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## The Law of Presidential Transitions

**ABSTRACT.** Presidents-elect and presidential transition teams wield enormous power. During the two-and-a-half months between Election Day and inauguration, the incoming President nominates cabinet secretaries and interacts with foreign leaders, while the presidential transition team prepares executive orders and drafts the budget the next President will send to Congress. The decisions they make, and the ideas and culture they build during the transition period, follow them into the White House after inauguration. Presidential transitions lay the foundation for four (or eight) years of executive-branch governance.

Despite their importance, presidential transitions have received almost no attention in the legal literature. This Note seeks to remedy that neglect by explicating the law of presidential transitions. And that law is sparse. Despite their similarities to the White House, presidential transitions are essentially ungoverned; the rules are largely left to the discretion of those bound by them. The asymmetry between thick presidential law and thin transition law creates significant governance and ethics risks, from conflicts of interest and foreign influence that infect policy-making to practices that strain the Constitution's allocation of executive power. These risks are not just hypothetical: many of them were realized during the 2016 transition, and their effects continue to be felt years after the fact. After cataloging these problems, this Note concludes by suggesting several potential solutions to reform presidential transitions and create a body of law up to the task of governing this critical component of American government.

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## INTRODUCTION

Presidential transitions have long been an inspiring yet vexing feature of the American political landscape. Every four or eight years, the upper echelon of the executive branch cycles out and is replaced in a matter of months. While transitions of power are commonplace in all functioning democracies, the extent of transition in the American political system is unique.<sup>1</sup> In the approximately seventy-five days between Election Day and Inauguration Day, an incoming presidential administration must nominate officials for top administration posts and begin filling the other roughly 4,100 presidentially appointed positions.<sup>2</sup> They must familiarize themselves with the more than one hundred federal agencies they will soon manage, including their key staff, pressing policy concerns, organizational challenges, and how the agencies will be integrated into the new administration's agenda.<sup>3</sup> They develop detailed policy plans, including their priorities for the critical first one hundred days after assuming office and drafts of executive orders to be signed following inauguration.<sup>4</sup> Finally, they must liaise with members of Congress, foreign governments, and other critical constituencies they will need to work with as they govern.<sup>5</sup> Their responsibilities and de facto powers mirror many of the President's. They are, in essence, quasi-executive.

All of this – the makings of the nucleus of an entirely new government – unfolds alongside the continued operation of the outgoing presidential administration. While other advanced democracies conduct their transitions in a matter of

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1. See David Fontana, *The Permanent and Presidential Transition Models of Political Party Policy Leadership*, 103 NW. U. L. REV. COLLOQUY 393, 393-94 (2009).
  2. See Bonne Berkowitz & Kevin Uhrmacher, *It's Not Just the Cabinet: Trump's Transition Team May Need to Find About 4,100 Appointees*, WASH. POST (Dec. 5, 2016), <https://www.washingtonpost.com/graphics/politics/trump-transition-appointments-scale> [<https://perma.cc/UV9D-S27T>].
  3. See, e.g., CHARLES O. JONES, *PASSAGES TO THE PRESIDENCY: FROM CAMPAIGNING TO GOVERNING* 125-32 (1998) (discussing the role and work of agency review teams); MARTHA JOYNT KUMAR, *BEFORE THE OATH: HOW GEORGE W. BUSH AND BARACK OBAMA MANAGED A TRANSFER OF POWER* 113-15 (2015) (same); *Presidential Transition Guide*, BOS. CONSULTING GROUP & PARTNERSHIP FOR PUB. SERV. 143-98 (2018) [hereinafter *Transition Guide*], <https://ourpublicservice.org/wp-content/uploads/2018/01/a34c10fbc8680350foeabd337a3812bo-1516222572.pdf> [<https://perma.cc/497P-PPKL>] (same).
  4. See JOHN P. BURKE, *PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE* 22, 34, 108-09, 205, 295 (2000); *Transition Guide*, *supra* note 3, at 111-42.
  5. See CARL M. BRAUER, *PRESIDENTIAL TRANSITIONS: EISENHOWER THROUGH REAGAN* 236 (1986) (foreign governments); JONES, *supra* note 3, at 118-25 (Congress).

days,<sup>6</sup> constitutional and statutory law sets the American transition period at roughly two-and-a-half months.<sup>7</sup> Scholars like Stephen Hess and Nina Mendelson have proposed shortening the transition period.<sup>8</sup> But the extent of preparation required necessitates some interregnum.

This lengthy transition period strains our constitutional order and norms of governance, even if it is necessary in practice. Although the sitting President retains constitutional authority and control of the levers of government during this period, most eyes inevitably fall on the President-elect. While our constitutional order demands that the President-elect wait in the shadow of the outgoing administration, the reality is often the inverse.<sup>9</sup> This sort of transition tension is as old as the nation itself: the midnight judicial appointment at issue in *Marbury v. Madison* arose out of a presidential transition.<sup>10</sup>

Officials and scholars have long understood the gravity of the transition period and the significance of presidential transition teams' work. It is the period in which a candidate becomes a President. As Congressman Charles Joelson put it during the floor debates over the enactment of the Presidential Transition Act of 1963:

[O]nce a man is President-elect, he is not the Democratic President-elect; he is not the Republican President-elect; he is the President-elect of the people of the United States of America. In that interim time he is called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office.<sup>11</sup>

This Note argues that, despite the quasi-executive authority and responsibilities they hold and the import of their work, presidential transition teams' operations remain largely lawless;<sup>12</sup> that this lawlessness invites ethical and governance lapses that threaten the integrity of the new administration once in

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6. See, e.g., Nina A. Mendelson, *Quick off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464, 467-68 (2009).

7. Compare U.S. CONST. amend. XX, § 1 (setting Inauguration Day on January 20), with 3 U.S.C. § 1 (2018) (setting presidential elections on the Tuesday following the first Monday in November).

8. See Stephen Hess, *Proposal: A New Presidential Selection Timetable*, in *THE PRESIDENCY IN TRANSITION* 97, 97-104 (James P. Pfiffner & R. Gordon Hoxie eds., 1989); Mendelson, *supra* note 6, at 468.

9. See BRAUER, *supra* note 5, at xiv; Mendelson, *supra* note 6, at 464-65.

10. 5 U.S. (1 Cranch) 137 (1803).

11. 109 CONG. REC. 13348 (1963).

12. See KUMAR, *supra* note 3, at 8 (calling transition law "amorphous"); Jack M. Beerbaum & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253,

office; and that Congress should step in to address these risks. Though the law governing presidential transitions has always been sparse, the 2016 Trump-Pence Transition demonstrated the dangers of relying on unwritten norms alone. One member of the Trump-Pence Transition described it as “the wild west,” with “rogue characters” involved in core transition activities.<sup>13</sup> The media reported the involvement of aides with financial conflicts of interest.<sup>14</sup> Reporters were unable to confirm whether these aides ever signed the Transition’s ethics policy, or whether it was enforced.<sup>15</sup> Another top Trump-Pence Transition aide, General Michael Flynn, was subsequently forced out of the White House and pled guilty to lying to the FBI about his interactions with the Russian government during the transition.<sup>16</sup> Though these problems were not entirely unique to 2016,<sup>17</sup> the Trump-Pence Transition far exceeded any of its predecessors in its disregard for longstanding norms and tolerance for ethical lapses.

Moreover, the failure to properly vet General Flynn – who briefly became Trump’s National Security Advisor – and the consistent flow of ethics-related scandals out of the Trump Administration highlight the stakes of transition governance.<sup>18</sup> Norms set during the transition period follow the President-elect and their team to the White House. While executive-branch law and the Office of Government Ethics provide some backstop, poor transition practices inevitably infect the new administration once in office. Lawless transitions threaten the integrity of American government on an ongoing basis, not just during the transition period.

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1255 (2006) (“[P]residential transitions have proceeded ad hoc rather than guided by explicit legal or constitutional principles.”).

13. Telephone Interview with Senior Trump-Pence Transition Aide (Nov. 7, 2019).
14. See, e.g., Tony Romm, *Thiel Could Gain from Trump Transition*, POLITICO (Dec. 6, 2016, 12:30 PM EST), <https://www.politico.com/story/2016/12/peter-thiel-trump-transition-benefits-232233> [<https://perma.cc/8VRE-P2GG>].
15. See Allegra Kirkland, *Thiel Won’t Confirm that He’s Signed Trump Transition Ethics Agreement*, TALKING POINTS MEMO (Dec. 6, 2016, 10:46 AM), <http://talkingpointsmemo.com/livewire/peter-thiel-wont-confirm-signed-turmp-transition-ethics-agreement> [<https://perma.cc/E2A4-RZY7>].
16. Plea Agreement of Michael T. Flynn, *United States v. Flynn*, No. 1:17-cr-00232-RC (D.D.C. Dec. 1, 2017).
17. See, e.g., BURKE, *supra* note 4, at 290, 321 n.28 (discussing exceptions to ethics rules made during the Clinton-Gore Transition).
18. See *Trump Team’s Conflicts and Scandals: An Interactive Guide*, BLOOMBERG (Mar. 14, 2019, 2:00 PM EDT), <https://www.bloomberg.com/graphics/trump-administration-conflicts> [<https://perma.cc/HER9-EXYH>].

To date, presidential transitions have received little, if any, sustained treatment in the legal literature.<sup>19</sup> And the broader presidential transition literature is predominantly prudential rather than legal, focusing on political, managerial, and operational issues.<sup>20</sup> This Note seeks to remedy that neglect, unfolding in four parts. Part I characterizes each presidential transition team as a temporary, quasi-governmental “Special Government Branch” that wields quasi-executive powers and merits legal treatment analogous to the executive branch. Part II describes the asymmetric legal regimes governing presidential transitions and the

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19. By my count, there are fewer than ten law review articles that address presidential transition in more than passing fashion. These articles tend to focus far more on the outgoing President than the incoming President-elect, especially the outgoing President's obligations to the transition team. See Mendelson, *supra* note 6, at 465 (“Most writing about presidential transitions . . . has focused on the problems associated with the outgoing President's actions . . .”); see also Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 953-82 (2003) (discussing administrative rulemaking by the outgoing administration during the transition); Beermann & Marshall, *supra* note 12, at 1270-89 (discussing the constitutional and legal obligations of outgoing Presidents during the transition period); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011) (discussing administrative rulemaking by the outgoing administration). Other pieces address narrow elements of the transition in piecemeal fashion. See Paul Horowitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067 (2009) (discussing the constitutional consequences of the Presidential Oath as a moment of transition but not the transition period itself); Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U. L. REV. 1573 (discussing the General Services Administration's decision to withhold transition funds from the Bush-Cheney Transition Team until Al Gore conceded the election). Nina Mendelson's work addresses presidential transitions directly but focuses on the normative question of the balance of power between the outgoing President and the President-elect, rather than the legal regime governing the latter. See Mendelson, *supra* note 6. Finally, Nancy Amoury Combs has written on foreign policy during presidential transitions but with a heavy focus on the single incident of the Iran hostage negotiations during the Reagan-Bush Transition. See Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303 (2001).
20. Several of the genre-defining works adopt a case-study methodology, moving chapter-by-chapter through detailed descriptions of the inner workings of past presidential transitions. See BRAUER, *supra* note 5 (covering the Eisenhower, Kennedy, Nixon, Carter, and Reagan transitions); BURKE, *supra* note 4 (covering the Carter, Reagan, Bush I, and Clinton transitions); LAURIN L. HENRY, *PRESIDENTIAL TRANSITIONS* (1960) (covering the Wilson, Harding, Hoover, Roosevelt, and Eisenhower transitions). While these case studies cover the operations, internal structures, and decision-making of these transition teams in excruciating detail, none offers much in the way of legal analysis. The Presidential Transition Act is mentioned in passing, mainly by reference to its provision of funds. See, e.g., BRAUER, *supra* note 5, at 131, 183. Only Burke mentions, albeit briefly, the use and evolution of transition-ethics rules. See BURKE, *supra* note 4, at 290. More recent entries in the transition literature have at least discussed the Presidential Transition Act and the basic legal structure of the transition in detail. See, e.g., KUMAR, *supra* note 3, at 8-9, 37-51. But as of yet, nothing in the literature goes further to remedy the legal lacuna.

presidency. It highlights the constitutional, legal, and ethical constraints on the White House that do not apply to transitions, despite their similarities. Part III offers a systematic account of the problems created by this asymmetry and the insufficiency of unwritten norms as the sole check on transition teams' conduct. Part IV offers several options to address the challenges identified in Part III. These include statutory reforms Congress could adopt, voluntary actions transition teams could take, and a reading of the Take Care and Oath Clauses of the Constitution that would constrain Presidents-elect during the transition period.

Throughout this Note, I rely on both published accounts of presidential transitions and a set of twenty original interviews I conducted with former transition staff and government officials involved in presidential transitions.<sup>21</sup> In line with earlier work on presidential transitions, I assured all interviewees they would be quoted anonymously to allow them to speak freely about sensitive subjects.<sup>22</sup>

### I. THE QUASI-EXECUTIVE STATUS OF PRESIDENTIAL TRANSITIONS

One reason for the sparse nature of transition law is that presidential transitions do not occupy their own conceptual category, making it difficult to write proper rules for them.<sup>23</sup> Instead, they sit in a murky middle ground between the prospective nature of campaigns and the fully realized authority of government.

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21. All interviews were conducted between Summer 2018 and Winter 2020, in person or by phone, and ranged from twenty minutes to ninety minutes. Interviews were conducted in line with best practices for social-science elite interviewing, including attempting to speak with individuals from both political parties and as many transition teams as possible; establishing the purpose of the interview and nature of the questions ahead of time (including sending questions in advance where requested); and explaining that interviews were on the record unless the interviewee requested otherwise and allowing those who requested to do so to approve quotes after the fact. See Darren G. Lilleker, *Interviewing the Political Elite: Navigating a Potential Minefield*, 23 POL. 207 (2003); David Richards, *Elite Interviewing: Approaches and Pitfalls*, 16 POL. 199 (1996). Interviewees were also promised anonymity to enable them to speak candidly, and they are referenced herein only by their affiliations with various transition teams in order to avoid identification. Though these interviews provide a first-hand look into the operations and inner workings of presidential transitions, they naturally reflect the experiences and biases of the interviewees. We should expect that aides will generally reflect favorably upon their own transition teams and make recommendations that reflect their own interests. Their accounts, though helpful, should be read with this qualification in mind.

22. See, e.g., JONES, *supra* note 3, at ix-x.

23. See, e.g., S. REP. NO. 100-317, at 17-21 (1988) (noting transition issues that the Senate Committee of Government Affairs could not resolve for the 1988 Presidential Transitions Effectiveness Act).



Unlike the executive branch, transitions cannot constitutionally wield the powers of government (even if, in practice, they nearly do).<sup>24</sup> But unlike campaigns, there is no doubt after Election Day that they *will* ultimately wield those powers.

I argue that the proper conceptual status of presidential transitions is as a “special government branch” or “special” White House, a term I take from the class of Special Government Employees (SGEs) created by 18 U.S.C. § 202.<sup>25</sup> SGEs are federal officers or employees who are expected to serve on certain advisory committees or in special short-term assignments for fewer than 130 days.<sup>26</sup> President Kennedy, in his message to Congress proposing the legislation that would produce this provision, wrote in favor of establishing “special standards for skilled individuals whose primary activity is in private professional or business life, but whose skills are used by the Government on a part-time or advisory basis” in order to ensure “ethical principles are maintained” while offering a “wide range of abilities . . . to Government.”<sup>27</sup> The House Report accompanying the eventual bill sought to resolve the “intolerable situation” that temporary government employees “have had to serve under the full rigor of existing general prohibitions, or have ignored these prohibitions, or have been made the subject of the numerous nonuniform ad hoc exemptions enacted to facilitate their recruitment.”<sup>28</sup> This sounds remarkably similar to the present situation regarding presidential transitions.

By design, SGEs are conceived as federal officials with special constraints. Although they hold positions of public trust, the short-term nature of their positions means they cannot be expected to completely sever their ties to the private sector.<sup>29</sup> The fundamental objective of the SGE classification is to accommodate needs that would otherwise preclude these individuals from serving in government while maintaining the core guarantee of loyal public service. Consequently,

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24. See, e.g., *infra* Section II.B.1.

25. Pub. L. No. 87-849, § 202(a), 76 Stat. 1119, 1121 (1962) (codified at 18 U.S.C. § 202(a) (2018)) (“[S]pecial Government employee’ shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis . . .”). For an overview of SGEs, see U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-548, OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES (2016) [hereinafter GAO SGE Report], <https://www.gao.gov/assets/680/678470.pdf> [https://perma.cc/5J2Y-DRYJ].

26. 18 U.S.C. § 202(a) (2018).

27. H.R. DOC. NO. 87-145, at 6 (1961).

28. H.R. REP. NO. 87-748, at 14 (1961).

29. See *id.* at 4-7.

SGEs are subject to substantially the same rules as full-time government employees regarding financial conflicts of interest, misuse of position, bribery, gifts related to their service, and postemployment representations.<sup>30</sup> They are not, however, subject to the same restrictions regarding outside employment and present representations.<sup>31</sup> That is, their ability to maintain outside employment is less restricted while ensuring direct conflicts are avoided.

The same philosophy – accommodating constraints while otherwise applying federal ethics law – should apply to presidential transitions. In this Part, I advance three claims in support of this position before offering a set of principles to guide the development of future transition law.

Before doing so, though, a brief note on the scope of my argument. Since the passage of the 2010 Pre-Election Presidential Transition Act, formal, federally supported transition activities begin after the major parties’ nominating conventions, rather than after the general election.<sup>32</sup> There is no longer a sharp temporal divide between the campaign and the transition. During that period of concurrent operation, “there’s a kind of permeability between the campaign and the transition.”<sup>33</sup>

My focus throughout this Note, and especially in this Part, is on the postelection transition alone. While preelection transition teams conduct some of the same work as postelection transition teams – such as preparing lists of potential nominees and laying out a preliminary policy agenda – they lack the certitude of the postelection transition that their principal will become President on January 20. They do not exercise quasi-executive powers in the ways I elaborate below. According to a transition aide for Presidents Obama and Clinton, “the pre-election transition [is] less formal than after the election. . . . Pre-election[,] you’re like any other advisor. . . . But after Election Day you’re on the ground, in the agencies, advising a person who has been elected President.”<sup>34</sup>

#### A. *The Quasi-Executive Powers of Presidential Transition Teams*

As any President or their staff can tell you, the business of governing begins before Inauguration Day. During the transition period, policy priorities are set,

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30. See GAO SGE Report, *supra* note 25, at 34-37.

31. See *id.*

32. Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, 124 Stat. 3045 (codified at 3 U.S.C. § 102 note (2018)).

33. Telephone Interview with Obama-Biden Transition Aide 1 (Sept. 20, 2019).

34. Telephone Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 1 (Nov. 1, 2019).

and nominations are announced. Depending on the circumstances of the transition period, the President-elect may even be brought in to coordinate crucial policy handoffs with the outgoing White House.<sup>35</sup> Once a new President is elected, the line between the outgoing and incoming Presidents begins to blur. From the perspective of transition law, the parallel authority (or quasi-authority) of Presidents-elect and Presidents suggests they merit analogous legal treatment.

1. *Presidential Transition Teams Make Executive-Branch Nominations*

The Appointments Clause vests in the President the power to nominate officers of the executive branch.<sup>36</sup> Yet according to historical practice, presidential transition teams begin announcing their nominations well before Inauguration Day, usually in early December.<sup>37</sup> Even if the nominations must be formally transmitted to the Senate after inauguration,<sup>38</sup> the Constitution does not prevent de facto exercise of this power during the transition period. Perhaps more probative of the quasi-executive powers of the President-elect, Congress frequently holds confirmation hearings for these nominees *before the new President has taken office*.<sup>39</sup> Even though Presidents-elect hold no formal constitutional authority, Congress treats them as if they do.

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35. See, e.g., HENRY, *supra* note 20, at 286 (describing Hoover and FDR's cooperation on the adjustment of British war debts during the transition); see also KUMAR, *supra* note 3, at 120 (discussing Bush II and Obama's cooperation on financial crisis policy).

36. U.S. CONST. art. II, § 2, cl. 2.

37. See JONES, *supra* note 3, at 94-98; Kevin Schaul & Kevin Uhrmacher, *Trump's Wait for His Major Cabinet Picks Was Nearly the Longest in 30 Years*, WASH. POST (Apr. 27, 2017), <https://www.washingtonpost.com/graphics/politics/how-long-confirmations-will-take> [https://perma.cc/7Y9R-VFVE].

