

# CRS Report for Congress

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## A Sunset Commission for the Federal Government: Recent Developments

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### Summary

The sunset concept provides for programs and agencies to terminate automatically on a periodic basis unless explicitly renewed by law. In recent years bills to create a federal sunset commission, modeled on the sunset review process in Texas, have been introduced. President Bush called for creation of a federal sunset commission in his FY2006 budget submission. Bills reflecting an Office of Management and Budget (OMB) draft proposal have been introduced (S. 1399, H.R. 3276, H.R. 3277). This report will be updated as events warrant.

### Background

The sunset concept provides for programs and agencies to terminate automatically according to a predetermined schedule unless explicitly renewed by law. Sunset measures usually contain two elements: an action-forcing mechanism, carrying the ultimate threat of elimination, and a framework or guidelines for the systematic review and evaluation of past performance.<sup>1</sup>

Colorado enacted the first sunset law in 1976, and by the early 1980s 36 states had adopted some version of sunset. Experiences with sunset reviews in the states, however, tempered initial enthusiasm, and by 2002, only about 20 states had active sunset laws.<sup>2</sup>

The record of the sunset process in Texas is of special interest, both because it is generally recognized as one of the more active state efforts and because recent federal legislative proposals borrow from that model. The website of the Texas advisory commission offers a 70-page *Guide to the Texas Sunset Process*, noting that the sunset process in Texas “is guided by a 10-member body appointed by the Lieutenant Governor

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<sup>1</sup> For additional background, see CRS Report RS21210, *Sunset Review: A Brief Introduction*, by Virginia A. McMurtry.

<sup>2</sup> For a review of experiences in the states, see CRS Report RL31455, *Federal Sunset Proposals: Developments in the 94<sup>th</sup> to 107<sup>th</sup> Congresses*, by Virginia A. McMurtry, pp. 2-5 and pp. 17-18.

and the Speaker of the House of Representatives. Assisting the Commission is a staff whose reports provide an assessment of an agency's programs, giving the Legislature the information needed to draw conclusions about program necessity and workability."<sup>3</sup> The *Guide* reports that since the sunset process began in 1978, "47 agencies have been abolished and another 11 agencies have been consolidated."<sup>4</sup> When reviewing the accomplishments of sunset in Texas, however, it is well to recall that the Texas Sunset Advisory Commission, while ultimately saved by its supporters in the Texas legislature, was nearly abolished in 1993.<sup>5</sup>

Over 70 bills were introduced in the 94<sup>th</sup> Congress (1975-1976) proposing various sunset arrangements, and sunset measures continued to be introduced in each subsequent Congress. Many hearings have been held on sunset measures, and several bills have been reported, but the only floor action occurred in the 95<sup>th</sup> Congress. On October 11, 1978, the Senate passed S. 2, the Program Reauthorization and Evaluation Act, by vote of 87-1.<sup>6</sup>

### **Sunset Commission Proposals Prior to the 109<sup>th</sup> Congress**

Unlike some of the earlier frameworks proposed for a federal sunset process, some bills introduced in the last few years have incorporated a commission approach. Two hearings have been held, but no further action has occurred. In 1997, H.R. 2939 (105<sup>th</sup> Congress) was introduced by Representative Kevin Brady of Texas. Modeled on the Texas sunset process, the bill called for establishment of a 12-member "Federal Agency Sunset Commission," to review and make recommendations at least every 12 years regarding the reorganization or abolishment of each federal agency, with the schedule for review to be determined by the commission. The Speaker of the House and the majority leader of the Senate were to appoint the members, each naming four congressional members and two private citizens "with experience in the operation and administration of Government programs." Each agency was to be abolished within a year after completion of the commission's review, unless Congress acted to continue the agency.

In September 1998, the House Subcommittee on Government Management, Information, and Technology held a hearing on the bill. Representative Brady and four other Members provided testimony in favor of the bill.<sup>7</sup> Arguably the most serious criticism of the bill raised at the 1998 hearing concerned potential constitutional problems with the commission framework. An advisory opinion from the Department of Justice

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<sup>3</sup> State of Texas, Sunset Advisory Commission, *Guide to the Texas Sunset Process*, Dec. 2003, p. 1, available online at [<http://www.sunset.state.tx.us/guide.pdf>].

