AT ISSUE

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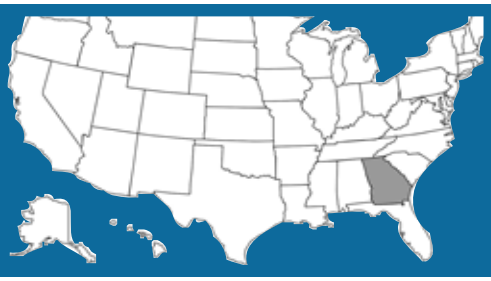

It is my privilege to present you with Volume 1, Issue 1 of the new Federal Edition of *At Issue*. We made the decision this year to expand *At Issue* into separate State and Federal Editions because of the enormous impact that federal policymaking has on state government.

This inaugural issue delves into the evermore complicated federal budgeting process and how it impacts our state budget. We also take a look at the controversial "midnight regulations" sometimes adopted by outgoing Presidential administrations and what we might expect from President Obama as his time in office comes to an end.

If you have ideas that you would like us to explore in subsequent editions of *At Issue*, please send me an email message.

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Federal Funding

Current Federal Budget and Appropriations Process

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The power to appropriate is vested in the legislative branch by both the U.S. Constitution and the Georgia Constitution. At the federal level, the process begins with the President's submission of a detailed budget request to Congress around the first Monday in February, similar to the Governor's budget recommendation that must be presented to the Georgia General Assembly by the 5th day of each legislative session. At the state level, the appropriations bill is introduced in the House of Representatives, considered by both chambers' Appropriations Committees, and ultimately must pass both chambers and be signed by the Governor to take effect. At the federal level, the framework of the appropriations process has many similarities but distinctive differences from Georgia's process.

The U.S. House of Representatives and Senate each have a Committee on the Budget, and Representative Tom Price (R-Georgia) currently serves as chairman on the House side. In response to the President's budget request, the House and Senate Budget Committees report a budget resolution that must cover the upcoming budget year and the four subsequent fiscal years. The reported budget resolution should successfully pass both houses, be reconciled in a budget conference, and be adopted by Congress before becoming a concurrent resolution on the budget—the target deadline for Congress to complete action on a concurrent resolution is April 15th of each year. Although the resulting concurrent resolution on the budget does not become law and is not signed by the President, it includes what is known as 302(a) allocations that set the total amount of money for the House and Senate Appropriations Committees to spend. In the case where the budget resolution does not pass both houses, the House and Senate may resort to alternative mechanisms, such as deeming resolutions, to provide temporary 302(a) allocations to the Appropriations Committees. Once they receive their 302(a) allocations, the House and Senate Appropriations Committees divide the total appropriations among 12 subcommittees, making what are called 302(b) allocations or suballocations. The 302(b) allocations are voted on by the respective Appropriations Committees, but are not subject to review or vote by the full House or Senate. *(continued on page 2)*

(Current Federal Budget and Appropriations Process – continued from page 1) The House and Senate Appropriations Committees each have 12 subcommittees dealing with a different part of the budget (See Figure 1, below, for discretionary budget authority allocations for each subcommittee, as originally contemplated by the Senate Appropriations Committee).

FIGURE 1

Discretionary Budget Authority Allocations to Appropriations Subcommittees (billions)		
Subcommittee	**FY 16 Enacted**	**FY 17 Senate**
Agriculture	$21.8	$21.3
Commerce, Justice, Science	$55.7	$56.3
Defense	$514.1	$516.0
Energy and Water Development	$37.2	$37.5
Financial Services and General Government	$23.2	$22.4
Homeland Security	$41.0	$41.2
Interior, Environment	$32.2	$32.0
Labor, HHS, Education	$162.1	$161.9
Legislative Branch	$4.4	$4.4
Military Construction, VA	$79.9	$83.0
State, Foreign Operations	$37.8	$37.2
Transportation, HUD	$57.3	$56.5
Total	**$1.067 trillion**	**$1.070 trillion**

Sources: Senate Appropriations Committee; Congressional Budget Office
Note: Allocation figures are reflective of those originally contemplates by the Senate Appropriations Committee

Each subcommittee must then propose an appropriations bill that must pass both houses of Congress and be signed by the President before going into effect. In addition to the spending limitations that are determined by the 302(a) and 302(b) allocations, appropriations bills are also subject to statutory spending caps. If appropriations bills are not enacted before the Federal Fiscal Year (FFY) begins on October 1, federal funding will lapse, resulting in a government shutdown. To avoid a shutdown, Congress will often pass a continuing resolution, which allows for continued funding to complete the appropriations process. Unlike the federal government, Georgia is constitutionally required to annually develop a balanced budget in an omnibus or single piece of legislation.