38. See 155 CONG. REC. S671 (daily ed. Jan. 20, 2009) (reporting various executive nominations received by the Senate for consideration beginning January 21, 2009).

39. See, e.g., *Nomination of Hillary R. Clinton to Be Secretary of State: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 1 (2009) (on Jan. 13); *Nomination of Eric H. Holder, Jr. to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1 (2009) (on Jan. 15); *Nomination of Colin L. Powell to Be Secretary of State: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. 1 (2001) (on Jan. 17); *Nomination of Warren M. Christopher to Be Secretary of State: Hearing Before the S. Comm. on Foreign Relations*, 103d Cong. 1 (1993) (on Jan. 13); *Nomination of Caspar W. Weinberger to Be Secretary of Defense: Hearing Before the S. Comm. on Armed Servs.*, 97th Cong. 1 (1981) (on Jan. 6).

## 2. *Presidential Transition Teams (Almost) Make Law*

No one would dispute that presidential transition teams engage in policy planning. But the extent to which transition teams engage in outright policy-making—including all elements except formal presidential action—is underappreciated. The Obama-Biden Transition, for example, set up a team tasked with developing “Day One Executive Orders” which would be ready for President Obama’s signature on his first day in office.<sup>40</sup> According to one member of the Obama-Biden Transition team, the “Executive Order Project” prepared many executive orders in final or near-final condition.<sup>41</sup> By one aide’s estimate, about thirty of them were ultimately signed into law in some form.<sup>42</sup> The Clinton-Gore Transition also had a team to develop actions the President could take “right out of the box,” and other members of the team drafted elements of model legislation that was ultimately enacted into law.<sup>43</sup>

In cases like these, the transition team functionally engages in outright law-making.<sup>44</sup> The fact that the President does not sign these orders until after inauguration does not alter the reality that whatever safeguards are necessary to protect the integrity of the White House policy process are equally necessary here. The common refrain that much of the transition team’s work is thrown out once the new administration takes power is no answer to this concern.<sup>45</sup> Not every executive order drafted by the White House ultimately becomes law, either. The question is whether transition teams, like White House staff, make the policy decisions that are ultimately reflected in law. The fact that they do make such decisions warrants appropriate, careful safeguards analogous to those that apply to policy-making within the walls of the West Wing.

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40. Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 2, in Washington, D.C. (Oct. 10, 2019).

41. *See id.*

42. Telephone Interview with Obama-Biden Transition Aide 2 (Oct. 14, 2019).

43. BURKE, *supra* note 4, at 300 (quoting Bruce Reed).

44. At the very least, it is reasonable to assume that for the four executive orders President Obama signed on his first two days in office, the key decisions were made prior to inauguration. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009); Exec. Order No. 13,490, 74 Fed. Reg. 4,673 (Jan. 21, 2009); Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 21, 2009).

45. *See, e.g.,* BURKE, *supra* note 4, at 300.

### 3. *Presidential Transition Teams Make (Part of) the President's Budget*

The President is required, by statute, to submit a proposed budget to Congress between the first Monday in January and the first Monday in February.<sup>46</sup> With Inauguration Day on January 20th, this timeline presents a quandary during presidential transition years. On the one hand, the political and career staff of the Office of Management and Budget, which assists the President in preparing the budget, report to the sitting President.<sup>47</sup> On the other hand, the consequences of this budget proposal will be borne by the incoming President, and the executive-branch agencies will use the funds in question to implement the new President's agenda.

As a result, transition teams have engaged in their own budget process alongside OMB's official process. Traditionally, although with some exceptions, the outgoing President has granted the transition team access to OMB officials and figures to assist this process.<sup>48</sup> The Senate report accompanying the 1988 Presidential Transitions Effectiveness Act noted that "it is critical that the incoming and outgoing administrations cooperate to ensure that the incoming administration has access to the expertise and information needed for drafting an alternative to the outgoing administration's budget in a timely fashion."<sup>49</sup> As a matter of comity, the last four administrations have also chosen to submit only a "transition" budget with baseline projections and left the final submission to the incoming administration.<sup>50</sup> Thus, the transition team's budget work ends up reflected in the President's final budget—and ultimately in federal appropriations—once the new administration takes office. Again, many key decisions are made from the transition team's headquarters rather than the White House.

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46. 31 U.S.C. § 1105 (2018).

47. See James P. Pfiffner, *Introduction: The Presidency in Transition*, in *THE PRESIDENT'S BUDGET IN TRANSITION*, *supra* note 8, at 1, 6.

48. *Id.* at 6.

49. S. REP. NO. 100-317, at 17 (1988).

50. See MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., RS20752, *SUBMISSION OF THE PRESIDENT'S BUDGET IN TRANSITION YEARS 5* (2012), <https://fas.org/sgp/crs/misc/RS20752.pdf> [<https://perma.cc/TKW2-ZX7J>]; *Transition Guide*, *supra* note 3, at 120.

4. *Presidential Transition Teams Engage in Foreign Policy*

The Constitution vests a substantial portion, if not all, of the federal power over foreign affairs in the President.<sup>51</sup> Despite the Logan Act's<sup>52</sup> statutory prohibition on foreign policy-making without "the authority of the United States," Presidents-elect have a long history of bucking the Constitution and doing just that. Within five hours of his election, then-President-elect Eisenhower transmitted a "message of friendship" to France.<sup>53</sup> Eisenhower also took a trip to Korea during his transition period, during which he met with South Korean President Syngman Rhee, who insisted on offering his views on American military strategy in the Korean War.<sup>54</sup> After all, from President Rhee's perspective, Eisenhower had far more sway over the war than Truman from that point on.

Then-President-elect Nixon contemplated a joint trip with President Johnson to the Soviet Union during his transition period, but it was ultimately canceled.<sup>55</sup> More perniciously, even before he was elected, Nixon actively sabotaged Johnson's Vietnam peace negotiations in order to improve his chances at winning the presidency.<sup>56</sup> Using a secret backchannel, he encouraged South Vietnamese President Nguyen Van Thieu to stall peace talks with the Johnson Administration. This allowed Nixon to present himself as the electoral solution to Johnson's unwinnable war. And it worked. While Nixon took these actions as a candidate, rather than as President-elect, this story highlights the risks of preinauguration foreign policy. The fact that the President-elect will become President with certainty only amplifies this risk. Foreign governments have every reason to bypass the outgoing President and deal with their incoming replacement because they will soon have four years of control over American foreign policy, rather than just a few months.

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51. See, e.g., U.S. CONST. art. II, § 2, cl. 1 (making the President commander-in-chief of the U.S. armed forces); U.S. CONST. art. II, § 2, cl. 2 (vesting in the President the power to make treaties and appoint ambassadors); U.S. CONST. art. II, § 3 (vesting in the President the power to receive ambassadors); see also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 236-52 (2001) (providing an overview of debates over the scope of the President's power over foreign affairs).
52. 18 U.S.C. § 953 (2018).
53. HENRY, *supra* note 20, at 465-66.
54. BRAUER, *supra* note 5, at 22; Allan R. Millet, *Dwight D. Eisenhower and the Korean War: Cautionary Tale and Hopeful Precedent*, 10 J. AM.-E. ASIAN REL. 155, 167 (2001).
55. BRAUER, *supra* note 5, at 153.
56. John A. Farrell, *When a Candidate Conspired with a Foreign Power to Win an Election*, POLITICO MAG. (Aug. 6, 2017), <https://www.politico.com/magazine/story/2017/08/06/nixon-vietnam-candidate-conspired-with-foreign-power-win-election-215461> [https://perma.cc/CSJ6-HKGM].

This asymmetry between formal and informal foreign policy power can allow Presidents-elect to overrule the wishes of sitting Presidents or force Presidents to act as quasi-agents of Presidents-elect in pursuing their own agenda.<sup>57</sup> In 1980, then-President-elect Reagan scuttled the imposition of oil import quotas by the International Energy Agency by indicating his opposition to them, even as the Carter Administration pushed for their adoption.<sup>58</sup> And President Carter's ability to secure the release of American hostages by Iran was only possible because Reagan made clear that the Iranians would get no better deal from him and that he would honor any deal made by Carter.<sup>59</sup> But Reagan could have done exactly what Nixon did to Johnson, undercutting Carter's authority by signaling that he would be a more favorable negotiating partner.

Moreover, as detailed below, the Trump-Pence Transition team transgressed this constitutional boundary in numerous ways, from making contacts with the Russian government to discuss sanctions to attempting to undermine American plans for a U.N. vote.<sup>60</sup>

##### 5. *Presidential Transition Teams Coordinate with and Advise the Outgoing President*

As some of the foreign policy examples suggest, the White House and transition team have coordinated policy-making on urgent issues in the past. In these cases, the transition team acts as an extension of the White House policy team itself, playing the same role as the President's advisers. This sort of cooperation has a long history.<sup>61</sup>

The archetypical case of transition-White House cooperation is the coordination between the Bush-Cheney White House and the Obama-Biden Transition on financial crisis policy. According to a senior Bush White House official, then-President-elect Obama made specific requests of President Bush regarding the timing of various initiatives, like the release of the tranches of TARP funding.<sup>62</sup> Timothy Geithner—then-President of the New York Fed and Obama's nominee for Treasury Secretary—formed part of a “triumvirate” with Federal Reserve Chairman Ben Bernanke and sitting Treasury Secretary Hank Paulson

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57. Cf. Beermann & Marshall, *supra* note 12, at 1276 n.90.

58. See BRAUER, *supra* note 5, at 237.

59. *Id.*

60. See *infra* Section III.B.1.

61. See HENRY, *supra* note 20, at 286 (noting cooperation during the Hoover-Roosevelt transition); Combs, *supra* note 19, at 305.

62. Telephone Interview with Senior Bush-Cheney White House Aide (Nov. 15, 2019).

when it came to the major decisions.<sup>63</sup> Geithner’s two hats brought President-elect Obama and the transition team inside the proverbial tent. President Bush also offered to work with Obama to agree jointly on an auto-bailout czar who would be appointed by Bush with the understanding that they would continue into the Obama Administration.<sup>64</sup> Obama ultimately declined this offer, but it is indicative of the extent of potential collaboration between the incoming and outgoing teams (and, had it been pursued, of the exercise of quasi-executive appointment power). Similarly, Obama-Biden Transition aide Daniel Tarullo was “essentially seconded to the Treasury” to deal with financial-crisis policy,<sup>65</sup> an inversion of the secondment arrangements contemplated by the Presidential Transition Act.<sup>66</sup> Where the exigencies of the nation require it, the separation between the incoming and outgoing administrations becomes even further blurred.

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Collectively, these powers mirror, if not duplicate, many of those belonging to the President and executive branch. Counterparties dealing with presidential transition teams, whether influence-seekers or foreign governments, treat them as if they *are* the federal government – because they soon will be. That the soon-to-be-gained authority of the President-elect and members of the transition team who move into government will last four years, rather than the outgoing administration’s remaining months or weeks, only exacerbates this dynamic. The rules and safeguards needed to protect the integrity of federal government decision-making are equally necessary for presidential transition teams.

#### *B. Quasi-Executive Privileges for Transition Teams*

The special privileges afforded to transition teams reinforce their quasi-executive status. Two particular features stand out. First, under the terms of the Intelligence Reform and Terrorism Prevention Act of 2004, presidential transitions may apply for security clearances (including prior to the general election) and receive classified information.<sup>67</sup> The Act itself contemplates that some transition team members will “need . . . access to classified information to carry out

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63. *Id.*

64. *Id.*

65. Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 3, in Washington, D.C. (Oct. 10, 2019).

66. See 3 U.S.C. § 102 note § 3(a)(2) (2018).

67. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601, 118 Stat. 3638, 3857 (2004) (codified at 50 U.S.C. § 3342 (2018)).



their responsibilities.”<sup>68</sup> It is hard to imagine a better indication that transitions are, legally speaking, quasi-executive (or at least quasi-governmental).

Typically, security clearances and access to classified information are given to those falling into one of two categories: members of the federal government, and contractors and consultants serving at the pleasure of the federal government.<sup>69</sup> Transition team members do not fall neatly into either category. They certainly do not serve at the pleasure of the outgoing administration (indeed, they may have ousted them). But while they are not members of the federal government, the extension of security clearances to them is suggestive of their quasi-governmental features. Unlike a campaign, whose purpose is to win an election, transitions require access to at least some of the tools of government to prepare the incoming administration for national security challenges they will face in office.<sup>70</sup>

Similarly, the President-elect, by statute, receives access to classified material including 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.”<sup>71</sup> This provision, too, treats the President-elect as a quasi-executive official rather than an aspirant to office.

Second, after Election Day, transition teams are afforded access to the premises and staff of federal agencies for the purposes of transition planning.<sup>72</sup> Transition teams are afforded several privileges by law when it comes to executive

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68. *Id.*; see 3 U.S.C. § 102 note § 3(f) (2018); see also Ctr. for Presidential Transition, *Memorandum of Understanding Between the Department of Justice and Presidential Candidate Barack Obama Regarding the 2008 Presidential Transition Clearance Adjudication Plan*, PARTNERSHIP FOR PUB. SERV. (Oct. 1, 2008), <https://presidentialtransition.org/wp-content/uploads/sites/6/2008/10/4c1353a83a49c605c5fbbc3dbced8134-1461091158.pdf> [https://perma.cc/92YN-8VWU] (preserving an agreement facilitating clearance for Obama-Biden Transition officials).

69. See 50 U.S.C. § 3341 (2018).

70. Presidential and vice-presidential candidates also receive classified security briefings, but these are afforded by custom (rather than by statute) before Election Day. See HENRY, *supra* note 20, at 472-73; Elizabeth Hinson, *Why Do Presidential Nominees Receive Classified Briefings?*, CBS NEWS (Aug. 4, 2016, 1:28 PM), <https://www.cbsnews.com/news/why-do-presidential-nominees-receive-classified-briefings> [https://perma.cc/3GR4-PUNM].

71. 3 U.S.C. § 102 note § 3(a)(8)(A)(v) (2018).

72. See Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-136, 130 Stat. 301 (2016) (codified at 3 U.S.C. § 102 note (2018)); Ctr. for Presidential Transition, *Obama-Biden Transition Project Agency Review Process Memorandum*, PARTNERSHIP FOR PUB. SERV. (Nov. 9, 2008), <https://presidentialtransition.org/wp-content/uploads/sites/6/2008/11/2882aa17374fca55c54abf39a5c4b179-1453148850.pdf>

agencies. The Presidential Transition Act provides that agency employees may be seconded to the transition team with the permission of the agency head and are thereafter “responsible only to the President-elect or Vice-President-elect.”<sup>73</sup> Further, under the terms of the Transitions Improvements Act of 2015 and Presidential Transition Enhancement Act of 2019, the President must create an “agency transition directors council” including a senior career employee from each covered agency.<sup>74</sup> Members of this council are required to coordinate transition activities with the White House and transition team, to prepare materials requested by the transition team, and to otherwise assist it. The 2015 Act also provides that the President must create a “White House transition coordinating council” comprised of “senior employees of the Executive Branch,” including the President’s Chief of Staff, cabinet members, and others, to “facilitate communication and information sharing” with eligible candidates and the eventual transition team.<sup>75</sup> Finally, the 2015 Act directs the President to negotiate a memorandum of understanding (MOU) with each transition team that provides for privileges including “access to employees, facilities, and documents of agencies by transition staff.”<sup>76</sup>

Even prior to the 2015 Act, the substantial privileges entailed in this MOU were granted to transition teams by custom. “Agency review” is a core transition function that involves conducting a “timely and thorough review of the key departments, agencies and commissions . . . of the United States government . . . and . . . provid[ing] the President-elect and his key advisors with the information necessary to make strategic policy, budgetary and personnel decisions.”<sup>77</sup> To carry out this function, transition teams have typically been afforded substantial access to agency premises, time to interview key officials, and access to non-public information germane to their inquiries (including classified information for those with security clearances).<sup>78</sup>

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[<https://perma.cc/2NGY-YFJC>] [hereinafter *Agency Review Memorandum*] (preserving an internal memo from the Obama-Biden Transition team detailing the plan for utilizing such access).

73. Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (1964) (codified at 3 U.S.C. § 102 note (2018)).
74. Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-136, 130 Stat. 301 (2016) (codified at 3 U.S.C. § 102 note (2018)). The 2019 Act updates the language of the 2015 Act to require that employees be career, rather than political. See Presidential Transition Enhancement Act of 2019, Pub. L. No. 116-121, 134 Stat. 138 (2020) (codified at 3 U.S.C. § 102 note).
75. 3 U.S.C. § 4(d) (2018).
76. *Id.* § 4(g).
77. *Agency Review Memorandum*, *supra* note 72, at 1.
78. See *id.* at 2-5.

These privileges extend well beyond those in any other nongovernmental context. They reinforce the quasi-executive status of transition teams as more than outsiders to government, even if they are not quite full insiders. Here, again, the lines between the authority of the outgoing and incoming administrations are blurred by the realities of the transition process.

### C. *The Distinction Between Campaigns and Transitions*

In addition to their many similarities with the White House, presidential transition teams also differ markedly from campaigns, their next-nearest analog. Transitions are commonly compared to campaigns.<sup>79</sup> It is easy to see why: a substantial number of transition-team staffers arrive from the victorious campaign, bringing with them the campaign's culture and tone of aspirational change.<sup>80</sup> As one senior transition official put it, "[H]ow the President-elect is spending their time is more an extension of the campaign and the discussion the President is having with the American people. In a practical sense, [the transition] is an extension of the campaign, especially in terms of funding [and] what you want to accomplish."<sup>81</sup>

From a legal perspective, however, this analogy is a poor one. At a fundamental level, the subjective intentions of campaigns and transitions differ. Campaigns have the objective of winning an election; transition teams have the goal of preparing to govern. Campaigns, viewed separately from the transition teams and governments to which they lead, are not responsible for long-term plans or the fate of the nation. Their work ends on Election Day. Transition teams' and campaigns' objective realities differ, as well. Campaigns face the prospect of losing—they may never ultimately hold the reins of government. By contrast, once Election Day passes, there is no doubt that the surviving transition team *will* govern in approximately seventy-five days.

These features help explain why American political culture takes campaign promises with a grain of salt.<sup>82</sup> Even commitments made in exchange for certain postelection actions are understood to be tenuous. Transition teams do not receive or deserve this benefit of the doubt.<sup>83</sup> While problems such as conflicts of

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79. See, e.g., JONES, *supra* note 3, at 54-55 (quoting campaign aides).

80. See, e.g., BRAUER, *supra* note 5, at 182; JONES, *supra* note 3, at 110-12.

81. Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 3, *supra* note 65.

82. See JONES, *supra* note 3, at 55 (quoting a senior campaign aide).

83. This is not to say that transition teams are not sensitive to promises made during the campaign. A mainstay of transition work is the development of a "promise book" to catalog all

interest and bribery should not be dismissed in the campaign context, they are at least one step further removed from governmental decision-making than during the transition. And campaigns certainly invest fewer resources in making actual policy decisions, let alone ones that will be implemented with a high degree of certainty. The legal framework governing transition teams must treat them with the gravitas of government. It should not tolerate or expect the frenetic, free-wheeling nature of campaigns.

Moreover, campaign law tolerates an exceptionally high degree of financial influence. Donations are an institutionalized and legally sanctioned element of campaigns.<sup>84</sup> As Senator Daniel Inouye, quoting Senator Russell Long, once quipped, “The distinction between a campaign contribution and a bribe is almost a hairline’s difference. You can hardly tell one from the other.”<sup>85</sup> Indeed, *McCutcheon v. FEC* conferred constitutional protection on financial influence over campaigns: “[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. ‘Ingratiation and access . . . are not corruption.’”<sup>86</sup>

This principle of protected financial influence is the polar opposite of the rule we enforce once officials enter the government.<sup>87</sup> Given the powers transitions wield, our law ought to treat such influence during transitions as it treats it for public officials, not candidates.

#### D. Principles for Presidential Transitions

The quasi-executive powers exercised by the President-elect and transition teams, the privileges they enjoy, and their differences from campaigns all point toward the need for a more stringent legal regime for transitions. The stakes—whether for conflicts of interest or for national security—are too high to remain

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promises and commitments made by the then-candidate and incorporate them into transition-planning efforts. The distinction I draw is between promises made during the campaign and those made during the transition. See, e.g., Ctr. for Presidential Transition, *Memorandum on Obama Promise Books*, PARTNERSHIP FOR PUB. SERV. (Sept. 4, 2008), <https://presidentialtransition.org/wp-content/uploads/sites/6/2008/09/d4432f6288d113ba16182e58340b5cb7-1453146498.pdf> [<https://perma.cc/8SJ9-SAP6>].