<sup>4</sup> *Ibid.*, p. 11.

<sup>5</sup> See David McNeely, "Is the Sun Setting on the Texas Sunset Law?" *State Legislatures*, vol. 20, May 1994, pp.17-20, for an account of that debate. This journalist/author covered politics in Austin for over 30 years.

<sup>6</sup> For further discussion of federal sunset proposals, see CRS Report RL31455.

<sup>7</sup> U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Government Management, Information, and Technology, *H.R. 2939, Federal Sunset Act of 1998*, hearing before subcommittee, 105<sup>th</sup> Cong., 2<sup>nd</sup> sess., Sept. 14, 1998 (Washington: GPO, 1998), pp. 7-37.

provided for the record referenced the *INS v. Chada* decision by the Supreme Court in 1983 (462 U.S. 919), and concluded:

Because this bill [H.R. 2939] would allow the abolishment of a statutorily created executive agency, not through legislation passed in conformity with Article I, but at the discretion and in accordance with a timetable imposed by a twelve-member Commission composed of eight members of Congress and four persons selected by the Speaker of the House and the majority leader, unless Congress affirmatively decides to adopt legislation preserving the agency, it violates the constitutionally required separation of powers.<sup>8</sup>

In 1999, Congressman Brady, along with 92 cosponsors, introduced H.R. 2128, (106<sup>th</sup> Congress), a revised version of the sunset commission legislation. This new bill contained provisions not found previously in H.R. 2939. First, a new subsection was added under “Review and abolishment of federal agencies” relating to extensions that would have allowed the deadline for abolishment of the agency, absent congressional action to reauthorize it, to be extended for an additional two years if approved by a supermajority of the House and the Senate. Second, a new section was added providing for compilation by the three congressional support agencies of a “Program Inventory.” In language reminiscent of federal sunset measures dating back to the 1970s (including S. 2 in the 93<sup>rd</sup> Congress), the section would have directed the Comptroller General of the General Accounting Office and the Director of the Congressional Budget Office, in cooperation with the Director of the Congressional Research Service, to prepare an inventory of federal programs within each agency for the purpose of advising and assisting Congress and the commission in carrying out the requirements of the act.

On June 28, 2001, Representative Brady, with 33 cosponsors, reintroduced virtually the same bill, now called the “Abolishment of Obsolete Agencies and Federal Sunset Act,” in the 107<sup>th</sup> Congress as H.R. 2373. On April 23, 2002, the House Government Reform Subcommittee on Civil Service, Census, and Agency Organization held a hearing on H.R. 2373, at which Texas Representatives Brady and Jim Turner, who had both served in the Texas legislature, testified in favor of the bill. The witness from the Office of Management and Budget (OMB) testified in general support of a sunset review process for the federal government. While acknowledging possible constitutional issues to be resolved, subsequently detailed in a letter from the Justice Department,<sup>9</sup> the OMB spokesman noted that the sunset commission as outlined in the legislation was similar to the proposal for a sunset review board that President Bush endorsed during the 2000 campaign. Further, according to the testimony from OMB, a sunset review process could tie in with the President’s Management Agenda (PMA), particularly in the government-wide initiative for budget and performance integration.<sup>10</sup>

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<sup>8</sup> Letter from William Michael Treanor, Deputy Assistant Attorney General, dated Sept. 21, 1998. See *ibid.*, pp. 53-54. For further discussion of the hearing, see CRS Report RL31455, pp. 15-16.

<sup>9</sup> Daniel J. Bryant, Assistant Attorney General, Department of Justice, letter to Rep. Dave Weldon, Chairman of the House Subcommittee on Civil Service, Census and Agency Organization, Apr. 23, 2002. Copy provided to author by subcommittee staff.

<sup>10</sup> Statement of Mark W. Everson, then Controller, Office of Federal Financial Management, OMB. See U.S. Congress, House Committee on Government Reform, Subcommittee on Civil  
(continued...)