It is important to briefly emphasize the difference and relationship between discretionary and mandatory spending, as well as appropriation and authorization measures. Appropriations bills fall under the jurisdiction of the House and Senate Appropriations Committees and provide new budget authority for programs, activities, or agencies previously authorized. These programs are known as "discretionary" because the laws that establish those programs leave Congress with the discretion to set the funding levels each year. Almost all defense spending is discretionary, as are the budgets for a broad set of public services, including environmental protection, education, job training, border security, veterans' health care, scientific research, transportation, economic development, some low-income assistance, law enforcement, and international assistance. The President's budget spells out how much funding he recommends for each discretionary program.

"Mandatory" spending, which is an ongoing law that either remains in place until changed or requires renewal only periodically, includes the three largest entitlement programs (Medicare, Medicaid, and Social Security) as well as certain other programs (including, but not limited to, SNAP, formerly food stamps; federal civilian and military retirement benefits; veterans' disability benefits; and unemployment insurance) that are not controlled by annual appropriations. Interest on the national debt is also paid automatically, with no need for new legislation. There is, however, a separate limit on how much the Treasury can borrow. This "debt ceiling" must be raised through separate legislation when necessary.

In contrast to appropriations bills and mandatory spending, authorization bills, such as the Fixing America's Surface Transportation Act that will be featured in the next Federal Edition of *At Issue*, fall under the jurisdiction of legislative committees and make reference to language in appropriations measures that alter existing law, such as establishing, continuing, or modifying agencies or programs. All appropriations must be supported by an authorization measure in current law or in legislation.

Budget and Appropriations Procedures Unique This Year

Although the House introduced a budget resolution, H. Con. Res. 125 on March 23rd of this year, no concurrent resolution on the budget has been formally adopted by Congress for FFY 2017 to date. Despite the stalemate, the House and Senate Appropriations Committees have moved forward on FFY 2017 appropriations bills, with the House Appropriations Committee using the spending levels outlined in the Bipartisan Budget Act of 2015, and the Senate stating they will assume an overall discretionary spending limit of $1.07 trillion. Like the Georgia General Assembly, federal appropriations bills must originate in the House, leading some to wonder how the Senate is working on appropriations bills at this time. The Bipartisan Budget Act of 2015 allows the Senate Budget Chairman, Senator Mike Enzi (R-Wyoming), to authorize an allocation, consistent with terms of the Act, to serve as a 302(a) allocation for purposes of budget enforcement in the Senate without congressional adoption of a concurrent resolution on the budget.

Looking Forward and Future Outlook
As of July 13, 2016, the House Appropriations Committee has approved 11 appropriations bills, and all 12 subcommittees have reported out appropriations bills. Four have been approved by the full House. The Senate Appropriations Committee had also approved 12 appropriations bills and two have been sent to the full Senate for consideration. The Senate also passed a substitute amendment to H.R. 2577, which was previously the FFY2016 Transportation-HUD appropriations bill as passed by the House in June of 2015. The Senate substitute incorporates both the Senate FFY2017 Transportation-HUD appropriations bill, with a technical correction, and the Senate FFY2017 Military Construction and Veterans Affairs appropriations bill, with an amendment on Zika response funding. The House subsequently concurred with the Senate amendment with an amendment, which contains the text of bills previously passed by the House. The Senate most recently rejected on a roll call vote the motion to invoke cloture on the conference report, and the process is ongoing. - ***MD***