84. See *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (2014); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

85. 120 CONG. REC. 10351 (Apr. 9, 1974).

86. *McCutcheon*, 572 U.S. at 192 (quoting *Citizens United*, 558 U.S. at 360).

87. See, e.g., 18 U.S.C. § 201 (2018) (criminalizing financial or other exchanges to influence public officials).

passive. But transitions also face a unique set of constraints. They are only two-and-a-half months long, meaning the time they have to implement strict ethics rules is limited.<sup>88</sup>

Moreover, the transition's short duration means that aides coming from outside the campaign cannot be expected to completely cut ties with their private-sector employers or divest financial assets in order to serve on it. According to a transition counsel involved in vetting, requiring complete separation (rather than merely a leave of absence) would prevent many qualified individuals from serving on the transition at all.<sup>89</sup> Many transition aides do not ultimately receive a government appointment<sup>90</sup> and others must wait months between Inauguration Day and when they finally enter government.<sup>91</sup>

Conceiving of transition teams as a "Special Government Branch," analogous to existing SGEs, offers a means of balancing the quasi-executive powers these organizations hold with the unique logistical constraints they face.<sup>92</sup> Treating transition aides this way reflects reality. According to a former government employee who helped coordinate the Trump-Pence Transition, in practice transition officials are thought of as "quasi-government employees who have access to critical information about federal agenc[ies] and agency staff."<sup>93</sup> Indeed, the General Services Administration (GSA) internally refers to transition aides this way already.<sup>94</sup>

To that end, I propose the following principles to guide the development of presidential transition law:

1. Transition teams must respect the constitutional rule that we have "one President at a time" and, as much as possible, avoid actions that co-opt or diminish the outgoing President's authority.
2. Transition teams should avoid publicly commenting on policies of the outgoing administration, or announcing new policies in conflict with

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88. See Interview with Clinton-Kaine Preelection Transition Aide, in New York, N.Y. (Sept. 13, 2019); Interview with Obama-Biden Transition Counsel, in Washington, D.C. (Oct. 9, 2019).

89. Telephone Interview with Obama-Biden and Clinton-Gore Transition Counsel (Nov. 1, 2019).

90. *Id.*

91. Interview with Obama-Biden Transition Counsel, *supra* note 88.

92. See 18 U.S.C. § 202; *supra* Part I.

93. Interview with Former Federal Government Employee Assigned to the Trump-Pence Transition, in Washington, D.C. (Oct. 10, 2019).

94. *Id.*

them, where the culmination of that policy process could or will take place during the transition period, absent extraordinary circumstances.

3. Where urgent policy issues during the transition period will continue into the next administration (for instance, a financial or public-health crisis), transition teams should coordinate with the outgoing administration to ensure continuity, while preserving both the authority of the current administration and the flexibility of the incoming administration.

4. Contacts with interested or regulated parties, especially foreign governments, should avoid policy discussion if possible. Where such discussion cannot be avoided, transitions should refrain from making commitments beyond those publicly stated during the campaign.

5. Ethical rules governing presidential transitions should address the same issues as those governing the executive branch, especially for conflicts of interest and use of nonpublic information for private gain, bribery, and gifts. However, rules covering outside activities, simultaneous and posttransition employment, and divestment should be relaxed to accommodate the needs of transition officials without compromising the fundamental rule that conflicted parties should not be involved in decisions implicating those conflicts.

6. To the extent possible, the enforcement of transition rules should be mandatory and supported by noncriminal penalties sufficient to compel adherence by good-faith actors.

These principles are intended to avoid the gravest risks facing presidential transitions: namely, that they are infected by conflicts of interest and self-dealing that are then carried into the White House or that they undermine the outgoing administration while it remains charged with its constitutional duties. In the next two Parts, I discuss the existing legal regime governing presidential transitions, its differences from the regime governing the presidency, and the problems the asymmetry between them has created.

## **II. A TALE OF TWO LEGAL REGIMES: THE TRANSITION AND THE PRESIDENCY**

Former New Jersey Governor Chris Christie commented in 2016 that leading a presidential transition is “the next best thing to being president . . . . You get

to plan the presidency.”<sup>95</sup> As we have seen, Christie’s assessment was, in many ways, correct.<sup>96</sup> White House aides whose work—including appointments and policy planning—mirrors the transition team’s work are subject to strict legal and ethics rules.<sup>97</sup> Not so for transition staffers, who labor under few mandatory limitations. And not all transition teams are equally scrupulous. The Trump-Pence Transition was notoriously loose with its ethical requirements compared to its predecessors,<sup>98</sup> although it was by no means the only transition to struggle with ethics issues.<sup>99</sup>

This Part summarizes the patchwork legal regime governing presidential transitions. It then contrasts this regime with the more rigorous regime governing the executive branch, particularly the White House. In both cases, I focus on the major statutory enactments governing each entity that are relevant to my analysis.

### A. *The Law of Presidential Transitions*

Formally, presidential transition teams are organized as 501(c)(4) nonprofit organizations,<sup>100</sup> even though they receive government funding, access to government facilities and services,<sup>101</sup> and their members can receive security clearances.<sup>102</sup> As Amy Comstock, former Director of the Office of Government Ethics, put it in 2000:

The President-elect’s Transition Team is not a Federal agency, and, except for limited purposes not relevant here, its members do not become

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95. MICHAEL LEWIS, *THE FIFTH RISK* 17–18 (2018).

96. See *supra* Part I.

97. See, e.g., Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1825 (codified as amended at 5 U.S.C. §§ 101-505 (2018)); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (2020).

98. See Libby Nelson, *Trump’s Team Got a Guide to Running an Ethical Transition. They Ignored It.*, VOX (Jan. 11, 2017, 10:51 AM EST), <https://www.vox.com/policy-and-politics/2017/1/10/14215074/trump-confirmation-hearings-ethics> [<https://perma.cc/RU46-GF53>].

99. See BURKE, *supra* note 4, at 101 (discussing ethics rules in the Reagan-Bush Transition); *id.* at 290, 321 n.28 (discussing ethics rules in the Clinton-Gore Transition).

100. Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, 124 Stat. 3045 (codified at 3 U.S.C. § 102 note (2018)); Isaac Arnsdorf, *Trump Transition Trying to Raise \$100,000*, POLITICO (Oct. 27, 2016, 3:19 PM), <https://www.politico.com/story/2016/10/trump-transition-raising-money-christie-230403> [<https://perma.cc/8J3R-8MDR>].

101. Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (1964) (codified at 3 U.S.C. § 102 note (2018)).

102. 50 U.S.C. § 3342 (2018).

Federal employees by virtue of their service on it. Accordingly, members of the President-elect's Transition Team who are not otherwise executive branch employees are not subject to the ethics laws and regulations applicable to members of the President-elect's Transition Team who are executive branch employees.<sup>103</sup>

Still, they are subject to a somewhat more involved legal regime than a typical nonprofit, albeit a piecemeal one.

### 1. *The Presidential Transition Act and Amendments*

The original Presidential Transition Act of 1963 (1963 Act) was passed “to carry out a recommendation made to the Congress by President Kennedy” based on the findings of the President's Commission on Campaign Costs.<sup>104</sup> The 1963 Act authorizes the provision of office space, services, and funding (primarily for staff compensation) by the GSA to the President-elect's transition team.<sup>105</sup> As would become contentious in the wake of the 2000 election, such resources are only made available to an “apparent successful candidate[.]”<sup>106</sup> In addition, the Act allocates funding to outgoing Presidents and vice presidents for their own transitions.

An examination of legislative history reveals that the bill's main purpose was to alleviate the burden of transition financing. At the time, that burden fell on national political parties and private individuals. According to the House Report accompanying the 1963 Act, “the size and complexity” of the Federal Government necessitates smooth transitions and requires that “sufficient resources are at hand to properly orient the new national leader.”<sup>107</sup> In floor debates on the 1963 Act, two additional motivations beyond orderly transition stood out. First, the bill's sponsor, Congressman Dante Fascell, emphasized that “these expenses are a legitimate part of the operation of our Federal Government and should be appropriated for like other Government expenses.”<sup>108</sup> He argued that as a proper

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<sup>103</sup>. Amy L. Comstock, *Memorandum: Presidential Transition*, OFFICE OF GOV'T ETHICS 1 (Dec. 28, 2000), [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/8125151B50ED2EE585257E96005FBD95/\\$FILE/DO-00-048.pdf](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/8125151B50ED2EE585257E96005FBD95/$FILE/DO-00-048.pdf) [<https://perma.cc/BFV5-4ZC8>].

<sup>104</sup>. H.R. REP. NO. 88-301, at 4 (1963).

<sup>105</sup>. Presidential Transition Act of 1963 § 3.

<sup>106</sup>. *Id.* § 3(c). For discussion of the issues surrounding this provision in 2000, see Zywicki, *supra* note 19, at 1575-79.

<sup>107</sup>. H.R. REP. NO. 88-301, at 4 (1963).

<sup>108</sup>. 109 CONG. REC. 13349 (1963).



governmental function, transitions ought to be funded by public money. Second, Congressman Benjamin Rosenthal noted the risk that private funders would feel “entitled to special consideration” from the incoming government.<sup>109</sup> As we shall see, the 1963 Act was insufficient to resolve this issue.

The Presidential Transition Act has been amended many times since its passage, although only five times of real consequence.<sup>110</sup> In 1988, the Act was amended to require disclosure of financial contributions and the names of transition personnel as a condition for receiving federal support.<sup>111</sup> Most importantly, the 1988 Act imposed a contribution limit of \$5,000 per person or organization, also as a condition on support.<sup>112</sup> Although it remains unclear whether this limit also applies to in-kind contributions, the Obama-Biden Transition team concluded that it did not (a significant loophole, if correct).<sup>113</sup>

In the wake of 9/11, the Act was updated to allow transition-team members to obtain security clearances, especially those expected to take national security positions in the incoming administration.<sup>114</sup> The 2004 amendment also directed outgoing officials to prepare a classified national security threat assessment for the incoming President-elect.<sup>115</sup>

Beginning in 2010, the Obama Administration worked to pass two bills to address shortcomings they experienced during their own transition process. First, the Pre-Election Presidential Transition Act of 2010 moved up the timeline for transition funding, from postelection to midsummer after the party conventions and made transition support available to both nominees of the major political parties, rather than only the winning candidate.<sup>116</sup>

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109. *Id.* at 13346.

110. I omit discussion of minor changes like increases in the amount of available funding.

111. Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 5, 102 Stat. 985, 986 (1988) (codified at 3 U.S.C. § 102 note (2018)).

112. *Id.*

113. Ctr. for Presidential Transition, *Memorandum from Blake Roberts to Chris Lu & Katy Kale, PARTNERSHIP FOR PUB. SERV.* (Oct. 24, 2008), <https://ourpublicservice.org/wp-content/uploads/2008/10/2oad737886a973f5189d68acc3f2839e-1453143568.pdf> [https://perma.cc/C7X4-J3BF].

114. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601(a)(3), 118 Stat. 3637, 3857 (2004) (codified at 3 U.S.C. note § 3 (2018)).

115. *Id.* § 7601(a)(1).

116. Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, 124 Stat. 3045 (codified at 3 U.S.C. § 102 note (2018)).

This change has been mostly lauded. Preelection transition planning had previously been a clandestine affair, as candidates wanted to avoid alienating voters by seeming overconfident.<sup>117</sup> When President Obama’s preelection transition efforts were leaked, Senator McCain accused him of prematurely “measuring the drapes.”<sup>118</sup> But the exact wording of the 2010 Act arguably produces an anomalous result in elections where one candidate is the incumbent President. By delaying the date of their party’s nominating convention, the incumbent President can delay their opponent’s access to preelection transition funds.<sup>119</sup> The Act provides that “[t]he [GSA] Administrator shall provide the notice [of their right to receive services and support] . . . in the case of a candidate of a major party . . . on one of the first 3 business days following the *last nominating convention* for such major parties.”<sup>120</sup> If the incumbent, for whom a delayed convention imposes little cost, chooses to postpone their party’s convention, their opponent’s access to transition support would be delayed as well. In 2020, the August 24-27 date for the GOP convention will delay the Democratic candidate’s access to transition support for more than a month after the Democrats’ July 13-16 convention. The statutory language allowing for these undesirable consequences should be amended.

The 2010 Act also prohibits the use of GSA resources during the preelection period for anything other than transition work and preparation to govern.<sup>121</sup> That is, it prevents the use of transition funds and GSA facilities and services for campaign purposes, functioning as a sort of Hatch Act for transition teams.<sup>122</sup>

Furthermore, the Presidential Transitions Improvements Act—passed in 2015—imposed new duties on the outgoing administration and GSA to facilitate

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117. See JONES, *supra* note 3, at 58, 66; KUMAR, *supra* note 3, at 45.

118. Peter Baker & Jackie Calmes, *Building a White House Team Before the Election Is Decided*, N.Y. TIMES (Oct. 24, 2008), <https://www.nytimes.com/2008/10/25/us/politics/25transition.html> [<https://perma.cc/LL8A-29Z8>].

119. Interview with Obama-Biden Transition Counsel, *supra* note 88.

120. 3 U.S.C. § 102 note (2018) (emphasis added).

121. Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, § 2(a), 124 Stat. 3045 (codified at 3 U.S.C. § 102 note (2018)).

122. An Act to Prevent Pernicious Political Activities, 5 U.S.C. § 7324 (2018) (“An employee may not engage in political activity . . . in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States . . . . [Such an employee] . . . may engage in political activity otherwise prohibited . . . if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.”). This is among the few felicitous places where transition law and presidential law overlap. Consequently, I omit discussion of the Hatch Act in the next Section because it is not a relevant point of difference.

the transition.<sup>123</sup> In particular, it requires the President to establish various coordinating councils and negotiate the MOU for the transition-team privileges discussed above.<sup>124</sup> Most recently, in 2020 the Act was updated again to require that the MOUs mandated by the 2015 Act include an ethics plan addressing conflicts of interest, the role of lobbyists, and other common transition ethics issues; it does not direct how these plans will be enforced.<sup>125</sup>

Collectively, these provisions of the amended Presidential Transition Act constitute the nucleus of the legal regime governing presidential transitions. Notably, these provisions mostly create obligations *to* transition teams. They say little regarding the obligations and limitations to which the transitions themselves are subject, beyond contributions limits and uses of GSA resources.

Moreover, these are the only statutory requirements for transitions *qua* transitions. The rest come from a patchwork of other laws under which transition teams incidentally fall. Below, I briefly summarize this patchwork.

## 2. *The Logan Act*

It is customary for Presidents-elect to speak with foreign leaders. On election night, there is even a more-or-less established order in which the new President-elect receives calls from foreign heads of state.<sup>126</sup> And further interactions to establish rapport are far from unusual. But, like all private citizens, members of presidential transitions – all the way up to the President-elect – are governed by the Logan Act.<sup>127</sup> Dating to 1799, the Logan Act criminalizes foreign policy-making by private citizens.<sup>128</sup>

A longstanding academic debate about its First Amendment implications, vagueness, and potential desuetude aside,<sup>129</sup> the Logan Act gives presidential

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123. Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-136, 130 Stat. 301 (2016) (codified at 3 U.S.C. § 102 note (2018)).

124. See *supra* Section I.B.

125. 3 U.S.C. § 102 note (2018).

126. See LEWIS, *supra* note 95, at 29.

127. 18 U.S.C. § 953 (2018).

128. *Id.* (prohibiting “[a]ny citizen of the United States . . . without authority of the United States, [from] directly or indirectly commenc[ing] or carr[ying] on any correspondence or intercourse with any foreign government or any officer or agent thereof, . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States.”).

129. See, e.g., Noah Feldman, Opinion, *Logan Act Is Too Vague to Prosecute Flynn. Or Anyone.*, BLOOMBERG (Feb. 15, 2017, 1:48 PM), <https://www.bloomberg.com/opinion/articles/2017-02-15/logan-act-is-too-vague-to-prosecute-flynn-or-anyone> [<https://perma.cc/T4UF-YPK5>];

transition teams reason to tread carefully. The line between establishing a working relationship and influencing policy is a thin one, as several members of the Trump-Pence Transition discovered.<sup>130</sup> Indeed, this risk is almost inherent in presidential transitions' foreign policy work. As Steve Vladeck put it regarding former National Security Advisor Michael Flynn, “[H]e’s only in this position [of having potentially violated the Logan Act] because, as of January 20, he *will* be exercising government authority.”<sup>131</sup>

The point is not that this is a special limitation on transitions. It is that they are especially likely to run up against the outer boundaries of this otherwise dormant statute.

### 3. *Nonprofit Law*

As 501(c)(4) social-welfare organizations, transition teams are also bound by Section 501(c)(4) of the Internal Revenue Code (and associated regulations) and the nonprofit law of their place of incorporation.<sup>132</sup> At a basic level, this means transition teams must be “operated exclusively for the promotion of social welfare” rather than for profit.<sup>133</sup> And like all other 501(c)(4)s, presidential transitions are subject to basic IRS reporting requirements.<sup>134</sup> These requirements constitute a significant portion of transition teams’ legal compliance efforts.<sup>135</sup>

Although not subject to the strict limits on political activities applicable to 501(c)(3) organizations,<sup>136</sup> 501(c)(4)s cannot engage in political campaigning as

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Steve Vladeck, *The Iran Letter and the Logan Act*, LAWFARE BLOG (Mar. 10, 2015, 10:32 AM), <https://www.lawfareblog.com/iran-letter-and-logan-act> [<https://perma.cc/FG9H-9C7R>].

130. See David Ignatius, Opinion, ‘Back Channels’ Are Protocol for a President – But Not for a President-Elect, WASH. POST (May 29, 2017, 12:10 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2017/05/29/back-channels-are-protocol-for-a-president-but-not-for-a-president-elect> [<https://perma.cc/LGA7-GQGP>]; Amber Phillips, *Did Michael Flynn Just Admit to Violating the Logan Act? And What Is the Logan Act?*, WASH. POST (Dec. 1, 2017, 12:06 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/28/democrats-think-donald-trump-just-violated-the-logan-act-what-is-that> [<https://perma.cc/N4F9-TZHR>].

131. Steve Vladeck, *The President-Elect and the Logan Act*, JUST SECURITY (Jan. 13, 2017), <https://www.justsecurity.org/36263/president-elect-logan-act> [<https://perma.cc/TEU7-RBUL>]. Vladeck argues that, precisely for this reason, the Logan Act should be read not to cover presidential transitions. *Id.*

132. I.R.C. § 501(c)(4) (2018).

133. *Id.* § 501(c)(4)(A).

134. See Treas. Reg. § 1.6033-2 (2019).

135. Interview with Clinton-Kaine Preelection Transition Aide, *supra* note 88.

136. Treas. Reg. § 1.501(c)(3)-1(b)(3) (2019).

their primary activity because it is not defined as an element of social welfare.<sup>137</sup> So long as transition teams are doing their jobs, this presents little issue. Transitions are oriented toward governing, while campaigns are oriented toward election. And where transition activities and campaigning blend together (for instance, in policy planning), transitions are likely covered by the fact that 501(c)(4)s may engage in nonexempt activities outside their primary purpose.<sup>138</sup>

#### 4. *Voluntary Ethics Codes*

The statutes and regulations outlined above constitute the core of the law of presidential transitions. The stunning fact that emerges from this study is that presidential transitions are essentially lawless. There is little to no specialized law that addresses their unique responsibilities and mitigates the risks inherent in this work. Even more surprising is the near-complete lack of law addressing ethics and conflicts of interest.<sup>139</sup> As governments-in-waiting, presidential transition teams face possible conflicts of a similar number and magnitude as the White House itself.<sup>140</sup>

Fortunately, transition teams historically have been aware of this problem and, since at least the Clinton-Gore Transition, have adopted voluntary codes of ethics to mitigate it (and the 2019 Act now requires some ethics code be in place).<sup>141</sup> The Obama-Biden Transition's ethics policy, for example, required staffers to recuse themselves from matters where they had financial interests or matters related to their lobbying activities; not to accept anything of value in exchange for influencing transition decisions; not to use nonpublic information acquired during the transition for private gain; not to appear before or attempt to influence any federal agency within the scope of their transition responsibilities; not to engage in lobbying related to their transition responsibilities for one year; and not to advise or aid foreign governments during the duration of the

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137. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (2019).