In final days of the 107<sup>th</sup> Congress, a substitute amendment to H.R. 2373 was circulated for comment, but no formal consideration of it occurred before adjournment. Congressman Brady introduced a measure virtually identical to H.R. 2373, as H.R. 1227 in the 108<sup>th</sup> Congress, on March 12, 2003. Cosponsors of H.R. 1227 eventually numbered 56, of whom 39 were original. The bill was referred to the Committee on Government Reform and then to the Subcommittee on Civil Service and Agency Organization, but no further action took place on H.R. 1227.

## Proposals in the FY2006 Budget

In the *Analytical Perspectives* volume of the President's budget submission for FY2006, sent to Congress on February 7, 2005, several budget process reform proposals were endorsed by the President. Among the actions requested, the Administration called for establishment of a federal sunset commission

to provide a process by which programs undergo the regular scrutiny brought about by having to defend their existence. Programs would be reviewed according to a schedule enacted by Congress. The Commission would consider proposals to retain, restructure, or terminate programs. Programs would automatically terminate according to the schedule unless Congress took some action to reauthorize them.<sup>11</sup>

Discussion of reform proposals in the FY2006 budget submission also called for creation of results commissions, "to consider and revise Administration proposals to improve the performance of programs or agencies by restructuring or consolidating them."<sup>12</sup> Congress would establish a results commission to address a particular program or policy area where duplicative or overlapping functions are found. If the President were to approve a commission reform proposal, the measure then would be considered by Congress under expedited procedures..

## Legislative Proposals in the 109<sup>th</sup> Congress

In March 2005, during House consideration of H.Con.Res. 95, the FY2006 budget resolution, Representative Hensarling offered a substitute amendment on behalf of the Republican Study Committee. Section 503 of the Hensarling amendment contained a Sense of the House provision that "legislation providing for the orderly abolishment of obsolete Agencies and providing a federal sunset for government programs should be enacted during this Congress."<sup>13</sup> Although the amendment was opposed by the House

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<sup>10</sup> (...continued)

Service, *Reforming Government: The Federal Sunset Act of 2001*, hearing before subcommittee, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., Apr. 23, 2002 (Washington: GPO, 2003), pp. 23-24. For further background on the PMA, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry,

<sup>11</sup> U.S. Office of Management and Budget, *Fiscal Year 2006 Analytical Perspectives* (Washington: GPO, 2005), p. 242.

<sup>12</sup> Ibid.

<sup>13</sup> See *Congressional Record*, vol. 151, Mar. 17, 2005, daily ed., p. H1639.

leadership and defeated by vote of 102-320,<sup>14</sup> a Sense of the Senate provision regarding a commission to review the performance of programs was included in H.Con.Res. 95 as reported from conference and agreed to by both chambers.<sup>15</sup> The Senate language appears to reflect the results commission idea more than sunset, although neither type of commission is explicitly referenced. Provisions for a commission to eliminate waste, fraud, and abuse, arguably similar to the commission envisaged in the Sense of the Senate language, were included in an omnibus budget reform bill, H.R. 2290, the Family Budget Protection Act of 2005, introduced on May 11, 2005.

On June 30, 2005, OMB released a legislative proposal titled “The Government Reorganization and Program Performance Improvement Act of 2005,” to create the framework for the two types of commissions — sunset and results — mentioned in the FY2006 budget submission.<sup>16</sup> Bills incorporating the draft language were introduced in both chambers on July 14, 2005. Senator Craig Thomas introduced S. 1399, in most respects mirroring the language in the OMB proposal. In the House, two bills were introduced. The Government Reorganization and Improvement of Performance Act, H.R. 3276, introduced by Representative Jon Porter with Representative Tom Davis and Representative Kevin Brady as cosponsors, would authorize the establishment of results commissions. The Federal Agency Performance Review and Sunset Act, H.R. 3277, introduced by Representative Brady for himself and Representatives Davis and Porter, would establish a sunset commission and review process for the federal government.