Federal Regulations and Policy

Midnight Rulemaking

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Like Cinderella leaving the ball, in the final months of most recent presidential administrations, federal agency appointees hurry to issue last-minute "midnight" regulations before they turn back into ordinary citizens at noon on January 20th. As was the case in the last two presidential transitions, the incoming administration takes a crack-of-dawn response to the regulations with both Andrew Card Jr., President Bush's then-Chief of Staff and Rham Emanuel, President Obama's then-Chief of Staff, firing off memorandums to the heads of federal agencies instructing them to withdraw or delay the hundreds of last-minute regulations. However, despite a delay in effective date, once a final regulation has been published in the *Federal Register*, the only unilateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act (APA). The practice of attempting to undo a previous presidential administration's actions is not new and dates back to the presidential election of 1800, when Thomas Jefferson defeated John Adams to become the third President of the United States. John Adams made several "midnight" appointments of judges before leaving office which Thomas Jefferson refused to honor when he became President, prompting the landmark *Marbury v. Madison* Supreme Court decision.

All three types of transitions, presidential, congressional, and judicial, have the power to shape agency rulemaking and thus, in turn, a wide range of public policy. As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable. Yet, they realized that Congress could not pass enough specific legislation to regulate everything. Instead, over the course of 60 years, Congress enacted more than 200 federal statutes with individual legislative vetoes of administrative regulations. In 1983, in the case of *IRS v. Chadha*, the Supreme Court invalidated these provisions, holding that they violated the constitutional separation of powers. Overturning administration action amounts to a legislative act, and the U.S. Constitution permits Congress to exert legislative authority only in the manner prescribed by Article I, i.e. passage by both houses of Congress and a signature or veto by the President.

On March 19, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act. Subtitle E of the Act was known as the Congressional Review Act (CRA), which had bipartisan support in Congress. The CRA was intended to shift power from the executive branch to Congress in a manner consistent with *Chadha* by providing it with more of a police-making authority, rather than a new effective legislative power. Before a new regulation can take effect, the CRA requires all federal agencies to submit to Congress a copy of the final regulation and a report detailing the reasons for its promulgation.

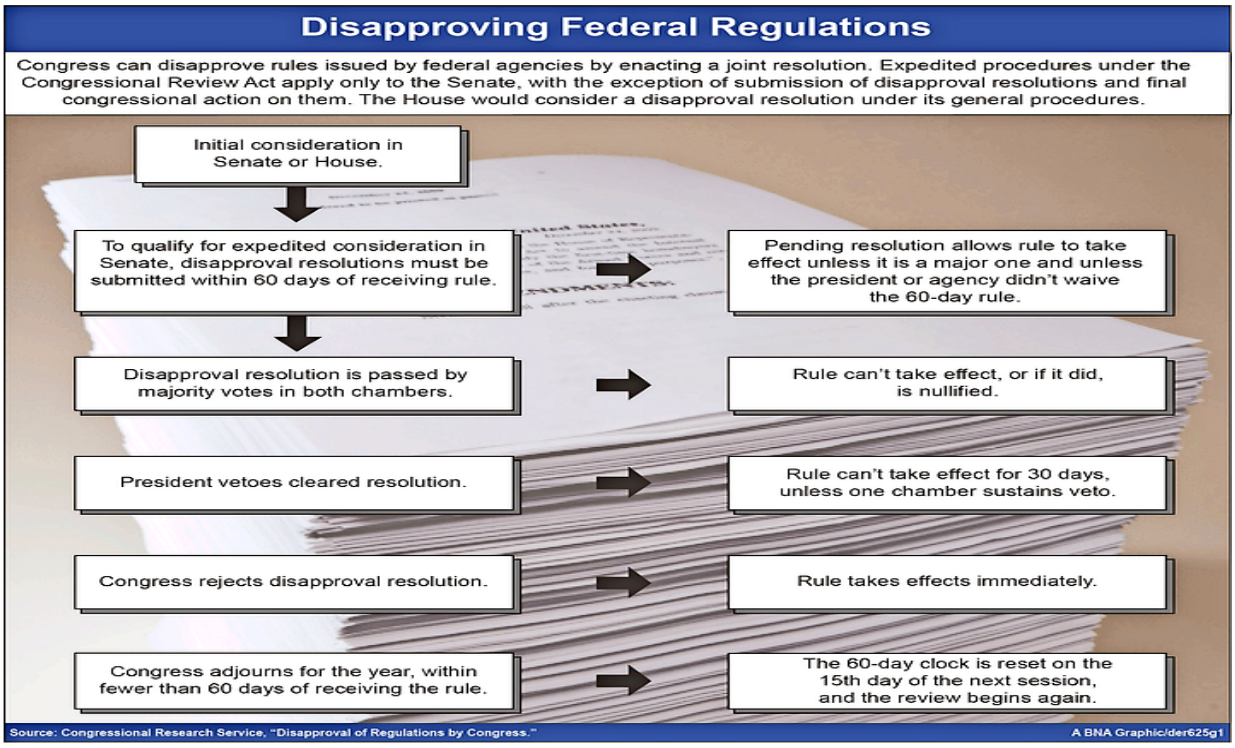
The effective dates of all "major" rules are delayed for 60 calendar days after they are published in the *Federal Register* or submitted to Congress, whichever is later, during which the CRA establishes a unique set of legislative procedures — often called expedited or "fast track" procedures — which Congress may adopt a joint resolution of disapproval that nullifies a rule(s). Many of these provisions only apply in the Senate. The CRA authorizes the White House Office of Management and Budget to determine whether a particular rule is a "major" rule.