138. See Rev. Rul. 81-95, 1981-1 C.B. 332; Raymond Chick & Amy Henchey, *Political Organizations and IRC 501(c)(4)*, INTERNAL REVENUE SERV. 6 (1995), <https://www.irs.gov/pub/irs-tege/eotopicm95.pdf> [<https://perma.cc/HD8Q-JL9M>].

139. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-615R, PRESIDENTIAL TRANSITION: INFORMATION ON ETHICS, FUNDING, AND AGENCY SERVICES 7 (Sept. 7, 2017), <https://www.gao.gov/assets/690/687012.pdf> [<https://perma.cc/YYF5-YHYF>] (“[M]embers of the Transition Team are not subject to the laws and rules governing ethics . . . .”) [hereinafter GAO Ethics Report].

140. See *infra* Part III.

141. See BURKE, *supra* note 4, at 290.

transition, among other commitments.<sup>142</sup> Other transition teams have adopted similar ethics policies, although the strictness with which they have been enforced has varied.<sup>143</sup>

The ethics codes signed by staffers have thus constituted the thickest source of restraints on transition teams. These codes create contractual, private-law obligations on transition-team members who sign them. Other than dismissal, however, they have lacked enforceable sanctions.<sup>144</sup> A former transition counsel called them “more aspirational documents than anything else.”<sup>145</sup>

### B. *The Law of the Presidency and Executive Branch*

By contrast, the moment the President-elect and their staff take their oaths of office and formally take power, they are bound by a litany of constitutional and statutory rules. Although there is ongoing debate regarding the enforceability of some of these provisions against the President,<sup>146</sup> there is no doubt that the law of the presidency and executive branch applies to their subordinates. That law embodies several objectives: laws that ensure a commitment to the Constitution and the rule of law; laws that guard against invidious foreign influence; laws that prohibit bribery and conflicts of interest; and laws that ensure presidential and executive recordkeeping. Together, these statutes form a body of law that requires the President and officers of the executive branch to govern

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142. See Ctr. for Presidential Transition, *Obama-Biden Transition Project Code of Ethical Conduct*, PARTNERSHIP FOR PUB. SERV. (2008), <https://presidentialtransition.org/wp-content/uploads/sites/6/2008/11/Obama-Biden-Transition-Project-Code-of-Ethical-Conduct-1.pdf> [<https://perma.cc/E5P4-3RCH>] [hereinafter Obama Ethics Code].

143. See *infra* Section III.A.

144. See *Code of Ethical Conduct*, TRUMP FOR AMERICA, INC. (Nov. 10, 2016), <https://www.politico.com/f/?id=00000158-6e3e-d204-a1f9-ffff6ed60001> [<https://perma.cc/63BV-X3FH>] [hereinafter Trump Ethics Code]; Obama Ethics Code, *supra* note 142; *Transition Code of Ethical Conduct*, BUSH-CHENEY PRESIDENTIAL TRANSITION FOUND. (2000), [https://www.oge.gov/web/oge.nsf/All%20Advisories/8125151B50ED2EE585257E96005FBD95/\\$FILE/DO-00-048.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/8125151B50ED2EE585257E96005FBD95/$FILE/DO-00-048.pdf?open) [<https://perma.cc/U4N8-NL4A>].

145. Interview with Obama-Biden Transition Counsel, *supra* note 88.

146. See Philip Bobbitt, *Can the President Be Indicted? A Response to Laurence Tribe*, LAWFARE (Dec. 17, 2018, 8:00 AM), <https://www.lawfareblog.com/can-president-be-indicted-response-laurence-tribe> [<https://perma.cc/3BNK-GW93>]; Laurence Tribe, Opinion, *Constitution Rules Out Immunity for Sitting Presidents*, BOS. GLOBE (Dec. 12, 2018), <https://www.bostonglobe.com/opinion/2018/12/10/constitution-rules-out-sitting-president-immunity-from-criminal-prosecution/6Byq7Qw6TeJlPVUhlGABPM/story.html> [<https://perma.cc/6Y9E-TEWB>]. See generally ANDREW COAN, PROSECUTING THE PRESIDENT: HOW SPECIAL PROSECUTORS HOLD PRESIDENTS ACCOUNTABLE AND PROTECT THE RULE OF LAW 111-97 (2019).

in the public interest, rather than for private gain, and that holds them accountable.

1. *Constitutional Rules*

The Constitution itself imposes four primary limits on the President and other executive-branch officials. Critically, these limits take effect only once the President enters office; they do not apply to Presidents-elect. First, the Oath Clause provides that

[b]efore he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”<sup>147</sup>

Similarly, although in less detail, the Constitution also provides that other federal officers “shall be bound by Oath or Affirmation, to support this Constitution.”<sup>148</sup>

The presidential oath is the only oath for which the Constitution prescribes specific content, rather than the mere existence of *some* oath “to support this Constitution,” as for other officers.<sup>149</sup> This specificity supports an inference that the Framers intended to impose on the President the tripartite obligation to preserve, protect, and defend—rather than merely support—the Constitution. The implication of the oath’s first-person phrasing is inescapably personal and unflinching in the weight it places on the President’s shoulders.<sup>150</sup> Some argue it entails a “meta-rule of construction” authorizing the President to act extraconstitutionally where necessary for “national self-preservation.”<sup>151</sup>

Second, the Foreign Emoluments Clause provides that “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, [or] Emolument . . . of any kind whatever, from any king, Prince, or foreign State.”<sup>152</sup> Similarly, the Domestic Emoluments Clause

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147. U.S. CONST. art. II, § 1, cl. 8.

148. *Id.* art. VI, cl. 3.

149. *Id.*

150. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1261 (2004).

151. *Id.* at 1257. But see generally Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004).

152. U.S. CONST. art. I, § 9, cl. 8.

provides that “[t]he President . . . shall not receive within that Period [of office] any other Emolument from the United States, or any of them.”<sup>153</sup> Once the President and other federal officers holding an “office of trust” take office, the Foreign Emoluments Clause prohibits them from accepting gifts, payments, or other enrichment in their capacity as officeholders.<sup>154</sup> The Domestic Emoluments Clause does the same for gifts from states to the President (which rarely presents an issue). Of course, this simplified account does not fully capture the interstices of these clauses. Whether President Trump’s receipt of revenue through his Washington, D.C. hotel, where foreign dignitaries and domestic government officials often stay, violates the Clause is the subject of recent and ongoing litigation.<sup>155</sup> What is clear, however, is that the Trump International Hotel only became a *constitutional* problem once President Trump took office. Presidents-elect are not prevented from taking emoluments by anything other than their own sense of duty.

Third, the Incompatibility Clause provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>156</sup> This provision is one of the Constitution’s clearest statements requiring the separation of powers. It affirmatively bans members of Congress from serving in the executive branch (or the judicial branch, for that matter).<sup>157</sup>

This strict separation makes good sense. To the extent the Framers relied on interbranch checks to ward off tyranny, simultaneously exercising the powers of

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153. *Id.* art. II, § 1, cl. 7.

154. See generally Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017) (providing one interpretation of the Foreign Emoluments Clause); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009) (explicating the scope and function of the Foreign Emoluments Clause). The definition of “emolument” remains contested and has been the subject of recent litigation. See, e.g., *D.C. v. Trump*, 315 F. Supp. 3d 875, 891 (D. Md. 2018), *rev’d on other grounds and remanded sub nom. In re Trump*, 928 F.3d 360 (4th Cir. 2019), *reh’g en banc granted*, 780 F. App’x 36 (4th Cir. 2019) (holding that emolument “encompass[es] any ‘profit,’ ‘gain,’ or ‘advantage’”).

155. See, e.g., *In re Trump*, 928 F.3d 360 (4th Cir. 2019); *D.C. v. Trump*, 930 F.3d 209 (4th Cir. 2019); *Blumenthal v. Trump*, 382 F. Supp. 3d 77 (D.D.C. 2019); *Citizens for Responsibility and Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *appeal docketed*, No. 18-747 (2d Cir. Feb. 16, 2018).

156. U.S. CONST. art. I, § 6, cl. 2.

157. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1963 n.127 (2011).



both branches would have been anathema.<sup>158</sup> Indeed, this principle of “one person, one office” runs deep in America’s unwritten constitutional tradition and finds constitutional manifestation in the Incompatibility Clause.<sup>159</sup>

Presidential transitions are permitted to blur, if not abandon, this constitutional convention. Then-Senator Jeff Sessions (AL), for example, formally served as Vice-Chair of the Trump-Pence Transition, along with Senator Tim Scott (SC), Representatives Tom Reed (NY) and Cathy McMorris Rodgers (WA), and then-Representatives Marsha Blackburn (TN) and Cynthia Lummis (WY).<sup>160</sup> Members of the transition’s Executive Committee included Representatives Chris Collins (NY), Sean Duffy (WI), and Devin Nunes (CA), and then-Representatives Lou Barletta (PA), Trey Gowdy (SC), Tom Marino (PA), and Dennis Ross (FL).<sup>161</sup>

This was somewhat unusual. Although few detailed personnel records from earlier transition teams have been made public, those that have been suggest that placing members of Congress in formal transition jobs is rare.<sup>162</sup> Of course, Rahm Emanuel served on the Obama-Biden Transition prior to his appointment as Chief of Staff while serving as U.S. Representative for Illinois’s Fifth District.<sup>163</sup> That was a notable exception – the archived staff pages for the Obama-Biden Transition do not list any other members of Congress.<sup>164</sup> The Reagan-Bush Transition also included at least one member of Congress, with another as an outside adviser. Senator Richard Stone joined the team after losing his 1980

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158. See THE FEDERALIST NO. 47 (James Madison).

159. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994).

160. Press Release, Am. Presidency Project, President-Elect Donald J. Trump Announces New Executive Committee Members and Staff Leadership Positions Serving on Presidential Transition Team (Dec. 15, 2016), <https://www.presidency.ucsb.edu/documents/press-release-president-elect-donald-j-trump-announces-new-executive-committee-members-and> [<https://perma.cc/FSV8-Q6J2>].

161. *Id.*

162. See, e.g., Telephone Interview with Senior Bush-Cheney Transition Aide (Jan. 27, 2020) (confirming no members of Congress worked on the Bush-Cheney Transition).

163. See KUMAR, *supra* note 3, at 50. Emanuel resigned his seat effective January 2, 2009, when the new Congress took their seats. See History, Art & Archives, *Rahm Emanuel*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/12955> [<https://perma.cc/C68L-83US>].

164. See *Obama-Biden Transition Project Board and Staff*, LIBR. CONG. WEB ARCHIVE, (Feb. 4, 2009) <http://webarchive.loc.gov/all/20090204215755/http://change.gov/learn/transitionstaff> [<https://perma.cc/33JL-48FC>] (displaying an archived page of the Obama-Biden Transition’s website, change.org).

reelection bid,<sup>165</sup> and Senator Paul Laxalt chaired the transition team’s congressional advisory group.<sup>166</sup> On the whole, though, the formal involvement of sitting members of Congress has been rare.

But whatever prevented earlier transition teams from relying heavily on members of Congress was customary, not obligatory. Nothing in the Constitution nor any statute or regulation prevents presidential transitions from installing members of Congress in their White House-in-waiting. But for the same reasons the Framers proscribed dual executive-legislative office-holding in the Incompatibility Clause, the Trump-Pence Transition’s practice should give us pause.

Finally, the Take Care Clause provides that the President “shall take Care that the Laws be faithfully executed.”<sup>167</sup> The Court has interpreted the Take Care Clause to confer a number of powers upon the President, including the power to remove unfaithful officers;<sup>168</sup> the power (or right) of prosecutorial discretion;<sup>169</sup> and the power to protect federal interests without explicit statutory authorization (where no other statute or rule prohibits such action).<sup>170</sup>

But the Take Care Clause also imposes obligations on the President similar to those of the Oath Clause. Most notably, the Court has treated it as a source of the President’s obligation to enforce the laws and respect legislative supremacy.<sup>171</sup> And numerous scholars have observed that it is worded in terms of a duty, rather than a grant of power, even if it nonetheless implies the aforementioned powers.<sup>172</sup> To the extent scholars have recognized a generalized duty under the

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165. *Profiles of Key Members of the President-Elect’s Transition Team*, WASH. POST (Nov. 7, 1980), <https://www.washingtonpost.com/archive/politics/1980/11/07/profiles-of-key-members-of-the-president-elects-transition-team/4d3aa103-b4c7-4c4e-b777-be902703a689> [https://perma.cc/5JUC-39XX].

166. See BURKE, *supra* note 4, at 97-101.

167. U.S. CONST. art. II, § 3.

168. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.” (citation omitted)).

169. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“The Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws . . . because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’” (citations omitted)).

170. See *In re Neagle*, 135 U.S. 1, 67-68 (1890).

171. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952); see also *Kendell v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (finding that there is no presidential authority to suspend or dispense with the execution of laws).

172. See, e.g., Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 334-35 (2006) (“[T]he Take Care Clause is essentially a duty, not a

Take Care Clause, it is a duty of care and a bar against unlawful executive action. As David Rubenstein has observed, that duty “might include presidential adherence to substantive and procedural law, a presidential ‘duty to supervise’ executive officials, as well as nonarbitrary and good-faith implementation of federal law.”<sup>173</sup> The duty attaches to the office of the President; on its face, it does not cover Presidents-elect. As I shall argue below, however, the requirements imposed by the Take Care Clause may matter for the President-elect’s competence to take the Presidential Oath in the first place.<sup>174</sup>

## 2. *Bribery, Conflicts of Interest, and the Ethics in Government Act*

The Constitution is not the only check that comes into force when a President enters office.<sup>175</sup> The fluid norms of transition ethics are hardened into legal obligations under Public Law 87-849,<sup>176</sup> the Ethics in Government Act, and associated regulations.<sup>177</sup> Not all of these requirements apply to the President and Vice President. But they cover the rest of the executive branch.<sup>178</sup> For the staff of a presidential transition team playing analogous preinauguration roles, the imposition of government ethics rules is a sea change.

The core of executive-branch ethics law criminalizes bribes given to influence official acts,<sup>179</sup> criminalizes executive-branch employee participation in matters in which they have a financial conflict of interest,<sup>180</sup> criminalizes receipt of outside compensation for government services,<sup>181</sup> limits outside earned income and

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power . . .”); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198 n.221 (1992) (arguing that the Clause’s language “suggests an obligation of watchfulness, not a grant of power”).

173. David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 170 (2018).

174. See *infra* Section IV.C.

175. For a full list of all applicable ethics laws, see *Compilation of Federal Ethics Laws*, U.S. OFFICE OF GOVERNMENT ETHICS (2015), <https://www.oge.gov/Web/oge.nsf/Resources/Compilation+of+Federal+Ethics+Laws> [<https://perma.cc/57JT-73AG>].

176. See Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified at 18 U.S.C. §§ 201-209).

177. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of the U.S. Code).

178. See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2219-20 (2018) (pointing out that 18 U.S.C. § 208’s conflict-of-interest provisions do not apply to the President and Vice President).

179. 18 U.S.C. § 201 (2018).

180. *Id.* § 208; see also 5 C.F.R. § 2635.402(a) (2020).

181. 18 U.S.C. § 209 (2018).

employment for certain noncareer executive-branch officers and employees,<sup>182</sup> and requires detailed financial disclosures (including from the President).<sup>183</sup> In some cases, federal employees can even be required to divest assets to comply with ethics rules.<sup>184</sup> In addition, the Office of Government Ethics (OGE), created by the Ethics in Government Act, is empowered to promulgate additional regulations governing executive-branch employees' conduct.<sup>185</sup> Those regulations substantially expand the scope of executive-branch ethics requirements. They run the gamut from additional conflict-of-interest provisions to rules governing federal employees in seeking outside employment as they leave government.<sup>186</sup>

Some of these statutory and regulatory restrictions apply prospectively. For example, 18 U.S.C. § 201's bribery ban applies to both officials currently serving and those who have "been selected to be a public official," including "any person who has been nominated or appointed to be a public official."<sup>187</sup> That covers some transition staffers but may not include those who have yet to be offered a specific position. More importantly, it certainly *does not* cover transition staffers who never accept administration jobs. They are entirely outside the ambit of federal ethics rules.

This lacuna matters. Executive-branch ethics regulations address a number of potential conflict-of-interest scenarios that mirror those facing presidential transition teams, especially when it comes to appointments and policy decisions where transition aides have financial conflicts. As Part I argued, presidential transition teams' policy and appointments activities so closely resemble those of the White House that analogous ethics rules are needed. For example, 5 C.F.R. § 2635.606 disqualifies executive-branch employees from "participat[ing] personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of the person . . . with whom he or she has an arrangement concerning future employment."<sup>188</sup> Such arrangements are commonplace – if not expected – on transition teams.<sup>189</sup> Yet no extant law addresses them.

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182. 5 U.S.C. app. §§ 501-505 (2018).

183. *Id.* §§ 101-105.

184. *See* 5 C.F.R. § 2634.1004 (2020).

185. 5 U.S.C. app. §§ 401-403 (2018).

186. 5 C.F.R. §§ 2635.101-2635.809 (2020).

187. 18 U.S.C. § 201(a)(2) (2018).

188. 5 C.F.R. § 2635.606(a) (2020).

189. *See infra* Section III.A.3.

### 3. *Foreign Agents and Dual Loyalty*

Federal law also bans foreign agents from serving in federal office. No one who “is or acts as an agent of a foreign principal” as defined by the Foreign Agents Registration Act and Lobbying Disclosure Act may serve as a “public official” of the United States, under penalty of fine or imprisonment.<sup>190</sup> This simple and straightforward prohibition ensures that the loyalties of American public servants lie with the United States alone. On its face, this statute does not apply to presidential transition staffers.<sup>191</sup> Nothing prohibits foreign agents from penetrating the inner workings of an incoming administration, so long as they do not migrate into the federal government after inauguration.

### 4. *The Anti-Deficiency Act and Voluntary Service*

In addition to ethics rules against salary supplements and restrictions on outside activities, a little-known statute dating to the early twentieth century has evolved into a bulwark against “in-kind” donations of labor to the U.S. government. The Anti-Deficiency Act, in relevant part, provides that “[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”<sup>192</sup> Transition teams are under no such obligation—voluntary service is typical.<sup>193</sup>

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190. 18 U.S.C. § 219(a) (2018).

191. Steve Vladeck characterizes the applicability of 18 U.S.C. § 219 to transitions as “an interesting question,” but states that he is “skeptical” that transition officials would qualify as “public officials.” Steve Vladeck, *A Primer on the Foreign Agents Registration Act—and Related Laws Trump Officials May Have Broken*, JUST SECURITY (Apr. 3, 2017), <https://www.justsecurity.org/39493/primer-foreign-agents-registration-act> [https://perma.cc/WR3Y-N232]. Section 219(c) defines “public officials” as members of Congress, agency officials, and the like, as well as “an officer or employee or person acting for or on behalf of the United States . . . in any official function.” 18 U.S.C. § 219(c) (2018). Beyond the fact that transition officials do not work for the United States (they work for the transition’s nonprofit entity), it would be impossible to treat them as public officials without calling into question the sole executive authority of the sitting President and the executive-branch officials who report to them, rather than the President-elect.

192. 31 U.S.C. § 1342 (2018).

193. See *Guidelines for Interacting with President-Elect Trump’s Transition Team*, COVINGTON & BURLING 1 (Nov. 15, 2016), [https://www.cov.com/-/media/files/corporate/publications/2016/11/working\\_with\\_president\\_elect\\_donald\\_trumps\\_transition\\_team.pdf](https://www.cov.com/-/media/files/corporate/publications/2016/11/working_with_president_elect_donald_trumps_transition_team.pdf) [https://perma.cc/AJ54-WLTQ] (“The Transition can hire paid staff and outside consultants, and will also rely on volunteers.”); Timothy Noah, *Presidential Transitions Come into the Open*, POLITICO (Sept. 5, 2016, 7:20 AM EDT), <https://www.politico.com/story/2016/09/trump-clinton>

Initially passed in 1884 (and subsequently incorporated into the 1905 Anti-Deficiency Act), the rule against voluntary service was intended as part of a broader package of restrictions on executive spending in excess of congressional appropriations.<sup>194</sup> Congress worried that ostensibly voluntary services could be used to retroactively impose unfunded liabilities on the federal government, which Congress would be forced to meet.<sup>195</sup> The rule against voluntary service ensures that such demands for payment cannot arise.

Incidentally, though, the Anti-Deficiency Act also serves an anticorruption purpose. It ensures wealthy individuals and corporations cannot circumvent rules on gifts and bribes by providing in-kind donations of labor or services. The executive branch can accept services only when Congress has authorized payment for them, ensuring those courting the President's favor cannot end-run the rest of our elected government.

