy Streeter.

establish clearer understandings of the essential functions of executive branch departments and agencies related to COOP planning.

## **Executive Branch COOP Budgeting**

The current budgetary environment is characterized by limited resources, coupled with an increased demand for a variety of homeland security protective measures, including executive branch COOP planning. Homeland Security Council and FEMA staff have suggested that, as a consequence of the multi-disciplinary nature of COOP planning, executive branch agency expenditures for COOP activities are sometimes spread across several departmental or agency accounts, and data are not readily available to demonstrate agency COOP funding levels.

On August 6, 2004, OMB issued a budget data request<sup>33</sup> that requires executive branch departments and agencies to submit a summary table for COOP programs that includes the department or agency name, account title and number, activity, and budget authority for the enacted and request levels, as appropriate. In addition, departments and agencies are required to submit a narrative background summary of their COOP plan and activities as well as an explanation of how the plan, and resources committed to it, adequately support established COOP standards. OMB has announced that it will review agency COOP program budget submissions as part of the FY2006 budget process, in conjunction with the Homeland Security Council.<sup>34</sup>

A potential consequence of this data gathering is that Congress might consider specific COOP program expenditures in the FY2006 authorization and appropriations cycles. Relatedly, Congress might request the Congressional Budget Office to prepare and analyze data similar to that specified in the budget data request.

A possible effect of the acquisition of technology, infrastructure, and supplies to be held in reserve for use in an emergency, is the likelihood that such an allocation might reduce resources available for routine operations. To the extent that COOP facilities and infrastructure are integrated into daily agency operations, this matter might be less salient. Access to specific COOP program expenditure data might provide Congress with tools to determine the utility of executive branch COOP programs and their integration into routine agency activities.

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<sup>33</sup> Generally, OMB uses budget data requests to identify budgetary and management information related to the programs and functions for which departments and agencies are responsible. According to OMB, the Aug. 6, 2004 budget data request will support review of executive branch homeland security and overseas combating terrorism funding, and will be used in developing the President's FY2006 Budget. The timing of the data submissions was to be determined in consultation between the departments and agencies and their OMB representatives.

<sup>34</sup> Office of Management and Budget, "Homeland Security (HS)/Overseas Combating Terrorism (OCT.) Funding Estimates, including Agency Continuity of Operations Program (COOP) Activities," Budget Data Request No. 04-41, Aug. 6, 2004.

## Level of COOP Preparedness

A report issued by the Government Accountability Office (GAO; formerly named the General Accounting Office) in February 2004 found that some agencies had created COOP plans that did not include all of the elements of a viable plan as defined by previous versions of Federal Preparedness Circular 65.<sup>35</sup> Consequently, GAO concluded that agency efforts to provide services during an emergency could be impaired. Additionally, GAO found that FEMA did not

- provide specific criteria through FPC 65 for identifying essential functions, or address interdependencies between agencies;
- review the essential functions identified in its assessments of COOP planning, or follow up with agencies to determine whether they addressed previously identified weaknesses; or
- conduct tests or exercises that could confirm that the identified essential functions were correct.

During the 108<sup>th</sup> Congress, the House Committee on Government Reform held an oversight hearing on the GAO report.<sup>36</sup> In response to questions from Members, a GAO representative suggested that the plans departments and agencies had in place at the time of the study were not fully compliant with the requirements of Federal Preparedness Circular 65. Consequently, GAO concluded that there is no assurance that executive branch departments and agencies are prepared for an emergency.<sup>37</sup>

In his opening statement to the committee, Michael D. Brown, Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, acknowledged that FEMA was designated the lead agency to provide guidance and assistance to the other Federal departments and agencies for COOP by Presidential guidance.<sup>38</sup> The under secretary also noted that FEMA guidance requires executive branch departments and agencies to develop COOP plans to support their essential functions. Through working relationships with other departments and agencies, and new and ongoing COOP initiatives, he indicated that FEMA was working to ensure improved coordination and provide enhanced planning guidance.<sup>39</sup>

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<sup>35</sup> U.S. Government Accountability Office, *Continuity of Operations: Improved Planning Needed to Ensure Delivery of Essential Government Services*, GAO-04-160, Feb. 27, 2004, available at [<http://www.gao.gov/new.items/d04160.pdf>], visited Feb. 1, 2005.

<sup>36</sup> The proceedings of the hearing are available in U.S. Congress, House Committee on Government Reform, *A Status Report on Federal Agencies' Continuity of Operations Plans*, 108<sup>th</sup> Congress, 2<sup>nd</sup> sess., Apr. 22, 2004, Serial No. 108-184, (Washington: GPO, 2004), at [[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_house\\_hearings&docid=f:95423.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:95423.pdf)], visited Feb. 1, 2005.

