
Impact of Intelligence Reform Act of 2004 on Transition

Question presented

How does the Intelligence Reform Act of 2004 affect Transition?

Short Answer

The Intelligence Reform Act of 2004 encourages rapid placement of national security personnel in both Transition and the new Administration and requires immediate transfer of information from current Executive Branch officials to the President-Elect.

The Act:

Allows each major party candidate, before the election, to request security clearances for prospective transition team members who would need access to classified information to carry out transition responsibilities; and requires the investigating agency to process the requests, to the fullest extent practicable, by the day after the election.

Encourages the President-Elect to request security clearances for high level national security candidates as soon as possible after the election; and requires the investigating agency to process the requests as soon as possible before the inauguration.

Encourages the President-Elect to submit high level national security nominees to the Senate before inauguration; and encourages the Senate to confirm or reject the nominees within 30 days.

Requires executive officials to prepare a detailed written summary of current national security issues and deliver it to the President-Elect as soon as possible after the election.

Discussion

Section 7601 of the Intelligence Reform Act of 2004 “addresses the 9/11 Commission’s recommendation to improve the transition between administrations.” Cong. Rec. S10008 (Sep. 30, 2004) (Sen. McCain). During the course of their investigation, Commissioners found that “the time of transition is a time of great vulnerability for our country” and that “[n]ational security policy making is too important to be disrupted by transition between administrations or delayed by an overburdened system.” Testimony of Commissioner Fred Fielding before the Senate Oversight of Government Management Subcommittee (Sep. 14, 2004). The Commission recommended several reforms so “transitions can work more effectively and allow new officials to assume their responsibilities as soon as possible.” The 9-11 Commission Report 422-23, quoted in Cong. Rec. S10008 (Sep. 30, 2004) (Sen. McCain). To implement these recommendations, Senators McCain and Lieberman introduced the text of section 7601 as an amendment; it passed on a voice vote. Cong. Rec. S10007 – 9 (Sep. 30, 2004).

The Act affects four aspects of Transition—

Security clearances for prospective transition team members;

Security clearances for candidates for national security positions in the Administration;

Senate consideration of candidates for high level national security positions.

Transmission of national security information from officials to the President-Elect;

See § 7601, Intelligence Reform Act of 2004, Pub. L. 108-458, 118 Stat. 3857 (Dec. 17, 2004).

SECURITY CLEARANCES FOR TRANSITION TEAM MEMBERS

The statute provides:

Each major party candidate for President may submit, before the date of the general election, requests for security clearances for prospective transition team members who will have a need for access to classified information to carry out their responsibilities as members of the President-elect’s transition team.

. . . Necessary background investigations and eligibility determinations to permit appropriate prospective transition team members to have access to classified information shall be completed, to the fullest extent practicable, by the day after the date of the general election.

Section 7601(b) (codified at 50 U.S.C. § 435b note).

This provision was recommended by the 9-11 Commission. Report at 422.

The agency implementing this statute may require us to wait until Senator Obama accepts the Democratic nomination to submit requests under this provision. The term “major party candidate for President” could be read to only include persons who have been nominated by their party (who were previously candidates for the party nomination).

The statute does not define “prospective transition team members” or “who will have a need for access,” apparently leaving that determination to the candidate. This may allow us to submit requests for a range of personnel whose transition work at least partially intersects with national security.

SECURITY CLEARANCES FOR ADMINISTRATION CANDIDATES

The Act provides:

1. The President-elect should submit to the Federal Bureau of Investigation or other appropriate agency . . . the names of candidates for high level national security positions through the level of undersecretary of cabinet departments as soon as possible after the date of the general election[] . . .
2. The responsible agency or agencies shall undertake and complete as expeditiously as possible the background investigations necessary to provide appropriate security clearances to the individuals . . . before the date of the inauguration

Section 7601(a) (codified at 3 U.S.C. § 102 note).

This provision was recommended by the 9-11 Commission. Report at 422. Senator McCain advocated for this provision because having “Defense Department, as well as other national-security-related positions, literally vacant for months and months and months . . . is really not an acceptable situation.” Cong. Rec. S10009 (Sep. 30, 2004).

SENATE CONFIRMATION OF ADMINISTRATION NOMINEES

The Act also contains a Sense of the Senate addressing the confirmation process:

1. [T]he President-elect should submit the nominations of candidates for high-level national security positions, through the level of undersecretary of cabinet departments, to the Senate by the . . . inauguration . . . and
2. for all such national security nominees received by the date of inauguration, the Senate committees to which these nominations are referred should, to the fullest extent possible, complete their consideration of these nominations, and, if such nominations are reported by the committees, the full Senate should vote to confirm or reject these nominations, within 30 days of their submission.

Section 7601(b).

Instead of this provision, the 9-11 Commission recommended that the Senate “adopt special rules requiring hearings and votes to confirm or reject national security nominees within 30 days of their submission.” Report at 422. While the Sense of the Senate statement in the Act is not binding, it may remind participants in the confirmation process of the risks associated with unnecessary delay. It could also be a powerful talking point.

TRANSMISSION OF INFORMATION

The Act provides that:

Activities . . . shall include the preparation of a detailed classified, compartmented summary by the relevant outgoing executive branch officials of specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force. This summary shall be provided to the President-elect as soon as possible after the date of the general election.

Section 7601(a) (codified at 3 U.S.C. § 102 note).

This provision was recommended by the 9-11 Commission, report at 422, after it found that “the [Clinton-Bush] transition process didn’t serve well in the briefing and handing over of important national security decisions from one administration to another.” Fielding Testimony (Sep. 14, 2004).

Conclusion

The Intelligence Reform Act of 2004 encourages rapid placement of national security personnel in both Transition and the new Administration and requires immediate transfer of information from current Executive Branch officials to the President-Elect. The passages providing for early investigation of Transition and Administration personnel do not rigidly define who is eligible for this treatment.



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