This strict interpretation of the rule against voluntary service is not unchallenged. The Government Accountability Office (GAO) in 1947 interpreted the rule to exempt *truly* gratuitous services. According to the GAO, where someone "agrees in writing and in advance that he waives any and all claims against the government on account of such service," the original aims of the rule suggest such services are permissible.<sup>196</sup>

But the GAO's interpretation appears to be premised on two opinions of the Attorney General, dating to 1913, neither of which supports a general allowance of fully gratuitous service. The first opinion held that a retired army officer, being otherwise compensated, could also serve as "superintendent of an Indian school

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-presidential-transition-obama-227701 [https://perma.cc/KGM5-C8BF] ("Transition staffs typically have more volunteers than paid employees.").

194. See *Emp't of Retired Army Officer as Superintendent of Indian Sch.*, 30 Op. Att'y Gen. 51, 53 (1913) ("[I]t is also perfectly evident from its legislative history that the purpose was to prevent the Departments from incurring financial obligations over and above those authorized in advance by Congress. . . . Acceptance of voluntary service . . . still carried with it a quasi-contractual or moral right to compensation . . ."). See generally Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1370-77 (1988) (describing the Anti-Deficiency Act).

195. See *Authority for the Continuance of Gov't Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 8 (1981) ("Despite the use of the term 'voluntary service,' the evident concern underlying this provision . . . [was] to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours.").

196. B-66664, 26 Comp. Gen. 956, 958 (1947); see B-173933, 54 Comp. Gen. 560 (1975).

or agency” without additional compensation.<sup>197</sup> The opinion is clear that “services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried” are permissible because “the evident purpose of Congress” was “to prevent the doing of things which it had not authorized.”<sup>198</sup> That is, Congress can override the rule against voluntary service. Where it has not, however, the rule should apply with full force.

A second opinion that year affirmed the ability of executive-branch employees to provide extraneous services without compensation. “There appears to be nothing in the statutes which prohibits the head of a department from permitting a clerk of his department to render additional services, without extra compensation, the necessity for which arises in his or in other departments . . . .”<sup>199</sup> But Acting Attorney General James Fowler was clear that this opinion was limited: “[T]his, in effect, is all I understand you wish to do.”<sup>200</sup>

These opinions do not justify the proposition “that *truly* voluntary service, with no right or expectation of repayment, is indeed permissible.”<sup>201</sup> Where Congress has not previously authorized an unpaid position, the risk that voluntary services may nonetheless create liability has not been fully assuaged. Moreover, it would be an absurd outcome if the legality of services turned on the subjective, largely unknowable intent of the rendering party.<sup>202</sup> The difference between service that is “truly” voluntary or not would then rest on an assessment of subjective intent that is at best subject to contract and at worst impossible to nail down.

Regardless, voluntary service on transition teams is permissible even where it might create some “moral right to compensation” or other implicit *quid pro quo* understanding.<sup>203</sup>

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197. *Emp’t of Retired Army Officer as Superintendent of Indian Sch.*, 30 Op. Att’y Gen. 51, 51 (1913).

198. *Id.* at 52.

199. *Designation of Disbursing Clerk for the Dep’t of Labor*, 30 Op. Att’y Gen. 129, 131 (1913).

200. *Id.*

201. Stith, *supra* note 194, at 1373.

202. See J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1239-41.

203. *Emp’t of Retired Army Officer as Superintendent of Indian Sch.*, 30 Op. Att’y Gen. 51, 53 (1913); see *infra* Section III.A.3.

5. *The Federal and Presidential Records Acts and FOIA*

Finally, presidential administrations are subject to a rigorous document preservation regime under the Federal Records Act (FRA),<sup>204</sup> Presidential Records Act (PRA),<sup>205</sup> and Freedom of Information Act (FOIA).<sup>206</sup> The PRA requires the President to “assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained.”<sup>207</sup> The FRA largely does the same for the rest of the executive branch, and makes clear its focus on “proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agenc[ies].”<sup>208</sup>

The fundamental objective of both statutes is to create and maintain a comprehensive documentary record of executive-branch decision-making in the public domain.<sup>209</sup> To that end, the PRA, in particular, requires preservation in the public domain of essentially all paper created by Presidents and their staff with any relation to “the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.”<sup>210</sup>

And FOIA (for all its shortcomings) strengthens the oversight elements of this regime by making it possible to force government production of many of these records. As David Pozen puts it, FOIA “allows ‘any person’ to request any federal agency record for any reason, or no reason at all. Agencies are required to turn over every responsive, nonexempt record within weeks.”<sup>211</sup> FOIA provides

204. 44 U.S.C. §§ 3101-07 (2018).

205. *Id.* §§ 2201-07.

206. 5 U.S.C. § 552 (2018).

207. 44 U.S.C. § 2203(a) (2018).

208. *Id.* § 3101.

209. See *The Presidential Records Act of 1978—S. 3494: Hearing Before the S. Comm. on Governmental Affairs*, 95th Cong. 1-2 (1978) (statement of Sen. Charles Percy); 96 CONG. REC. S11096-97 (daily ed. July 26, 1950) (statement of Sen. McClellan (reading into the record Letter from Frank L. Yates, Acting Comptroller Gen., Gov’t Accountability Office, to John H. McLellan, Chairman, Senate Comm. on Expenditures in the Exec. Dep’ts (July 25, 1950))); see also *Nixon v. Admin’r of Gen. Servs.*, 433 U.S. 425, 452-53 (1977) (describing the purpose of federal records law).

210. 44 U.S.C. § 2201(2)(A) (2018).

211. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 118 (2018) (footnote omitted). That said, this rosy view is not always borne out. FOIA’s efficacy has suffered due to poor agency funding, numerous exemptions, and a pattern of use for private gain rather than public benefit. See generally David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017).



exceptionally broad and immediate access to FRA documents. By contrast, the PRA allows the President to delay access to most documents for up to five years and to particularly sensitive ones for up to twelve.<sup>212</sup>

Executive-branch documents are among our nation's best maintained public records because they matter as both a repository of public reasoning and as building blocks of histories yet to be discovered. But these rationales apply with equal force to presidential transition teams, with the caveat that many transition documents would likely fall under FOIA's "deliberative process" privilege<sup>213</sup> applicable to FRA but not PRA documents.<sup>214</sup> Presidential transition teams shape the foundation of the presidency itself. Yet they are subject to almost no record-keeping rules or retrospective accountability.<sup>215</sup> These documents only make it into the public record by voluntary release or accidental transmission.<sup>216</sup> The only party capable of accessing them appears to be law enforcement, which under the terms of the GSA's memorandum of understanding with the Trump Administration was able to request access directly from GSA.<sup>217</sup>

According to an aide on the Trump-Pence Transition team, "[We] [g]ot rid of many documents because we never wanted [them] to see the light of day. We got rid of almost everything."<sup>218</sup> Some records from the Obama-Biden Transition were preserved by individuals on an ad hoc basis.<sup>219</sup> But members of the Obama-Biden Transition team reported that they were not aware of any organized

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212. 44 U.S.C. § 2204(a)-(b) (2018).

213. 5 U.S.C. § 552(b)(5) (2018). See generally *Department of Justice Guide to the Freedom of Information Act: Exemption 5*, DEP'T OF JUST. (2019), <https://www.justice.gov/oip/page/file/1197816/download> [<https://perma.cc/R58K-MPY7>].

214. 44 U.S.C. § 2204(c)(1) (2018).

215. See *Democracy Forward Found. v. U.S. Gen. Servs. Admin.*, 393 F. Supp. 3d 45, 48 (D.D.C. 2019) (concluding that transition records held by the GSA are not subject to FOIA).

216. A watchdog group, American Oversight, has filed a number of lawsuits using FOIA to request communications with the Trump Transition from the GSA, which assists presidential transitions. See, e.g., *Am. Oversight v. U.S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 327 (D.D.C. 2018). But unless transition documents or communications are shared with the GSA or another government agency, they do not fall within the ambit for FOIA or any other federal records law.

217. See Anne Gearan & Philip Rucker, *Trump Criticizes How Mueller Obtained Transition Emails, Says No Plans to Fire Special Counsel*, WASH. POST (Dec. 17, 2017), [https://www.washingtonpost.com/politics/mueller-unlawfully-obtained-emails-trump-transition-team-says/2017/12/16/6162f350-e2cc-11e7-8679-a9728984779c\\_story.html](https://www.washingtonpost.com/politics/mueller-unlawfully-obtained-emails-trump-transition-team-says/2017/12/16/6162f350-e2cc-11e7-8679-a9728984779c_story.html) [<https://perma.cc/4NA3-DTE8>].

218. Interview with Trump-Pence Transition Aide, in New York, N.Y. (Oct. 4, 2019).

219. Interview with Clinton-Kaine Preelection Transition Aide, *supra* note 88; Interview with Obama-Biden Transition Aide 3, in Washington, D.C. (Oct. 14, 2019); Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 3, *supra* note 65.

recordkeeping initiative and said they would not be surprised if many records had been deleted.<sup>220</sup> Without a regime like PRA and FRA, these documents may be lost forever.

In sum, presidential law's main preoccupations—preserving our legal and constitutional order, preventing corruption and foreign influence, and maintaining accountability through recordkeeping—appear largely absent from the law of presidential transitions. The main body of law governing them has rightly focused on the need for a smooth transfer of power. And it has in small ways, like the \$5,000 individual-contribution limit, addressed some of the most glaring risks transitions face. But lawmakers have punted on many of the thorniest questions, such as financial and employment-related conflicts of interest or the relevance of the Constitution's "faithful execution" clauses, relying instead on voluntary commitments and the incidental protection of statutes passed for other purposes. As I argue below, the stakes of presidential transitions and risks facing them—similar to those facing the President—are too high to accept this state of affairs.

### III. PROBLEMS WITH LAWLESS TRANSITIONS

Thus far, this Note has argued (1) that Presidents-elect and presidential transition teams hold responsibilities analogous, and sometimes identical, to Presidents and the White House and (2) that the legal regime governing them is minimal relative to the substantial ethical and constitutional requirements borne by the President and executive branch. From a purely formalist perspective, this might not be so worrisome. Presidents and their advisors have often asserted that we have "one President at a time."<sup>221</sup> Indeed, scholars have thought this point so obvious that they have debated just *how* obvious it is that we only have one President.<sup>222</sup>

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220. *E.g.*, Interview with Obama-Biden Transition Aide 3, *supra* note 219.

221. *See, e.g.*, *The President's News Conference in Los Cabos, June 19, 2012*, in 2012 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, BARACK OBAMA 817, 821 (2016) (Obama); *The President's News Conference of January 27, 1969*, in 1969 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RICHARD M. NIXON 15, 21 (1971) (Nixon); *see also* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 536 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)); Interview with Senior Bush-Cheney Transition Aide, *supra* note 162 (describing the "one president at a time" rule as an important legal and ethical challenge of the transition).

222. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 576 (1994) ("Lessig and Sunstein say that the Article II Vesting Clause is needed only to specify the Chief Executive's title (the 'President') and to make clear that we have only one President. But we do not need the Article II Vesting Clause to tell us these things. They

But reality could not be further from the idealized separation contemplated by the Constitution and claimed by the Presidents clothed in its authority.<sup>223</sup> The implications of this practical reality are magnified in elections where sitting Presidents and their party are ousted. As Sanford Levinson has queried regarding foreign policy, “What if . . . there is genuine disagreement within the American public about what [its] interests are, and what if a major part of the election debate concerned the[ir] definition . . . ? Does it make any sense for a repudiated president . . . to represent the United States . . . ?”<sup>224</sup> From the perspective of democratic legitimacy and practical authority, for any policy issue with a time horizon longer than two-and-a-half months, the “one President at a time” rule rings hollow.

For the President-elect and transition team to hold quasi-executive authority without the constitutional and legal restrictions placed on that office presents tremendous difficulties. Below, I enumerate the ethical, governance, accountability, and constitutional problems posed by lawless presidential transitions.

### A. *Ethics and Conflicts of Interest*

Even run-of-the-mill transition practices present numerous ethical risks that have occasionally manifested during the last few presidential transitions. But the Trump-Pence Transition stands apart for its ethical lapses and its demonstration of how dangerous ungoverned transitions can be when ethics are deprioritized.

#### 1. *Financial Conflicts*

Financial conflicts of interest present the simplest problem facing transition teams. Like many executive-branch employees, transition employees and volunteers often hold financial interests affected by the transition team’s work. Suppose a transition-team employee holds a longstanding position in a natural-gas company. Federal rules governing hydraulic fracturing (fracking) on federal land have obvious financial implications for that position. Should the transition team announce that it plans to roll back fracking regulations and allow for more drilling and extraction, it would be reasonable to expect the value of that position to

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are self-evident from the remainder of the text of Section 2 of Article II . . . .”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 52 (1994) (“[W]hat [Article II] section 1 does is simply say: We have chosen one President.”).

223. See *supra* Section I.A.

224. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 99 (2006).

increase. The employee has a classic conflict of interest. Were they a federal employee, the employee would be forced to recuse themselves from policy formulation on that issue under threat of criminal sanction, including up to five years in prison.<sup>225</sup>

But transition-team employees face no such restrictions by law. They can be intimately involved in decisions that lead to prospective policy announcements, which may be incorporated into securities prices far in advance of the President-elect's taking office. They can even be involved in policy planning that forms the basis of policies finalized once the new administration is in office. Though the Trump-Pence Transition's formal ethics policy required aides to recuse themselves from decisions where they had conflicts of interest,<sup>226</sup> according to a transition aide there was no formal recusal policy in place; instead, these decisions were at the discretion of individual aides.<sup>227</sup> Not every member of the Trump-Pence Transition followed the letter of the ethics code. For example, Peter Thiel was involved in selecting nominees who, once in office, would have substantial regulatory authority over companies in which he invests or who might be in positions to select his companies for government contract work.<sup>228</sup> It was not even clear during the transition that he had signed the ethics code at all.<sup>229</sup> None of this was necessarily illegal under current transition law, but had Thiel been a federal employee, he may have been barred by 18 U.S.C. § 208 or 5 C.F.R. § 2635.502.<sup>230</sup>

Similarly, investor Carl Icahn advised the Trump-Pence Transition on energy regulation while owning numerous companies in the sector. He was personally involved in the selection of Scott Pruitt to head the E.P.A., the agency responsible for one of the regulations most material to his holdings.<sup>231</sup> As the Washington Post reported at the time, Icahn publicly railed against regulations governing the mixing of ethanol into gasoline while watching his own shares in CVR Energy,

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225. 18 U.S.C. §§ 208(a), 216(a)(2) (2018).

226. See Trump Ethics Code, *supra* note 144.

227. Interview with Trump-Pence Transition Aide, *supra* note 218.

228. See Romm, *supra* note 14.

229. See Kirkland, *supra* note 15.

230. 18 U.S.C. § 208 (2018) (criminalizing participation in matters where the employee has a financial interest); 5 C.F.R. § 2635.502(a) (2020) (prohibiting participation in matters where “the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter,” absent authorization).

231. Patrick Radden Keefe, *Carl Icahn's Failed Raid on Washington*, NEW YORKER (Aug. 21, 2017), <https://www.newyorker.com/magazine/2017/08/28/carl-icahns-failed-raid-on-washington> [<https://perma.cc/3B9X-6F9P>].

a petroleum refinery, nearly double in value.<sup>232</sup> Icahn also perfectly encapsulates the risk that poor transition ethics will infect the administration. Once in office, President Trump named him as a special adviser on the same regulatory issues, intensifying the consequences of this obvious conflict.<sup>233</sup>

At the time, government ethics experts waged a campaign of protracted handwringing but were powerless to do much more. Norman Eisen, a former ethics lawyer in the Obama White House, argued that Thiel should “disqualify himself from any transition matter, [and] one would assume that would include appointments . . . which may directly conflict with his financial interests.”<sup>234</sup> But “should” is the operative word. Nothing actually compels transition-team operatives to recuse themselves other than generalized restrictions on, for instance, insider trading. But if, like Thiel, Icahn, and Secretary of Commerce Wilbur Ross, aides come to the transition team with preexisting holdings, nothing legally stops them from recommending policies that line their pockets.

While the Trump-Pence Transition’s conflicts of interest were more blatant than its predecessors, they were by no means the first of their kind. In 2009, for example, it was reported that an Obama-Biden Transition team member, still employed by Citigroup at the time, was involved in the selection of Obama’s Treasury Secretary and economic team.<sup>235</sup> While there is no evidence of personal profiteering of the kind seen during the Trump-Pence Transition, under federal ethics rules this would likely have required a recusal. Similarly, the Clinton-Gore Transition allowed top aides to participate in appointments decisions with direct bearing on the financial interests of their clients in private law practice.<sup>236</sup>

Of course, recent transition teams have published ethical codes of conduct specifically proscribing such behavior. The Trump-Pence Transition’s ethical code required participants to avoid “involvement in any particular transition matter which to my knowledge may directly conflict with a financial interest of

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232. John Wagner & Yan Q. Mui, *Trump Confidants Serving as Presidential Advisers Could Face a Tangle of Potential Conflicts*, WASH. POST (Jan. 8, 2017), <https://www.washingtonpost.com/politics/trump-confidants-could-face-tangle-of-potential-conflicts-as-presidential-advisers/2017/01/08/2daaf264-d428-11e6-945a-76f69a399dd5> [https://perma.cc/L788-USRT].

233. See Eric Lipton, *Icahn Raises Ethics Flags with Dual Role as Investor and Trump Adviser*, N.Y. TIMES (Mar. 26, 2017), <https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html> [https://perma.cc/W7HB-K6PL].

234. Romm, *supra* note 14.

235. See NOAM SCHEIBER, *THE ESCAPE ARTISTS: HOW OBAMA’S TEAM FUMBLER THE RECOVERY* 7–8 (2012); David Dayen, *The Most Important WikiLeaks Revelation Isn’t About Hillary Clinton*, NEW REPUBLIC (Oct. 14, 2016), <https://newrepublic.com/article/137798/important-wikileaks-revelation-isnt-hillary-clinton> [https://perma.cc/8CXV-WMNU].

236. See *supra* note 17 and accompanying text.

mine.”<sup>237</sup> But, even after the 2019 Act, enforcement of these codes lies with the transition team itself. If the transition team’s general counsel chooses to waive the rules or overlook a conflict, or if a transition member brazenly disregards them, nothing obligates the transition team to enforce its rules.<sup>238</sup>

And all of this is to say nothing of lobbyists, with their own species of conflicts, whose involvement is a perennial transition issue.<sup>239</sup> Both the Obama-Biden and Trump-Pence Transitions required staffers to disqualify themselves from any matter on which they had lobbied in the past twelve months.<sup>240</sup> Like general financial conflict rules, transition lobbying restrictions need not be (and have not always been) strictly enforced.<sup>241</sup>

At bottom, the American public is at the mercy of the President-elect and their transition team when it comes to policing conflicts of interest.

## 2. *Transition Insiders*

Not everyone who works on a presidential transition team joins the administration when the President takes office on January 20. Many return to the private sector, armed with personal connections and inside information gained on the transition. Charles Jones quotes one transition aide focused on trade issues, who admitted that many trade lawyers join the transition team solely to make

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237. Trump Ethics Code, *supra* note 144.

238. See, e.g., Kirkland, *supra* note 15 (reporting that Peter Thiel may have been permitted to abstain from signing the ethics code entirely).

239. See generally Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (describing rent-seeking and various forms of corruption associated with lobbying).