"Major" rules are generally ones that are likely to have an annual effect on the economy of $100 million or more; that will increase costs and prices for certain constituencies such as consumers or state governments; or that will have some adverse effect on the economy. Non-major rules are subject to the Administrative Procedure Act (APA), under which these rules become effective 30 days after they are published in the *Federal Register*. While decisions made under the APA are subject to judicial review, any "determination, finding, action, or omission" made pursuant to the CRA cannot be challenged in court. To ensure that the joint resolution does not spend too much time in a Senate committee, the CRA provides that the joint resolution may be taken out of committee and placed on the Senate's legislative calendar if the committee has not reported a disapproval resolution within 20 calendar days after the rule was submitted to Congress. This action must be prompted by a petition supported by at least 30 Senators.

(continued on page 4)

(Midnight Rulemaking - continued from page 3) To ensure that the joint resolution is acted upon quickly once on the Senate calendar, the CRA also limits debate time and prohibits common tactics that are intended to delay action such as certain kinds of motions and amendments. Finally, the CRA provides that any joint resolution sent over to the other house for consideration will not be referred to committee in the receiving house. This ensures that the resolution is available for floor action. Any vote on the resolution in the receiving house must be on the resolution sent over, not on one created by the receiving house. If Congress adopts a joint resolution of disapproval, it must then submit it to the President for consideration. If the President vetoes the joint resolution, the rule will become effective unless Congress can override the veto within 30 session days after receiving the President's veto. Significantly relating to presidential transitions, if Congress adjourns its session sine die within the 60-day time period, the time period starts over again in the new session of Congress.

One might think that any joint resolution of disapproval would always be vetoed by the President because the agency would probably not have submitted the rule to Congress in the first place if the President's views were not favorable to the rule. However, this would not apply in situations involving a presidential transition in which the President under whose administration the rule was submitted, has been succeeded by another who takes a contrary view of the regulatory issue in question. In fact, the sole successful use of a disapproval of a resolution since enactment of the CRA occurred in the context of a presidential transition.



On November 14, 2000, while the contested 2000 election was still being decided, President Clinton's Occupational Safety and Health Administration (OSHA) finalized a workplace ergonomics rule that had been a decade in the making. On March 20, 2001, President Bush signed the first ever CRA disapproval resolution, canceling the regulation. "It is mind-numbing how quickly the CRA was used and how fast the ergonomics regulations have been undone," a labor official said at the time. Many have said that this one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated. However, one rule issued by the Obama Administration this Spring may not be safe from CRA disapproval of the next administration, because it was issued less than 60 days before Congress adjourns for the year (according to current schedules published by leadership of both houses of Congress). The Department of Labor's overtime rule, which is the subject of the next Federal Edition of *At Issue,* was issued on May 18th, two days past May 16, 2016, the relevant date for CRA disapproval. Assuming Congress stays on its current schedule, the next administration may once again make history by undoing this "midnight rulemaking."- ***AF***

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