<sup>37</sup> *Ibid.*, p. 30.

<sup>38</sup> PDD 67.

<sup>39</sup> U.S. Congress, House Committee on Government Reform, *Can Federal Agencies* (continued...)

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The GAO report was based on COOP plans and materials of several agencies which were in place on October 1, 2002, and were evaluated on the basis of an earlier version of FPC 65, issued in July 1999. Some executive branch COOP planners suggest that the report failed to take into consideration ongoing changes made to the executive branch COOP program. Moreover, these observers suggest that GAO failed to acknowledge that FEMA's advisory role is accompanied by little or no authority to compel action by other executive branch agencies.

Since the release of the GAO report, the Department of Homeland Security has sponsored Forward Challenge '04, a full-scale, interagency COOP exercise in the spring of 2004. The exercise was designed to involve all federal executive branch departments and agencies. It afforded the participants an opportunity to

- execute alert and notification procedures;
- establish operational capability at agency alternate facilities;
- implement agency succession plans and delegations of authority;
- test interoperable communications capabilities; and
- test procedures for receiving, processing, analyzing, and disseminating information from internal agency assets and from external entities.<sup>40</sup>

An after-action report on the exercise issued by FEMA in August 2004 reported that 45 agencies encompassing more than 300 sub-entities, mobilized to their alternate COOP locations, or other designated sites, to test the continuation of essential government services during a national security emergency. Approximately 3,500 — 4,000 staff from participating agencies took part in the exercise, which required them to move to more than 100 alternate site locations. The FEMA report concluded that the executive branch had demonstrated its capability to alert and notify departments and agencies in the National Capital Region of a COOP event. FEMA found that the exercise improved overall readiness, increased awareness by senior leadership of succession plans and their responsibilities, and prepared departments and agencies to provide essential services in the event of an emergency or disaster, regardless of cause.<sup>41</sup>

FEMA issued an updated FPC 65 in June 2004. Efforts by FEMA and the Homeland Security Council to provide guidance regarding the specification of essential functions continue, and include training to support the development of

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<sup>39</sup> (...continued)

*Function in the Wake of a Disaster?* pp. 36-37.

<sup>40</sup> Department of Homeland Security, Federal Emergency Management Agency, *Exercise Forward Challenge '04: Interagency After Action Report* (Washington: 2004), p. iii.

<sup>41</sup> *Ibid.*, pp. 1, 31.

clearly defined, and mutually understood essential functions for all agencies.<sup>42</sup> Until those actions are completed, and systematic oversight of COOP activities is established, however, GAO's conclusion that agencies are likely to continue to base their COOP planning on ill-defined assumptions that could limit the effectiveness of resulting plans, might still be salient.

## Congressional Committee Jurisdiction

Government operations in the executive branch are generally overseen by the House Committee on Government Reform and the Senate Committee on Homeland Security and Governmental Affairs. In the 109<sup>th</sup> Congress, the House committee has jurisdiction over government management measures, including the "management of government operations and activities,"<sup>43</sup> which would appear to give it a role in COOP oversight across the executive branch. At the start of the 109<sup>th</sup> Congress, the House converted the Select Committee on Homeland Security into a standing committee and transferred some, but not all, related legislative jurisdiction to it from other standing committees. The House Committee on Homeland Security has both oversight and legislative responsibility regarding the Department of Homeland Security, including "domestic preparedness for and collective response to terrorism," as well as "broad oversight authority over government-wide homeland security matters."<sup>44</sup> In the Senate, the Committee on Homeland Security and Governmental Affairs has jurisdiction over matters relating to the Department of Homeland Security, with certain limitations,<sup>45</sup> as well as "organization and reorganization of the executive branch of the government."<sup>46</sup> This would appear to give both panels some government-wide role in overseeing the guidance and implementation of COOP planning related to potential interruptions due to attack or other incursion.

Different approaches to homeland security in the House and Senate have resulted in different committees having different jurisdictions and internal structures. The Senate, pursuant to S.Res. 445 of the 108<sup>th</sup> Congress directed its Appropriations Committee to reorganize its subcommittees to accommodate the creation of the Department of Homeland Security. What action the Senate panel will take, and whether the House Committee on Appropriations takes similar action is not yet clear. Ongoing bicameral coordination of congressional legislative, oversight, and investigative roles over homeland security might affect congressional attention to COOP activities in the 109<sup>th</sup> Congress. Also, the potential publication of COOP expenditures by OMB in annual budget proposals might encourage authorizing

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<sup>42</sup> See section on FEMA Guidance and Essential COOP Functions, above.