240. See Obama Ethics Code, *supra* note 142; Trump Ethics Code *supra* note 144.

241. See Catherine Ho, *Lobbyists Are Still Involved in Trump Team, Despite the President-Elect’s Pledge to Remove Their Influence*, WASH. POST (Nov. 18, 2016, 10:04 PM EST), <https://www.washingtonpost.com/news/powerpost/wp/2016/11/18/lobbyists-remain-involved-in-trump-transition-despite-pledge-to-remove-their-influence-2> [https://perma.cc/TWT9-PUUX]. That being said, the difference between transitions and the executive branch is less stark when it comes to lobbying rules. Restrictions on executive-branch employment for former lobbyists are governed primarily by executive orders determined by the President and their staff, rather than by statute or OGE regulations. See, e.g., Exec. Order No. 13,770, 82 Fed. Reg. 9,333 (Feb. 3, 2017) (Trump ethics order); Exec. Order No. 13,490, 74 Fed. Reg. 4,673 (Jan. 26, 2009) (Obama ethics order). These orders go back to the Kennedy Administration. See JACOB R. STRAUS, CONG. RESEARCH SERV., R44974, ETHICS PLEDGES AND OTHER EXECUTIVE BRANCH APPOINTEE RESTRICTIONS SINCE 1993: HISTORICAL PERSPECTIVE, CURRENT PRACTICES, AND OPTIONS FOR CHANGE 6-7 (2017), <https://fas.org/sgp/crs/misc/R44974.pdf> [https://perma.cc/3WUL-6AJU].

connections and enhance their professional stature.<sup>242</sup> For this reason, the two most recent transition teams sought to prohibit members from using those assets to lobby in the first six months of the administration.<sup>243</sup> For the Trump-Pence Transition, the prohibition's success was mixed at best.<sup>244</sup>

But lobbyists are just the tip of the iceberg. Many transition-team members are exposed to the most intimate details of policy planning, plans that would likely be classified (or at least confidential) were they to be made within the halls of the White House. For example, agency review teams help develop the incoming administration's priorities for each agency, including potential rulemaking.<sup>245</sup> Team members' personal relationships with transition staffers who enter the administration are valuable not solely because they can provide access but also because they offer insight into what arguments and issues will appeal to key officials, how decisions will be made within the new administration, and in some cases what specific decisions are likely to be made.

Such inside information is valuable not only for lobbying but also in helping companies and other regulated entities plan their business strategies. For example, a volunteer who aids the transition team's technology policy team may know the views of key executive decision-makers on antitrust enforcement and how to avoid their scrutiny. They might know what areas appointees favor for innovation subsidies and how to frame a proposed initiative to appeal to that official.

The Obama-Biden and Trump-Pence Ethics Codes included provisions banning staffers from using "any non-public information, in any manner, for any private gain . . . at any time during or after" the transition.<sup>246</sup> But such rules function more as an honor code than an actual prohibition. Anecdotally, it is typical for transition aides who do not enter government to return to or take jobs at firms that have substantial regulatory interests of their own or advise on such issues. They are often on "temporary leave" from their private employers rather than fully separated; a return to the private sector after inauguration is the

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242. See JONES, *supra* note 3, at 127.

243. See Obama Ethics Code, *supra* note 142; Trump Ethics Code, *supra* note 144.

244. See Theodoric Meyer & Michael Stratford, *Trump Transition Staffers Headed to K Street Despite Lobbying Ban*, POLITICO (May 3, 2017, 5:15 AM EDT), <https://www.politico.com/story/2017/05/03/trump-lobbying-ban-transition-237850> [<https://perma.cc/9Y6V-V43A>].

245. See *Transition Guide*, *supra* note 3, at 149 (explaining that agency review reports should include "[e]ffective policies in the pipeline or already in place that can provide quick wins for the new administration" and "[t]op legal, regulatory and legislative issues requiring early leadership attention").

246. Obama Ethics Code, *supra* note 142; see also Trump Ethics Code, *supra* note 144 (including a nearly identical provision).

norm.<sup>247</sup> In the executive branch, employees with arrangements for prospective employment must recuse themselves from matters germane to that employer's interests, absent a waiver.<sup>248</sup> No law requires the same for transition-team members.

At the very least, such temporary arrangements entail substantial risk that staffers' outside loyalties will subconsciously influence their transition work. At worst, temporary transition staffers with low interest in or limited prospects for federal employment may seek out insider knowledge they can leverage in the private sector. While many transition staffers abide by the ethics codes they sign, these untested contracts are far less of a deterrent than the penalties on unethical behavior faced by federal officials.<sup>249</sup>

### 3. *Quid Pro Quo Staffing*

Transition teams' reliance on volunteers creates opportunities for private-sector organizations to curry favor with the incoming administration by "donating" staff. Companies that encourage their employees to join the transition and continue to pay their salaries and benefits are essentially able to end-run the \$5,000 contribution limit by providing a pool of skilled labor at no cost. Unlike the executive branch, transitions are not governed by the Anti-Deficiency Act's rule against voluntary service.

Such arrangements are far from hypothetical. By matching publicly reported information on the Trump-Pence Transition's staff with financial-disclosure forms for staffers who ultimately entered the administration,<sup>250</sup> it is possible to piece together a picture of which companies allowed or encouraged their employees to join the Trump-Pence Transition while retaining their private-sector

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247. See, e.g., *Press Release: Obama-Biden Transition Team Announces Agency Review Team Leads for Depts of Treasury, State, Defense*, AM. PRESIDENCY PROJECT (Nov. 12, 2008), <https://www.presidency.ucsb.edu/node/285178> [<https://perma.cc/85ES-EHWL>].

248. 5 C.F.R. § 2635.606 (2020) ("An employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of the person by whom he or she is employed or with whom he or she has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver . . .").

249. See 18 U.S.C. § 798 (2018).

250. For the financial-disclosure forms of Trump-Pence transition staffers, including the dates of their simultaneous outside employment, see *Trump Town: Trump for America, Inc.*, PROPUBLICA, <https://projects.propublica.org/trump-town/organizations/trump-for-america-inc> [<https://perma.cc/2TQY-4TZJ>].



positions.<sup>251</sup> Based on lists of transition staff maintained by law firm Steptoe & Johnson<sup>252</sup> and the Center for Responsive Politics,<sup>253</sup> a few patterns emerge.

Most obviously, private-sector lawyers are drastically overrepresented among reported transition employees. Of reported Trump-Pence Transition staffers, nine were simultaneously employed at Jones Day alone.<sup>254</sup> Several staffers also appear to have been affiliated with firms led by or associated with members of the Trump-Pence Transition's leadership team, including Founders Fund and Thiel Macro (Peter Thiel's companies), and the Boston Consulting Group<sup>255</sup> (home base for the transition's "Director of Agency Action").<sup>256</sup> This coziness is not limited to the Trump-Pence Transition: the Obama-Biden Transition attracted attention for its close ties to private-sector consulting firms,<sup>257</sup> and the 2000 Bush-Cheney Transition drew heavily on the ranks of the banking industry.<sup>258</sup>

The extent of these relationships alone, given that they do not require severance from outside employers as federal government jobs do, should raise eyebrows. The deeper question is what these firms get out of essentially donating

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251. The financial-disclosure forms required of incoming executive-branch appointees include their most recent employment and when it was terminated. Thus, it is possible to determine who retained private-sector jobs (whether formally on leave or not) during the transition period.

252. *Trump Administration Transition*, STEPTOE & JOHNSON (Dec. 20, 2016) [hereinafter Steptoe List], <https://www.steptoelaw.com/en/news-publications/trump-administration-transition.html> [<https://perma.cc/6F5L-N9MG>].

253. *Trump Administration*, CTR. FOR RESPONSIBLE POL. (Feb. 1, 2019) [hereinafter CRP List], <https://www.opensecrets.org/trump/political-appointees> [<https://perma.cc/BKB6-766M>].

254. This is somewhat unsurprising, given that Jones Day provided legal representation to the Trump campaign. See Robert Costa, *McGahn Joins Global Law Firm—and Remains Involved in Trump's Judicial Choices* (Mar. 3, 2019, 7:01 PM EST), [https://www.washingtonpost.com/politics/mcghahn-joins-global-law-firm--and-remains-involved-in-trumps-judicial-choices/2019/03/03/2220545e-3dec-11e9-85ad-779ef05fd9d8\\_story.html](https://www.washingtonpost.com/politics/mcghahn-joins-global-law-firm--and-remains-involved-in-trumps-judicial-choices/2019/03/03/2220545e-3dec-11e9-85ad-779ef05fd9d8_story.html) [<https://perma.cc/3YBG-6X29>].

255. See Steptoe List, *supra* note 252.

256. See Eamon Javers, *Who's Who on Trump's Policy Team*, CNBC (Nov. 15, 2016, 9:13 AM EST), <https://www.cnbc.com/2016/11/10/here-are-the-people-choosing-donald-trumps-policy-teams.html> [<https://perma.cc/U8X8-PL6E>].

257. See *Move over Goldman*, ECONOMIST (Jan. 13, 2009), <https://www.economist.com/business/2009/01/13/move-over-goldman> [<https://perma.cc/G7CF-HQ94>]. A member of the Obama-Biden Transition also confirmed that McKinsey was closely involved. Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 3, *supra* note 65.

258. See Rob Blackwell, *No Shortage of Bankers on Bush Transition Team*, AM. BANKER (Jan. 3, 2001, 2:00 AM), <https://www.americanbanker.com/news/no-shortage-of-bankers-on-bush-transition-team> [<https://perma.cc/P8M7-NJWM>].

their employees as free labor. At a minimum, they gain deep insight into the priorities, culture, and personalities of the incoming administration. In the words of a senior transition aide, firms offer to assist transitions because it offers “prestige, access, influence. There is a reason firms do it. [It gives them] insight into regulations, access to information, access to cabinet secretaries. It is unprecedented access.”<sup>259</sup> If their employees perform well, they may even land jobs in the new administration and provide their former employers preferential consideration or access once in office. And for firms that do contract work with the federal government, the chance to convert those connections into lucrative contracts no doubt looms large.<sup>260</sup>

According to a former federal government employee assigned to the Trump-Pence Transition, there were numerous transition aides working on agency landing teams who, as far as this employee knew, were employees of private consulting firms. As this employee put it,

Is it technically wrong? Maybe not. But [this work] does provide preferential visibility [into the agencies]. The consulting firms are tripping over themselves to get access, [and as far as I know] there isn’t a review to ensure the consultants who do [agency review] are not also currently, or prospectively, working on proposals for that same agency at their home consulting firm.<sup>261</sup>

Transition staffers who serve two masters—the transition and their outside employer—are at risk of allowing private interests to drive decisions that are of a deeply public nature. The fact that they may be drumming up business while shaping the next administration exemplifies the problems with relying on volunteers with outside employment to staff the transition. Without robust ethics rules, nothing prevents them from using their privileged positions for private gain.

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<sup>259</sup>. Interview with Clinton-Kaine Preelection Transition Aide, *supra* note 88.

<sup>260</sup>. See *cf.* Thornton McEnery, *BCG Might Want to Consult Someone About Its Developing Trump Problem*, DEALBREAKER (Jan. 14, 2019), <https://dealbreaker.com/2017/02/bcg-trump-problem> [<https://perma.cc/3HNQ-JGKX>] (“BCG takes in the most revenue by far from government contracts of the big three consulting firms.”); see also Interview with Obama-Biden Transition Aide 4, in New York, N.Y. (Oct. 4, 2019).

<sup>261</sup>. Interview with Former Federal Government Employee Assigned to the Trump-Pence Transition, *supra* note 93.

#### 4. *Transition Financing and Outside Contributions*

In addition, transitions rely on private donors to finance much of their operations. Although transition teams receive some public funding under the PTA, that amount has historically fallen short of transition teams' ultimate expenditures.<sup>262</sup> In 2008, the Obama-Biden Transition spent \$9.2 million, of which \$4 million was raised through private donations, while the Bush-Cheney transition in 2000 spent \$5 million of private donations and \$4 million in federal funding.<sup>263</sup> Most recently, the Trump-Pence Transition spent \$4.39 million in federal funding (of a total \$7 million available) and also raised an additional \$6.5 million in private donations; of that \$6.5 million, the Trump-Pence Transition spent \$4.7 million, for total expenditures of \$9.1 million through February 2017.<sup>264</sup>

Public filings show that the \$6.5 million in private donations included donations from incoming cabinet secretaries,<sup>265</sup> numerous trade associations and lobbying groups,<sup>266</sup> and large corporations.<sup>267</sup> The public filings also reveal the extent to which the spirit of the \$5,000 contribution limit is circumvented with donations on behalf of multiple members of the same family<sup>268</sup> and with contributions on behalf of both an individual and a corporate entity controlled by that

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262. Telephone Interview with Senior Bush-Cheney Transition Aide, *supra* note 162 (explaining that federal funding is not sufficient and that they warned the Obama-Biden Transition as much).

263. See Drew Harwell & Lisa Rein, *Who's Helping to Pay for President-Elect Trump's Transition Effort? You Are*, WASH. POST (Nov. 23, 2016, 11:27 AM EST), <https://www.washingtonpost.com/news/powerpost/wp/2016/11/23/elizabeth-warren-wants-to-know-how-donald-trump-is-using-taxpayer-funds-for-his-transition> [<https://perma.cc/E7W9-K7EC>].

264. GAO Ethics Report, *supra* note 139, at 24-27; see also Carrie Levine & Michael Beckel, *Billionaires & Corporations Helped Fund Donald Trump's Transition*, CTR. FOR PUB. INTEGRITY (Feb. 23, 2017), <https://publicintegrity.org/federal-politics/billionaires-and-corporations-helped-fund-donald-trumps-transition> [<https://perma.cc/EGD6-EU4A>] (providing additional financing information).

265. *Financial Report for the 2016 Presidential Transition Team*, TRUMP FOR AM., INC. 22 (Feb. 19, 2017) [hereinafter *Financial Report for Trump Transition*], [https://www.gsa.gov/cdnstatic/Trump\\_for\\_America\\_\\_Inc.\\_30\\_Day\\_report\\_20170217.pdf](https://www.gsa.gov/cdnstatic/Trump_for_America__Inc._30_Day_report_20170217.pdf) [<https://perma.cc/SG6Z-N93H>] (reporting a December 14, 2016 donation from Elisabeth DeVos, as well as nine other members of the DeVos family).

266. See, e.g., *id.* at 7 (November 4, 2016 donation from NRA Institute for Legislative Action); *id.* at 8 (November 9, 2016 donation from Financial Services Roundtable); *id.* at 24 (December 20, 2016 donation from Airlines for America).

267. See, e.g., *id.* at 9 (November 22, 2016 donation from PepsiCo); *id.* at 18 (December 8, 2016 donation from AT&T); *id.* at 24 (December 19, 2016 donation from Caremark Rx Inc.).

268. See, e.g., *id.* at 19 (December 8, 2016 maximum donations from five members of the Lindner family, owners of American Financial Group); *id.* at 54 (January 12, 2017 maximum donations

individual.<sup>269</sup> As of now, the goal of the Presidential Transition Act’s drafters to avoid the influence of private money on the presidential transition process appears unfulfilled.<sup>270</sup>

The thought of direct private financing of the White House would be antithetical to the norms of American government.<sup>271</sup> Yet that is – or nearly is – what private transition fundraising amounts to. Presidential transition teams are far closer to the White House than anything else in terms of the powers they exercise and the manner in which they are treated by interested counterparties.<sup>272</sup> Indeed, during the preelection period in 2016, the Trump-Pence Transition offered donors “an inside look on the work underway on planning for the transition” in exchange for a \$5,000 donation, formalizing the sort of quid pro quo that government ethics rules are designed to prevent.<sup>273</sup> During the transition, however, this behavior was perfectly legal, even if ethically suspect.

Private interests can also circumvent the donation limit with in-kind contributions or services provided at reduced rates. As the Obama-Biden Transition concluded, in-kind contributions including but not limited to “transportation,

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from six members of the Jacobs family, owners of the Delaware North company). For control of American Financial Group, see Steve Watkins, *American Financial Co-CEO, FC Cincinnati Owner Divests Another \$10 Million in Stock*, CINCINNATI BUS. COURIER (May 28, 2019), <https://www.bizjournals.com/cincinnati/news/2019/05/28/american-financial-co-ceo-fc-cincinnati-owner.html> [<https://perma.cc/D6SY-B49W>]; for control of Delaware North, see *Family Leadership*, DEL. NORTH, <https://www.delawarenorth.com/about/family-leadership> [<https://perma.cc/Q458-X8CW>].

269. See, e.g., *Financial Report for Trump Transition*, *supra* note 265, at 4 (August 25, 2016 donation from Nicholas Loeb of \$5,000, the maximum individual contribution); *id.* at 6 (October 21, 2016 donation from “The Nick Loeb Company” of \$5,000); *id.* at 23 (December 16, 2016 maximum donations from Warren Stephens, Harriet Stephens, and Stephens, Inc., a financial services firm of which Warren Stephens is CEO). For Stephens’s role as CEO, see *Warren A. Stephens*, STEPHENS, <https://www.stephens.com/private-equity/our-team/warren-a-stephens> [<https://perma.cc/GN8D-VY2P>].

270. See *supra* notes 107-109 and accompanying text. A President-elect could also bypass the \$5,000 contribution limit entirely by foregoing the funding and transition-support services provided by the GSA under Section 3 of the Presidential Transition Act. See 3 U.S.C. § 102 note § 6(c).

271. Cf. Renan, *supra* note 178, at 2215-21 (describing the norm against presidential self-dealing and norms to address financial conflicts of interest).

272. See *supra* Part I.

273. Anna Palmer, Jake Sherman & Daniel Lippman, *Scoop: Team Trump Gives Republicans a ‘Look Inside’ Transition for \$K Donation – Hackers Targeted Arizona Election System – Huma Calls It QUILTS – B’DAY: Warren Buffett*, POLITICO (Aug. 30, 2016, 7:25 AM EDT), <https://www.politico.com/tipsheets/playbook/2016/08/scoop-team-trump-gives-republicans-a-look-inside-transition-for-5k-donation-hackers-targeted-arizona-election-system-huma-calls-it-quits-bday-warren-buffett-216115> [<https://perma.cc/R5SE-XJVK>].

office space, furniture, [and] office equipment” are not capped at all.<sup>274</sup> Donors can thus finance transitions far in excess of the statutory limit by providing access to temporary homes for staffers, renting office space or other goods for free or at below-market rates, or otherwise providing things of value in noncash forms. The Trump-Pence Transition took this loophole even further, proposing to use privately raised money to pay rent on transition office space at the President-elect’s offices in Trump Tower.<sup>275</sup> Although it is unclear if this ever came to pass, it is illustrative of the extent to which transition law (or the lack thereof) leaves open the door to self-dealing in various forms.

### B. Constitutional Quandaries

Shortfalls in ethics and accountability are not the only problems caused by lawless transitions. As Part I showed, the reality of a change in presidential administration strains the “one President at a time” norm. The Constitution, however, contemplates the existence of one President, who has the sole ability to exercise the executive power. Presidential transitions challenge that constitutional allocation of power, and no law yet exists to meet those challenges.

#### 1. Foreign Policy—The Limits of the Logan Act

As Section I.A.4 discussed, the Constitution vests much or all of the foreign-relations power of the United States in the President.<sup>276</sup> A longstanding perspective backed by both judicial precedent and scholarly support is that the President is the “sole organ of the federal government in the field of international relations.”<sup>277</sup> An essential element of that power, especially in the context of treaty-making and negotiation with foreign powers, is the President’s ability to speak as the sole mouthpiece of American government and authoritatively express the

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274. Roberts, *supra* note 113, at 2.

275. See Email from Anonymous Trump-Pence Transition Staffer to Aimee Whiteman, Gen. Servs. Admin. (Nov. 11, 2016, 5:58:56 AM EST), <https://www.documentcloud.org/documents/4110106-GSA-Trump-Hotel-Correspondence.html#document/p2668/4398927> [https://perma.cc/89XX-M337].

276. See *supra* note 51 and accompanying text.

277. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936); see also *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (“[F]oreign policy [is] the province and responsibility of the Executive.” (citation omitted)); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529 (1999) (“[T]he Constitution is best read to vest the President with primary constitutional authority over the conduct of foreign affairs . . .”).

position of the nation.<sup>278</sup> As an agent in foreign affairs, the President is unique in their “characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, ‘[d]ecision, activity, secrecy, and dispatch.’”<sup>279</sup>

But that constitutional unity is called into question during the transition period. Foreign powers are keenly aware that the outgoing President’s authority is time-limited and their commitments and capacity for action correspondingly less potent.<sup>280</sup> The President-elect, despite an utter lack of formal constitutional authority, in many ways represents the primary agent of American foreign policy for the foreseeable future. In 2016, for example, the Russian government actively sought access to the Trump-Pence Transition team to address foreign policy issues including U.S. sanctions on Russia and Syria and to establish ongoing communications channels.<sup>281</sup> From his perch on the transition team, General Flynn worked directly with the Russian Ambassador to broker a de-escalation over American sanctions.<sup>282</sup> And although they were ultimately unsuccessful in stopping it entirely, in December 2016 the Trump-Pence Transition succeeded in convincing Egypt to postpone a U.N. resolution criticizing Israeli settlements in the West Bank.<sup>283</sup> History shows that when a President-elect speaks, the world listens.<sup>284</sup>

This sort of private making of foreign policy by transition teams is, in theory, proscribed by the Logan Act.<sup>285</sup> But the practical reality of the presidential transition process undercuts the efficacy of the Logan Act as a deterrent, to say nothing of its general desuetude. Transition teams have every right to reach out to foreign governments to establish initial rapport, foreign governments have every reason to try to talk shop with the President-elect and transition team (their soon-to-be negotiating partners), and outgoing administrations are loath to en-

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278. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (“Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not.”).