Provisions relating to the establishment and functioning of the sunset commission in H.R. 3277 and in Section 4 of S. 1399 are very similar, but the structure and language in the two bills are not identical. Both would establish a federal sunset commission, consisting of seven members, to be appointed by the President in consultation with congressional leaders. Programs and agencies would be reviewed by the commission at least once every 10 years, according to the schedule for review proposed by the President and enacted into law. The commission would be empowered to obtain information from federal agencies, to hold hearings, and to consider any publicly available evaluations and assessments, including those by OMB. The bills would require the commission to use six stipulated criteria in conducting the reviews, including cost effectiveness and extent of duplication or conflict with other agencies and programs. The commission would provide the President with an annual report containing its assessment of each agency and program reviewed during the preceding year, along with its recommendations on how to improve the results achieved and whether to abolish any agency or program. The President would then submit his recommendations to Congress on the respective agencies and programs,

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<sup>14</sup> Ibid.

<sup>15</sup> For further background on the budget resolution, see CRS Report RL32791, *Congressional Budget Actions in 2005*, by Bill Heniff Jr. Sec. 502 reads:

It is the sense of the Senate that a commission should be established to review Federal agencies, and programs within such agencies, including an assessment of programs on an accrual basis, and legislation to implement those recommendations, with the express purpose of providing Congress with recommendations to realign or eliminate Government agencies and programs that are wasteful, duplicative, inefficient, outdated, irrelevant, or have failed to accomplish their intended purpose.

<sup>16</sup> Copy of OMB draft legislation available electronically at [[http://www.whitehouse.gov/omb/legislative/grppi\\_act\\_2005.pdf](http://www.whitehouse.gov/omb/legislative/grppi_act_2005.pdf)]. Site visited Aug. 2005.

along with the report of the sunset commission and any draft legislation needed to implement the recommendations. A program or agency would be abolished two years after the date of submission of the President's recommendation regarding its future unless the agency or program were to be reauthorized or receive up to a two-year deadline extension pursuant to law.

The Senate bill differs from the OMB draft and H.R. 3277 with respect to at least one significant feature. Both the OMB draft and H.R. 3277 contain a noteworthy exemption with regard to certain regulations and their enforcement: "No regulations to protect the environment, health, safety, or civil rights shall sunset under this Act," nor shall any program relating to enforcing said regulations "sunset unless provision is made for the continued enforcement of those regulations." Provisions for exemptions from sunset termination are not found in S. 1399.

## Future Considerations

In the transmittal letter of June 30, 2005, accompanying the OMB draft proposal for results and sunset commissions, Director Joshua Bolten stated: "This proposal is an important priority of the Administration and part of the President's efforts to achieve the results the American people expect at a reasonable cost. We respectfully request that Congress take prompt and favorable action on this legislation."<sup>17</sup>

In addition to possible action on H.R. 3277 and S. 1399, Congress might consider establishment of a sunset commission as part of an omnibus budget reform measure, such as H.R. 2290. Another approach might entail appending provisions for a sunset commission to a related measure, such as H.R. 185, the Program Assessment and Results Act (PARA), which was reported on March 17, 2005.<sup>18</sup> The bill would amend the Government Performance and Results Act (P.L. 103-62, known as GPRA) to require OMB to review government programs at least once every five years.<sup>19</sup> PARA would create a statutory process resembling the Program Assessment Rating Tool (PART), used by OMB in preparing the President's budget since FY2004.<sup>20</sup>

While those opposed to establishment of a federal sunset commission have criticized the approach as being costly, duplicative, and possibly unconstitutional,<sup>21</sup> the sunset review process has a significant number of supporters.

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<sup>17</sup> Copy of transmittal letter available electronically at [[http://www.whitehouse.gov/omb/legislative/grppi\\_act\\_trans\\_ltr.pdf](http://www.whitehouse.gov/omb/legislative/grppi_act_trans_ltr.pdf)]. Site visited Aug. 2005.

<sup>18</sup> House Committee on Government Reform, *Program Assessment and Results Act*, Report together with Minority Views to accompany H.R. 185, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 109-26 (Washington: GPO, 2005).

<sup>19</sup> For further background on PARA, see CRS Report RL32671, *Federal Program Performance Review: Some Recent Developments*, by Virginia A. McMurtry.

<sup>20</sup> For further discussion of PART, see CRS Report RL32663, *The Bush Administration's Program Assessment Rating Tool (PART)*, by Clinton T. Brass.

<sup>21</sup> See, for example, OMB Watch, "Sunset, Results Commission Proposals Likely," Apr. 4, 2005, available at [<http://www.ombwatch.org/article/articleprint/2769/-1/330>].