<sup>43</sup> House Rule X (h).

<sup>44</sup> House Rule X (i) (D).

<sup>45</sup> CRS Report RS21955, *S.Res. 445: Senate Committee Reorganization for Homeland Security and Intelligence Matters*, by Paul S. Rundquist and Christopher M. Davis. The limitations do not appear to prevent the committee from exercising jurisdiction over executive branch COOP programs.

<sup>46</sup> Senate Rule XXV (1) (k) (1) (10).

committees and appropriations subcommittees to provide more oversight of COOP activities in the departments and agencies they oversee.

## **Issue Immediacy**

As the memory of dramatic disruptions, such as the September 11, 2001, attacks and biological agent incidents, fade, attention to administrative operations like COOP planning may receive lower priority attention from agency planners. Emergency preparedness observers note that the success of contingency planning is dependent on current planning and regular drills, simulations, or other testing. Prior to the attacks, executive branch COOP management by the National Security Council and FEMA and guidance for other executive branch agencies were all in place, and that guidance included requirements for agency-wide staff education, as well as the testing and drilling of COOP plans. Nevertheless, on September 11, 2001, some federal employees reportedly were unaware of these plans, and some agencies found they had no way of accounting for, or communicating with, evacuated staff.

The apparent disparity between the level of planning by senior officials and the level of readiness and awareness by line managers and agency lead some observers to maintain that continual drills and educational awareness efforts will be necessary to achieve and maintain an appropriate degree of COOP capability. The current relatively low state of alert could offer an opportunity to test readiness during a non-crisis situation. Congress might elect to prevent miscommunications that occurred in September 2001 in future events by conducting oversight and exploring potential legislative options to establish such training.

## **Related CRS Products**

### **Continuity of Operations**

CRS Report RL31857, *Continuity of Operations (COOP) in the Executive Branch: An Overview*, by R. Eric Petersen.

CRS Report RL31594. *Congressional Continuity of Operations (COOP): An Overview of Concepts and Challenges*, by R. Eric Petersen and Jeffrey W. Seifert.

CRS Report RL31978. *Emergency Preparedness and Continuity of Operations in the Federal Judiciary*, by R. Eric Petersen.

CRS Report RL31739. *Federal Agency Emergency Preparedness and Dismissal of Employees*, by L. Elaine Halchin.

### **Continuity of Government**

CRS Report RS21089. *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

CRS Report RL31394. *House Vacancies: Selected Proposals for Filling Them After a Catastrophic Loss of Members*, by Sula P. Richardson.

CRS Report RL31761. *Presidential and Vice Presidential Succession: Overview and Current Legislation*, by Thomas H. Neale.

## **Background Issues**

CRS Report RS21017. *Terrorist Attacks and National Emergencies Act Declarations*, by Harold C. Relyea.

CRS Report 98-505. *National Emergency Powers*, by Harold C. Relyea.

CRS Report RL31542. *Homeland Security — Reducing the Vulnerability of Public and Private Information Infrastructures to Terrorism: An Overview*, by Jeffrey W. Seifert.

CRS Report RL31787. *Information Warfare and Cyberwar: Capabilities and Related Policy Issues*, by Clay Wilson.

CRS Report RS22023. *Organization and Mission of the Emergency Preparedness and Response Directorate: Issues During the 109th Congress*, by Keith Bea.



## Acronym Glossary

|      |   |
|------|---|
| AAR  | After Action Report   |
| BDR  | Budget Data Request   |
| COG  | Continuity of Government  |
| COOP | Continuity of Operations  |
| CWG  | Interagency COOP Working Group  |
| DHS  | Department of Homeland Security   |
| E.O. | Executive Order   |
| ECG  | Enduring Constitutional Government  |
| EOP  | Executive Office of the President   |
| FAS  | Federation of American Scientists   |
| FC04 | Forward Challenge '04   |
| FEA  | Federal Enterprise Architecture   |
| FEMA | Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security |
| FPC  | Federal Preparedness Circular   |
| FR   | <i>Federal Register</i>   |
| FY   | Fiscal Year   |
| GAO  | Government Accountability Office, formerly General Accounting Office  |
| GPRA | Government Performance Results Act  |
| HSC  | Homeland Security Council   |
| HSPD | Homeland Security Presidential Directive  |
| NCR  | National Capital Region   |
| NEF  | National Essential Function   |
| NSC  | National Security Council   |
| OMB  | Office of Management and Budget   |
| ONSC | Office of National Security Coordination, FEMA  |
| PDD  | Presidential Decision Directive   |
| PMEF | Primary Mission Essential Function  |
| SMEF | Secondary Mission Essential Function  |

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