279. *Id.* (alteration in original) (citation omitted).

280. See Beermann & Marshall, *supra* note 12, at 1280-81; Combs, *supra* note 19, at 329-32.

281. See 1 ROBERT S. MUELLER, III, U.S. DEP’T JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 145-65, 168-73 (2019), <https://assets.documentcloud.org/documents/5991061/buzzfeed-mueller-report-foia.pdf> [https://perma.cc/SV2R-E3V4]; Statement of the Offense, *United States v. Flynn*, No. 1:17-cr-00232-RC, at 4 (D.D.C. Dec. 1, 2017) [hereinafter Flynn Statement].

282. Flynn Statement, *supra* note 281, at 2-3.

283. See MUELLER, III, *supra* note 281, at 167-68.

284. See *supra* Section I.A.4.

285. See *supra* notes 126-131 and accompanying text.

ter the political fracas that would result from criticizing the incoming administration for stepping on its toes. According to one senior transition aide involved in foreign policy, “[u]sually you’ve had at least one meeting with foreigners prior to inauguration. Traditionally, you meet with Mexico. There’s nothing wrong with courtesy calls.”<sup>286</sup> But given the incentives for foreign governments, the constitutional grey area surrounding transition foreign policy is practically inevitable.

## 2. Agency Control and Midnight Regulations

The outgoing administration’s control over administrative rulemaking is also at its nadir during the presidential transition period. In the 1980s and 1990s, the United States developed something of an informal tradition of “midnight regulations” – legislative rules promulgated in the teeth of the impending arrival of a new (and often ideologically divergent) administration.<sup>287</sup> In response, new administrations would put the brakes on any unpublished regulations and delay the dates on which recently published rules take effect.<sup>288</sup> More recently, the outgoing Bush II Administration publicly foreswore midnight rulemaking in order to avoid burdening the Obama Administration with unnecessary rollbacks.<sup>289</sup> Such an approach aligns well with arguments in the academic literature that midnight regulations unduly impede the new President.<sup>290</sup> The conventional view is that such rulemaking flies in the face of the democratic will and unjustifiably burdens the incoming President.

But just because midnight rulemaking is politically problematic does not mean the outgoing President lacks the constitutional authority to engage in it.

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<sup>286</sup>. Telephone Interview with Senior Obama-Biden and Clinton-Gore Transition Aide 1, *supra* note 34.

<sup>287</sup>. See O’Connell, *supra* note 19, at 472-76, 498.

<sup>288</sup>. See Beermann, *supra* note 19, at 949; O’Connell, *supra* note 19, at 472-74, 498.

<sup>289</sup>. See Memorandum from Joshua B. Bolten, Chief of Staff, White House, to the Heads of Exec. Dep’ts & Agencies and the Adm’r of the Office of Info. & Regulatory Affairs (May 9, 2008), <http://graphics8.nytimes.com/packages/pdf/washington/COS%20Memo%205.9.08.pdf> [<https://perma.cc/8ZGP-4JGX>]. That said, this moratorium achieved mixed results and certainly did not entirely prevent midnight rulemaking on the eve of President Obama’s inauguration. See O’Connell, *supra* note 19, at 472.

<sup>290</sup>. See Beermann, *supra* note 19, at 951-52 (discussing the burdens, delays, and challenges midnight rules impose on incoming administrations); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 564-65 (2003) (“[T]hese decisions might strike some as nosethumbing by the outgoing administration at the public’s choice of a new President, especially when the new President is of a different political party.”).

One administration's midnight rulemaking is another's last-minute response to urgent concerns of public import.<sup>291</sup> Much of the midnight-rulemaking literature has the *legal* concern backward: political pressure on career agency officials to slow-walk late-term regulations is a diminution of the President's constitutional powers. These officials will have their chance to serve the new President after inauguration. Until then, they remain constitutionally accountable to the sitting President.

During the twilight period of the outgoing administration, agency officials are keenly aware of the reality that if they delay the promulgation of would-be midnight regulations, their dallying will likely go unpunished. And if they complete them, there is a good chance their work will be scrapped. Moreover, agency officials may be suspicious of the motives driving late-term presidential action. Such motives can range from a desire to burden the next administration with the work of administrative reversals to an intent to embarrass them with politically charged rulemaking processes that must be consummated or unwound at some reputational cost.<sup>292</sup>

Agency officials report, by statute, to politically appointed agency heads and other principal officers. These political appointees are constitutionally accountable to the President, and they in turn rely on the cooperation of inferior officers to fulfill their duties.<sup>293</sup> The nebulous nature of presidential transition teams' authority strains this arrangement and its constitutional underpinnings for three reasons.

First, agency officials are understandably hesitant to devote substantial time and effort to regulatory processes that are likely to be reversed or met with hostility from the new administration. Jason Loring and Liam Roth find that the Clinton Administration repealed or amended fifty-seven percent of the Bush I Administration's midnight regulations in their sample.<sup>294</sup> Together with the moratoria on finalizing incomplete rulemaking processes that are now common for new administrations, it is clear that incoming Presidents typically oppose the midnight regulations they face upon entering office.<sup>295</sup>

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291. See Beermann & Marshall, *supra* note 12, at 1287-88.

292. See Beermann, *supra* note 19, at 951-52.

293. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483-84 (2010); *Myers v. United States*, 272 U.S. 52, 132 (1926).

294. Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1456-57 (2005).

295. See O'Connell, *supra* note 19, at 471-72.



Knowing they will soon serve different masters, agency officials may be disinclined to put their full effort behind rulemaking openly opposed by the transition team.<sup>296</sup> Indeed, according to one Obama-Biden Transition aide, the atmosphere at the agencies surrounding Obama's election was "euphoric."<sup>297</sup> Although no set of interactions can be generalized, this aide reported that agency officials were highly cooperative and eager to get started on the Obama agenda.<sup>298</sup> While career officials are of course entitled to their political views, such excitement is a problem if it pares back the outgoing President's ability to wield their constitutionally vested powers.

Second, agency officials highly involved in unwanted rulemaking may put their careers at risk by working against the stated wishes of the President-elect and transition team. For example, the Trump-Pence Transition's landing team at the Environmental Protection Agency requested the names of employees who had worked on climate change or attended certain climate-focused events.<sup>299</sup> The implication was clear that these officials would be singled out and possibly punished for their work once Trump entered office.<sup>300</sup>

And they were. Within six months of President Trump's inauguration, an official at the Department of Interior blew the whistle on reassignments of key agency personnel by the Trump Administration that he alleged were retaliation for their involvement in climate-change work.<sup>301</sup> Officials whose responsibilities

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296. This is not to say this dynamic applies in all cases. A former government employee involved in the Trump-Pence transition described career officials at agencies such as the Environmental Protection Agency (EPA) as "upset about the agency landing team members coming to EPA. They were angry about the selection and level of expertise of the agency landing team members and the potential direction the EPA was going to head." Interview with Former Government Employee Assigned to the Trump-Pence Transition, *supra* note 93. But that disdain for the incoming administration may be dampened by the threat of retaliation, as discussed below.

297. Telephone Interview with Obama-Biden Transition Aide 2, *supra* note 42.

298. *Id.*

299. See Steven Mufson & Juliet Eilperin, *Trump Transition Team for Energy Department Seeks Names of Employees Involved in Climate Meetings*, WASH. POST (Dec. 9, 2016, 4:07 PM EST), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/09/trump-transition-team-for-energy-department-seeks-names-of-employees-involved-in-climate-meetings> [<https://perma.cc/SZ6M-KFU5>].

300. See *id.* (quoting historian Paul Sabin describing the questionnaire as treating climate work as "contaminating or disqualifying" and Senator Ed Markey as calling any retaliation a "political witch hunt").

301. See Joel Clement, Opinion, *I'm a Scientist. I'm Blowing the Whistle on the Trump Administration*, WASH. POST (July 19, 2017, 4:10 PM EDT), <https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate>

deal with climate change have also been discouraged from communicating about their work and have been prevented from giving public talks on climate-related issues.<sup>302</sup> With this sword of Damocles hanging over them, one can hardly fault officials for trying to avoid climate-related rulemaking during the transition period.

The Trump-Pence Transition set a new precedent in this respect. While removal of political appointees has long been a feature of presidential transitions, the Trump Administration has extended political personnel decisions to career officials, as well. The sword no longer hangs over the heads of a few; it now swings across the entire range of officials working on contested issues. The risk of retaliation can divide agency officials' loyalties and deter them from cooperating with lame-duck Presidents. This dynamic divests the sitting President of a measure of their power prior to exiting office.

Third, there are nontrivial concerns about the democratic legitimacy of midnight regulations. Agency officials may wish to avoid working against the wishes of the incoming President, even if ordered to do so by the sitting President. Midnight regulations have been criticized because they are made when the President's political accountability is at its lowest ebb and because they often run counter to the political preferences expressed in the most recent election.<sup>303</sup> To the extent these concerns weigh on agency officials, they may hesitate to engage in rulemaking contrary to the stated wishes of the President-elect. But the Constitution requires that they follow the direction of the outgoing President until the next one is inaugurated. Democratic legitimacy concerns do not change that.

### 3. *Transition Emoluments*

Finally, it is worth briefly noting that the Constitution's Emoluments Clauses do not apply to the President-elect or members of the transition team. To the

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-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83\_story.html [https://perma.cc/B4WZ-JK7W].

302. See Lisa Friedman, *E.P.A. Cancels Talk on Climate Change by Agency Scientists*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/climate/epa-scientists.html> [https://perma.cc/JAC3-HHHV]; Valerie Volcovici & P.J. Huffstutter, *Trump Administration Seeks to Muzzle U.S. Agency Employees*, REUTERS (Jan. 24, 2017, 10:27 AM), <https://www.reuters.com/article/us-usa-trump-epa-idUSKBN15822X> [https://perma.cc/D4UW-359R].

303. See Beermann, *supra* note 19, at 951-52; Christopher Carlberg, *Early to Bed for Federal Regulations: A New Attempt to Avoid "Midnight Regulations" and Its Effect on Political Accountability*, 77 GEO. WASH. L. REV. 992, 992-93 (2009); Mendelson, *supra* note 290, at 566-67. Conversely, it is at least arguable that midnight regulations bear some salutatory characteristics for these same reasons. To the extent one believes special interests stand in the way of prosocial regulations, lame-duck Presidents are well-positioned to advance the public good. See Beermann, *supra* note 19, at 952.

extent foreign powers (or states) attempt to bribe them, nothing in the Constitution or applicable ethics law prevents it. This presents a profound threat to the sanctity of the presidency from any President-elect inclined toward corruption.

In summary, the lack of statutory law covering the ethics and governance of presidential transitions poses major problems for the federal government. And the lack of applicable law when it comes to the inevitable competition for authority between the President and President-elect puts stress on our constitutional order. The Trump-Pence Transition revealed that transition norms are insufficient to hold these challenges at bay. Whether due to unscrupulousness or inexperience, many of the worst transition risks appear to have been realized during the 2016 presidential transition.

#### IV. LEGAL SOLUTIONS TO THE LAWLESS TRANSITION PROBLEM

At present, our statutory framework for presidential transitions is woefully inadequate. It hardly contemplates the problems laid out in Part III, let alone offers a means to address them. And not every problem can be addressed by statute. It would surely present a First Amendment issue to require by law that presidential transition teams refrain from speaking against the outgoing administration's regulatory policies. After all, such stances may have been what won them the election in the first place.

Addressing the gap in presidential transition law will require, at minimum, an extrastatutory approach to cover the full spectrum of present risks. But a large number of possible solutions are within Congress's grasp. In this Part, I present potential statutory, voluntary, and constitutional approaches to discipline transition teams and impose rules that would foster good governance and respect for our legal and constitutional order.

##### A. *Statutory Solutions*

As in many cases, Congress is best positioned to take on the problem of lawless transitions, especially ethical and conflict-of-interest issues.

##### 1. *Full Funding and Banning Private Financing*

At a minimum, Congress should address the clear gap between extant transition funding and expenses by fully funding postelection presidential transitions. According to former aides deeply involved in transition budgeting, current

federal appropriations are not enough.<sup>304</sup> It is well within the power of Congress to set aside appropriate sufficient funding in presidential-election years, based on the full expenses of the previous presidential transition. Of course, previous transition teams have relied on substantial volunteer workforces. While employees on leave from the private sector should be permitted to serve on transition teams (subject to proper recusals for conflicts), reliance on outside compensation as a workaround for limited transition funding should be eliminated. Thus, accurate estimation of transition funding requirements must account for increased payroll and benefit costs if transitions cannot rely on outside compensation for staff.

Even still, the requisite funding is a drop in the proverbial bucket given the stakes of setting up a functional, prepared, and ethically sound presidential administration. Recent presidential transitions have spent around \$10 million, after accounting for private donations.<sup>305</sup> Setting aside at most \$20-30 million dollars, making it available in tranches as the transition team spends the funding already available to it, and requiring that any excess funds be returned to the GSA is well within the federal government's means.

This increase in public funding should be paired with a corresponding ban on private donations. In 1988, Congress amended the PTA to require disclosure of financial contributions and transition personnel, especially volunteers with outside income, to mitigate the risk of conflicts and inappropriate influence.<sup>306</sup> Experience has proven these concerns justified but the solution insufficient. Arguments in favor of reducing the role of large private donations in politics – especially campaigns – are legion.<sup>307</sup> As Robert Yablon summarizes, advocates against big money in politics argue that it “undermines political equality, distorts democracy, diminishes electoral integrity, breeds corruption, discourages broad public participation, [and] coarsens political discourse.”<sup>308</sup> The same arguments apply to presidential transitions but are magnified because there is no risk that

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304. Interview with Clinton-Kaine Preelection Transition Aide, *supra* note 88; Telephone Interview with Senior Bush-Cheney Transition Aide, *supra* note 162.

305. See *supra* notes 263-264 and accompanying text.

306. Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 5, 102 Stat. 985, 986 (1988) (codified at 3 U.S.C. § 102 note (2018)); see also S. COMM. ON GOVERNMENTAL AFFAIRS, PRESIDENTIAL TRANSITIONS EFFECTIVENESS ACT OF 1988, S. REP. NO. 100-317, at 10-12 (1988).

307. See generally RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015).

308. Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 194 (2017) (footnotes omitted).

the President-elect and their team will lose the election. And unlike campaigns, where the two general-election campaigns spent about \$1.5 billion together,<sup>309</sup> the cost of publicly financing transitions is comparatively minimal. Opponents cannot rely on cost to oppose a \$20-30 million investment in the functioning of our government.

Like campaign finance, however, a ban on private donations may run up against the Roberts Court's expansive First Amendment jurisprudence.<sup>310</sup> Although the Court has recently been hostile to such moves, a full prohibition on private donations to presidential transitions has a few virtues that may yet save it. First, unlike the statutory provision at issue in *Citizens United*, a full ban would not target any type of disfavored entity. The Court in *Citizens United* evidenced particular discomfort with "[s]peech restrictions based on the identity of the speaker."<sup>311</sup> A total prohibition avoids this problem.

Second, a presidential transition is not itself a democratic process. Unlike an election, where "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus" is at issue,<sup>312</sup> by the time the transition arrives, the consensus has already been reached. Third, transitions might be found to fall into the narrow class of "governmental functions that cannot operate without some restrictions on particular kinds of speech," like public education, the corrections system, and the military.<sup>313</sup> Particularly given the Court's earlier recognition that "large contributions are given to secure a political quid pro quo from current and potential office holders, [undermining] the integrity of our system of representative democracy," this rule would have some chance of withstanding First Amendment scrutiny.<sup>314</sup>

This is not to say such a restriction would certainly, or even likely, survive. It is only to suggest that, given the compelling policy reasons for banning private transition financing and the compelling government interest in avoiding corruption, such a rule (hopefully) has at least a fighting chance.

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309. See Bill Allison et al., *Tracking the 2016 Presidential Money Race*, BLOOMBERG (Dec. 9, 2016), <https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising> [<https://perma.cc/84XS-N789>].

310. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734-36 (2011); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (referring to a prohibition on "corporate independent expenditures" in election campaigns as "a ban on speech"); Jedediah Purdy, *Beyond the Boss's Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018).

311. 558 U.S. at 340.

312. *Id.* at 339.

313. *Id.* at 341.

314. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); see also *Ariz. Free Enter.*, 564 U.S. at 749 (recognizing anticorruption as a legitimate justification for limiting political contributions).

2. *Extension of Federal Ethics Rules to Transition Staffers*

Congress should also apply certain federal ethics rules, or analogous ones, to transition staffers. At a minimum, rules analogous to the following provisions should be applied to transition-team members:

- 18 U.S.C. § 201(c) (2018) (prohibiting bribery of public officials);
- 18 U.S.C. § 208 (2018) and 5 C.F.R. § 2635.402 (2020) (prohibiting participation in decisions where employees have a financial interest);
- 18 U.S.C. § 219 (2018) (prohibiting participation of foreign agents);
- 5 C.F.R. § 2635.101 (2020) (outlining general principles of ethics and public trust);
- 5 C.F.R. § 2635.202 (2020) (restricting solicitation and acceptance of gifts);
- 5 C.F.R. § 2635.604 (2020) (requiring recusal from matters affecting the interests of prospective employers);
- 5 C.F.R. § 2635.702 (2020) (prohibiting use of office for private gain); and
- 5 C.F.R. § 2635.703 (2020) (prohibiting use of nonpublic information for private gain).

And while provisions requiring full cessation of outside employment, like 18 U.S.C. § 209 and 5 C.F.R. § 2635.802, or divestment, like 5 C.F.R. § 2634, to resolve conflicts may not be feasible during the short two-and-a-half month transition period, aides should be required to go on temporary leave from their outside employers and stop receiving a salary while working on the transition team. Appropriate recusals should then be instituted to address conflicts of interest arising from outside employment relationships. While many of the existing versions of these statutory provisions impose criminal sanctions, the uncertainties inherent in short-term transition staffing may make civil penalties a more appropriate deterrent. Finally, Congress could recreate by statute a version of the Emoluments Clauses applicable to Presidents-elect and transition team aides, along with appropriate sanctions.

The recently passed Presidential Transition Enhancement Act of 2019 (PTEA) accomplishes some of this. It requires transition teams to submit an ethics plan as part of their memorandum of understanding with the GSA, including how the transition team will address the role of registered lobbyists and foreign agents, prohibit transition officials from participating in matters in which they have a financial interest, and avoid the use of nonpublic information for private gain.<sup>315</sup> But it does not impose mandatory sanctions for violations. The PTEA

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315. Transition Enhancement Act of 2019, Pub. L. No. 116-121, 134 Stat. 138, 140-42 (2020) (codified at 3 U.S.C.A. § 102 note (2020)).

merely requires that transition teams provide a “description of how the transition team will enforce the Code of Ethical Conduct, including the names of the members of the transition team responsible for enforcement, oversight, and compliance.”<sup>316</sup> As the experience of the Trump-Pence Transition demonstrates, voluntary compliance is not enough.

### 3. *Transition Inspector Generals*

Another option to enhance transition oversight is to create transition “Inspector Generals” empowered to monitor and report on the behavior of the transition team, just as Inspector Generals (IGs) do for executive agencies.<sup>317</sup> The Inspector General Act of 1978<sup>318</sup> creates Offices of the Inspector General embedded within various departments, agencies, and other “establishments” to audit the operations and effectiveness of government programs, report any issues they observe to the head of the agency and/or Congress, and propose solutions to these issues.<sup>319</sup> Pursuant to this mandate, IGs are empowered to requisition documents and information from the establishment under their supervision; subpoena production of documents, information, and other tangible things; and, subject to authorization by the Attorney General, make arrests.<sup>320</sup> They are the federal government’s internal “watchdogs.”<sup>321</sup>

Congress could create an Inspector General for the transition team as a condition of PTA support. Like executive-branch IGs, the transition IG would be empowered to audit transition operations (for instance, for adherence to conflict-of-interest rules), investigate specific allegations of wrongdoing, and report to Congress on the transition team’s performance of its duties. As a standalone reform, a transition IG would at least force some accountability and transparency on transitions through public reporting. Though timing might make it difficult for them to police violations during the transition they audit, enabling them to gather information, report these violations after the fact, and suggest ways to prevent them in the future would serve a valuable public accountability function. Establishing a transition IG would also help create an institutional actor with a

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<sup>316</sup> *Id.* at 140.

<sup>317</sup> Thanks to Harold Koh for suggesting this.

<sup>318</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. (2018)).

<sup>319</sup> *Id.* § 2; *see also id.* § 4.

<sup>320</sup> *Id.* § 6.

<sup>321</sup> *See* CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 2 (2020).

mandate to explore transition improvements after the new administration takes office (at which point interest in transitions tends to wane).<sup>322</sup>

#### 4. *Transition Aides as Special Government Employees*

As discussed in Part I, presidential transitions bear many similarities to temporary Special Government Employees.<sup>323</sup> Another statutory option to make executive-branch ethics rules applicable to transition aides would be to make them SGEs. Congress could amend the Presidential Transition Act to create a “Presidential Transition Agency” within the GSA, headed by the President-elect after Election Day. The President-elect would then be empowered to hire transition aides as SGEs, who would be federal employees and subject to applicable SGE restrictions (or some modified version of them).<sup>324</sup>

This option has the advantage of incorporating existing executive-branch law and practice, sweeping transitions into existing federal infrastructure rather than creating an entirely new legal edifice. And it would simplify some of the existing requirements of the Presidential Transition Act by more closely integrating the transition team and GSA.

But it is not without objections. Most importantly, such an arrangement could create an Appointments Clause problem if the President-elect, in their role as head of the Presidential Transition Agency, is considered an Officer of the United States.<sup>325</sup> In that case, the Constitution would require appointment by the President or a department head, who arguably cannot be required by statute to appoint a particular individual. Given the lack of *formal* authority held by the President-elect, however, they are unlikely to be deemed an officer.<sup>326</sup> As a result, the GSA Administrator can be statutorily required to appoint only a person with the requisite qualifications: an “apparent successful candidate” under the Presidential Transition Act.<sup>327</sup>

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322. See *infra* Section IV.D.

323. See *supra* Part I.

324. Critically, though, this agency should *not* be subject to the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. §§ 1-16 (2018)). This agency would not advise the President and should not be subject to FACA’s requirements of open meetings and publication of minutes and other materials. See 5 U.S.C. app. § 10(a)-(c) (2018).

325. U.S. CONST. art. II, § 2, cl. 2.

326. See *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2063 (2018); *Edmond v. United States*, 520 U.S. 651, 666 (1997).

327. Presidential Transition Act of 1963, Pub. L. No. 88-277, § 3(c), 78 Stat. 153 (1964) (codified at 3 U.S.C. § 102 note (2018)).



The arrangement also raises the question of whether a Presidential Transition Agency housed within the executive branch would make the President-elect and their staff accountable to the President. While in some attenuated sense the answer is yes (all executive-branch employees ultimately work for the President), this problem would only arise if the President ordered the GSA Administrator to take certain actions to change the course of the transition team. That possibility is a remote one, given the interests of the President in an orderly transition; the President's constitutional duties to ensure a smooth transfer of power under the Take Care, Term, and Oath Clauses;<sup>328</sup> and the political backlash the President would face for such interference. At the very least, there is no obviously fatal constitutional flaw in such a course.

##### 5. *Mandatory Record-Keeping*

Finally, Congress should impose on presidential transition teams record-keeping requirements analogous to those of the PRA. It should require preservation and release of transition records after a designated period of years but deny the right to withhold predecisional, deliberative documents.<sup>329</sup> Like the imposition of ethics rules, this requirement would be imposed as a condition on receipt of public funds and support. Presidential transitions represent critical junctures in our nation's history. They determine who will be nominated to consequential cabinet posts, the early trajectory and policy choices of a new administration, and the priorities that may define four years of our country's path.

The same rationales for preserving presidential records apply to transitions.<sup>330</sup> Without mandatory record-keeping, future generations are left with a seventy-five-day gap in their historical understanding of a presidency. The gears of the policy and political process begin to turn immediately after Election Day, but historians and future citizens are presently barred from seeing the early background of those decisions. The PRA was passed after Watergate to ensure that those documents are preserved and eventually see the light of day.<sup>331</sup> Presidential transition teams, given the purview of their work and composition of their staff, should be held to the same standards.

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328. See Beermann & Marshall, *supra* note 12, at 1271-80.

329. See 44 U.S.C. § 2204 (2018); *supra* Section I.B.4. The PRA allows the President to restrict access to certain sensitive records for up to twelve years and requires other records to be released within five years.

330. See 44 U.S.C. § 2204.

331. See Carl Bretscher, *Presidential Records Act: The President and Judicial Review Under the Records Acts*, 60 GEO. WASH. L. REV. 1477, 1478 (1992).

*B. Candidate Pledges*

Congress, however, lacks the powers to implement rules that address all of the problems and principles discussed in Parts I through III. In particular, Congress cannot condition receipt of transition funds and support on candidates' commitments to avoid publicly clashing with the outgoing administration on critical policy decisions during the transition period. Such a law would be unconstitutional because it would condition the receipt of government benefits on the recipients' waiver of a constitutional right (here, free speech).<sup>332</sup>

One alternative to circumvent this limit on Congress's authority is for candidates to sign pledges to follow these policies. With the cooperation of the two major parties, it might even be possible to condition these pledges on certain forms of party support (such as speaking slots at the party conventions). These pledges would not be zero-sum: because the requirements attached to them would take effect only after the election, they pose no risk of asymmetric advantage to a nonsigner over a signer. As such, one party might be willing to sign on in the absence of the other's support, overcoming the first-mover problem that has long plagued extralegal solutions to political problems.

Moreover, voluntary transition pledges might offer candidates an opportunity to differentiate themselves through their commitments. As has long been the case with financial contributions, the electoral benefits of anticorruption pledges and the consequences for those who break their promises or for opponents who do not follow suit make a voluntary approach viable.<sup>333</sup> On a limited basis, this approach has even worked across party lines.<sup>334</sup> At the very least, there is precedent to suggest that a pledge-based approach to transition reform could work.

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332. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.").

333. See Yablon, *supra* note 308, at 216-17.

334. See, e.g., Dan Eggen, *Scott Brown, Elizabeth Warren Pledge to Curb Outside Campaign Spending*, WASH. POST (Jan. 23, 2012), [https://www.washingtonpost.com/politics/brown-warren-pledge-to-curb-outside-campaign-spending/2012/01/23/gIQAi4jbLQ\\_story.html](https://www.washingtonpost.com/politics/brown-warren-pledge-to-curb-outside-campaign-spending/2012/01/23/gIQAi4jbLQ_story.html) [https://perma.cc/4T73-Y3JN].

C. *Constitutional Solutions: The Take Care Clause and Oath of Office*

Finally, there is at least a colorable argument that the Constitution's Oath Clause and Take Care Clause can be read together to apply retrospectively to actions taken during the transition period. On this view, these clauses proscribe failures regarding ethics, loyalty, emoluments, or otherwise that occur during the transition period.

The argument proceeds in four steps. First, the Oath of Office should be read to incorporate by reference the Take Care Clause. That is, the duty to "execute the office of President of the United States," and "preserve, protect and defend the Constitution of the United States"<sup>335</sup> necessarily includes an obligation to "take Care that the Laws be faithfully executed."<sup>336</sup> The latter is, constitutionally, a component of the Office of the President.

Second, the "take care" obligation may be read to impose on the President a generalized obligation to support the rule of law in good faith and to exercise care over the American legal order as a whole.<sup>337</sup> By "rule of law," I mean a thick understanding of this concept that entails not just fidelity to enacted law but also a commitment to processes and values that promote the "quality" of the rule of law.<sup>338</sup>

As Jack Goldsmith and John Manning argue, if fidelity to legal text were all that faithfulness required, an alternative phrasing like "faithfully observed" would better capture that objective.<sup>339</sup> Read together with the Oath Clause,

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335. U.S. CONST. art. II, § 1, cl. 8.

336. U.S. CONST. art. II, § 3.

337. Andrew Kent, Ethan Lieb, and Jed Shugerman argue that the Oath and Take Care Clauses, together, impose a "fiduciary" duty on the President "[to] act for reasons associated primarily with the public interest rather than his self-interest . . . [and] act diligently and in good faith, taking affirmative steps to pursue what is in the best interest of his national constituency. Whereas the prohibitions on self-dealing sound in proscription, the command of diligence, care, and good faith contain an affirmative, prescriptive component." Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2179 (2019).

338. Such values may include transparency, equality of application, stability, and clarity, among others. Still, the question of which values are essential—or most central—is a subject of longstanding debate. See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Even thicker conceptions emphasize not only procedural values but also substantive moral values like justice and equality. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11-12 (1985); JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971).

339. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1857-58 (2016).

which requires “faithfully execut[ing]”<sup>340</sup> the office of the President, they argue that the Take Care Clause may imply a “general obligation of good faith, as measured by the norms and expectations that governed the proper exercise of executive power at the time.”<sup>341</sup> On this view, the choice of the word “executed” in this context calls on the President to exercise honest judgment and good faith in the fulfillment of their constitutional duty.

I suggest that the choice to impose a duty to “take care” rather than merely to “faithfully execute the laws” connotes an obligation not just to execute the law in good faith but to preserve the broader system of governance and values the law serves. The text affirms that the President is more than just Congress’s agent—judgment and discretion are required.<sup>342</sup> Dr. Johnson’s Dictionary—commonly used to plumb the meaning of the Framers’ phrasing<sup>343</sup>—defines “care,” variously, as “[s]olicitude,” “[c]aution,” “[r]egard”; “charge”; and “heed in order to protection and preservation.”<sup>344</sup> All of these meanings imply a duty that extends beyond mere execution. They suggest an obligation to take care of the laws themselves.<sup>345</sup>

The addition of this duty suggests more than just enforcement discretion.<sup>346</sup> Otherwise, the “take care” language would be surplusage. A duty simply to faithfully execute the laws would encompass the same meaning, if faithful execution itself is more than faithful observance. On this view, the Take Care Clause pre-

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340. U.S. CONST. art. II, § 1, cl. 8.

341. Goldsmith & Manning, *supra* note 339, at 1858; see also Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 698 (2014) (“[E]xecuting laws ‘faithfully’ could be different from executing them strictly.”).

342. See Price, *supra* note 341, at 696 (“While the congressional scheme dictates that the President must execute the laws that Congress enacts, it does not require that this function be performed robotically.”).

343. See, e.g., Goldsmith & Manning, *supra* note 339, at 1857.

344. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 333-34 (London, J.F. & C. Rivington et al. 6th ed. 1785) (emphasis added).

345. Cf. Beermann & Marshall, *supra* note 12, at 1277-80 (arguing (1) that the Take Care Clause imposes an obligation on the outgoing President during the transition to ensure their successor is equipped to take office and execute the Office of the President, and (2) that Presidents are stewards of the functioning of our legal order rather than just the laws themselves).

346. This conception differs from Kent, Lieb, and Shugerman’s “affirmative obligation of diligence,” which requires that the President “be motivated by the right kinds of reasons” and “ensure (‘take Care’) that anyone under his command in the business of executing the law is doing so only in the best interests of his national constituency.” Kent et al., *supra* note 337, at 2190-91. In my view, the Take Care duty implies more than proper motivation and solicitude for the good of the nation. It includes in that conception of best interest a metaduty to defend our legal order and the rule of law it upholds.

scribes a duty of care that applies to the underlying obligation of faithful execution. Together, these phrases imply a broader rule-of-law obligation that makes the President a steward of our nation's entire legal order, just as the Oath Clause does for the Constitution. That is, it extends the Oath's preservationist logic beyond the Constitution's structural framework.

Third, an oath – including the President's Oath of Office – may be defective and void *ab initio*. As Richard Re argues, the President's oath may be “morally defective” if the process by which they arrived on the podium to take it was undemocratic or if they do not intend to actually follow it.<sup>347</sup> Making a promise or taking an oath does not cleanse immorality or ill intent.<sup>348</sup> Indeed, the moral content of a promise depends critically on the intent and moral position of the promisor. If Presidents-elect take the oath in a morally compromised position which – due to ill intent or inability – will prevent them from fulfilling their constitutional duties, the oath is morally defective and thus constitutionally suspect, if the Oath Clause is read to have any real purpose. Presidents-elect whose malintent will make their oath defective would thus be in derogation of their constitutional duty from the moment they take office and recite an oath they cannot keep.

Fourth, actions taken by Presidents-elect during the transition period that put them in a morally compromised position, lack good faith, and undermine the rule of law and constitutional order would thus render their oath defective and their assumption of presidential power constitutionally dubious. Unlike candidates before the election, Presidents-elect *know* they will soon take the Oath of Office. They know with absolute certainty they will soon be bound by the Take Care Clause, and whatever obligations they ascribe to it. Moreover, their moral improprieties and anticonstitutional actions (such as accepting foreign emoluments) cannot be cleansed by the democratic process. Actions taken during the transition period occur after the election, meaning voters have no opportunity to approve questionable actions. Malfeasance during the transition period bears directly on the content of the Oath.

Thus, actions that compromise an incoming President's loyalty to the American electorate through corruption or actions that put the President's personal interests ahead of the nation's in dealing with a foreign power call into question the validity of a new President's oath.<sup>349</sup> If the President, by their own doing, is incapable of taking care that the laws be faithfully executed, their oath is defective and their constitutional duty abrogated at the moment they take office. To

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347. See Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 313-14 (2016).

348. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 173-74 (1986).

349. Cf. MUELLER, *supra* note 281, at 145-73 (detailing Trump-Pence Transition team members' interactions with Russian officials).

the extent the President-elect's agents on a transition team undertake such actions with the knowledge and consent of the President-elect, this constitutional argument may apply, as well.

This argument requires a bit of creative constitutional interpretation, and I by no means intend to present it as an ironclad means to constitutionalize elements of transition reform. Legislative action remains a superior option. Rather, my aim is to suggest that some protections arguably already exist against the most egregious forms of transition malfeasance. Whether this argument would be recognized and approved by courts is another matter.

Moreover, what parties could bring suit under this theory is a nebulous question. One option is that Congress could bring suit in the wake of a presidential veto on the grounds that the President's derogation of the Oath rendered the President's veto unconstitutional. Unfortunately, recent precedent has cut back the scope of congressional standing to sue.<sup>350</sup> And the Court might deem such a suit a nonjusticiable political question anyway because it involves passing on the President's fitness for office.<sup>351</sup>

This argument, if accepted, also brings with it additional constitutional questions that bear directly on the conduct of the transition. If Presidents-elect are bound by derivative Oath of Office and Take Care obligations, does that mean they can exercise derivative benefits like executive privilege, as well? Executive privilege derives from "the supremacy of each branch within its own assigned area of constitutional duties."<sup>352</sup> On this view, the application of these constitutional duties to Presidents-elect may bring with it a host of follow-on constitutional results. While beyond the scope of this Note, it bears noting the constitutional complexity inherent in the quasi-governmental position of the President-elect and transition team.

#### *D. Counterarguments and Counterweights to Transition Reform*

In light of these proposed solutions, it is worth taking a moment to contemplate the general drawbacks of such reforms and the obstacles to their success. First, achieving any transition reform is challenging because transitions suffer

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350. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-56 (2019); *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997); *Blumenthal v. Trump*, 949 F.3d 14, 18-20 (D.C. Cir. 2020).

351. See generally Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005) (arguing that the political-question doctrine should be clarified with four enumerated criteria for review).

352. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

from a dearth of repeat players. Once a President-elect has traversed the minefield of the transition period and ascended to the presidency, they almost certainly will never go through another presidential transition from the incoming side.<sup>353</sup> Aside from a small number of aides who assist multiple Presidents-elect, there are few who possess an ongoing personal interest in transition reform. Moreover, incoming transition teams have an interest in avoiding transition reform. Whatever their own plans for rules and ethical codes, statutory requirements offer only downsides for them because they bear the costs of adhering to them. As such, the constituency for transition reform among those most affected by these issues is limited.

I have no clear solution to this structural problem, other than to note that the March 2020 passage of the Presidential Transition Enhancement Act of 2019 indicates that reform is not impossible.<sup>354</sup> My hope is that this Note and other supporters of transition reform can persuasively make the case that further reform is essential in light of the risks we face. The ultimate beneficiaries of transition legal reforms are the American people, whose nascent governments would be better insulated from illicit influence and forces working against the public interest. That building political support for reform is difficult is no argument against the merits of these proposals.

Second, enforcement of any transition law might be challenging. The Logan Act, for example, has never been enforced against a transition team, despite arguable violations for roughly a century.<sup>355</sup> The outgoing President faces strong political incentives not to disrupt the activities of a popular, newly elected President. And once the new President takes office, their own officials will be loath to prosecute friendly transition aides (who may also be their colleagues). Further, it is not even clear that existing executive-branch ethics rules succeed in preventing violations by the most unscrupulous officials. Ethics law has had a mixed record at best in preventing ethical violations by Trump Administration officials. Given the time-pressured environment of the transition and its less formal staffing model, it is hard to see why mandatory ethics rules would fare any better in policing those inclined to ignore them.

On the whole, however, executive-branch ethics rules have been a success. At a minimum, they serve a useful information-forcing function by requiring officials to disclose their assets and potential conflicts. They have at least succeeded in bringing to light the Trump Administration's many ethical lapses, even if they

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353. It is possible that a President could lose a subsequent election and then win one at a later date, necessitating two transitions, but that outcome is, historically speaking, unlikely.

354. See Transition Enhancement Act of 2019, Pub. L. No. 116-121, 134 Stat. 138 (2020) (codified at 3 U.S.C. note (2018)).

355. See *supra* Section I.A.4.

have not prevented them. Moreover, especially if transitions are required to use public financing, the support provided under the Presidential Transition Act affords the federal government some enforcement leverage. Agreement to comply with transition law could be made a condition on receipt of federal funding, GSA support, agency access, and other critical transition needs. Individual civil liability for violators could also enhance the deterrent effect of these restrictions.

Finally, transition reform must not be so burdensome as to hinder the transition in the execution of its mandate to prepare to govern.<sup>356</sup> Policing ethical and other violations is not worth imperiling the preparation of the entire incoming administration. For this reason, transition law must be tailored to the timing and external constraints transitions face. Disclosure requirements must rely on readily available documents like tax returns, rather than entirely new forms each aide must complete. Outside employment prohibitions are similarly ill-suited to transitions, though requiring temporary leaves of absence would accomplish substantially the same objective. This objection is one that points to a need for careful drafting, not a reason to abandon this project.

## CONCLUSION

The 2016 presidential transition demonstrated the vulnerability of our current transition model. Transition teams wield quasi-executive power, or even de facto executive power in some cases. They are of the utmost importance to the functioning and integrity of our government. Yet in 2016, conflicts of interest were allowed to fester during the transition period. Those conflicts ultimately migrated to 1600 Pennsylvania Avenue and infected our nation's government. At the same time, the Trump-Pence Transition's cavalier attitude toward interaction with foreign governments resulted in outright interference, threatening the Constitution's allocation of foreign-relations powers to the sitting President. Like so much of the Trump presidency, the Trump-Pence Transition is a case study in our overreliance on norms that the President, or President-elect, can simply choose to disregard.<sup>357</sup> Although none of these norm violations were entirely new, they went far beyond the limited missteps characteristic of earlier transition teams.

My argument has been that these problems can be in part attributed to the lawless nature of presidential transitions. For a process so critical to the integrity of American government, the extent to which presidential transition law has been neglected is jarring, especially in light of their quasi-executive character. Fortunately, we are not powerless to resolve these challenges. Congress holds the

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356. See *supra* Section I.D.

357. Cf. Renan, *supra* note 178.



authority to ameliorate many of the ethical issues, governance risks, and strains on our constitutional order that have long plagued presidential transitions. Moreover, the Constitution itself may demand that Presidents-elect heed these concerns. But without legislation or major voluntary undertakings, this constitutional imperative will continue to be ignored.<sup>358</sup>

Of course, the need for reform must be tempered by a cognizance of the risk of overcorrection. Congress has long been aware of the delicate balance needed for successful transition reform, but has also been reticent to act out of fear that it will strike the wrong one.<sup>359</sup> As it did with Special Government Employees, Congress must ensure transitions are law-informed and bound by baseline rules without subjecting them to micromanagement.

Even with the risk of overcorrection in mind, the lesson of the 2016 transition was that this balance can no longer be left to the discretion of transition teams. Given the stakes for the integrity of our government, we cannot afford to run the risk that Presidents-elect and their transition teams disregard transition norms. This lawless state of affairs cannot be permitted to persist.

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358. See *supra* Part IV.

359. S. REP. NO. 100-317, at 19 (1988).