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Transition Administration

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Article

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Michael Herz[†] and Katherine Shaw^{††}

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INTRODUCTION

After a presidential election and before inauguration, wary outgoing Presidents and cautious incoming ones intone a familiar refrain: “[T]he country has only one president at a time.”¹ Reading the Constitution seems to confirm that understanding. The President-elect appears in the provisions governing elections but is absent from the provisions regarding governance. Article II vests executive power in “a President.”² The Twentieth Amendment creates an on-off switch for the passage of power. At a specific moment—precisely at noon on January 20—one President is out and one is in.³ The public official becomes a private citizen; the private citizen becomes a public official. One President at a time.

1. See, e.g., *Transcript of Clinton’s Remarks on Presidential Transition*, N.Y. TIMES (Nov. 5, 1992), <https://www.nytimes.com/1992/11/05/nyregion/transcript-of-clinton-s-remarks-on-white-house-transition.html> [<https://perma.cc/5SWA-YWTY>] (“During the transition that is now beginning, I urge America’s friends and foes alike to recognize, as I do, that America has only one President at a time.”); Dana Milbank, *The President-Elect, Talking Turkey*, WASH. POST (Nov. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/26/AR2008112603714.html> [<https://perma.cc/6WNQ-PUFZ>] (“That ‘there is only one president at a time,’ as Obama put it yesterday. And Tuesday. And Nov. 18. And Nov. 8. And Nov. 7.”); Richard Nixon, President, U.S., *The President’s First News Conference* (Jan. 27, 1969), <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-152> [<https://perma.cc/9HHB-GEUQ>] (“I have scrupulously followed the line that we have one President at a time, and that he must continue to be President until he leaves office on January 20.”); see also *Presidential Transition Guide*, Ctr. for Presidential Transition, P’SHP FOR PUB. SERV. & BOS. CONSULTING GRP. 202 (Apr. 2020), <https://presidentialtransition.org/wp-content/uploads/sites/6/2018/01/Presidential-Transition-Guide-2020.pdf> [<https://perma.cc/SD2K-X5BY>] (“[Between election and inauguration, i]t is best practice for the president-elect and the staff to understand the relevant protocols and adhere to the democratic custom that there is only one president at a time.”).

2. U.S. CONST. art. II, § 1 (emphasis added).

3. U.S. CONST. amend XX (“The terms of the President and Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin.”).

Early American practice largely corresponded to this model. Newly elected Presidents held back; most marked the end of the campaign by going on a lengthy vacation.⁴ Some advance planning took place, of course, but it was at a geographical remove, private, and self-contained.⁵ But over the decades, and especially since the enactment of the Presidential Transition Act of 1963 (PTA),⁶ this pristine constitutional model has fit reality ever more poorly. Transition operations have steadily increased in size, length, and scope; Presidents-elect make forceful statements on issues of the day; and the transition operation looks ever more like a government entity.⁷ It is no longer possible to view incoming Presidents—or the teams around them—as purely private citizens, waiting in the wings. But if that is not the accurate characterization, what is?

Presidential transitions—a phrase that describes the period of time between the election and inauguration of a new President, and also, as we use it here, the operation that surrounds the President-elect—are fundamentally liminal entities. They straddle the realms of public and private, governmental and nongovernmental, present and future. Transition staff members take no oath of office, on their own possess no formal governmental authority,⁸ and are funded in part by private donations.⁹ Yet they are provided government offices and email accounts,¹⁰ enjoy broad access to sensitive and sometimes classified information,¹¹ prepare executive orders that will be issued immediately after inauguration,¹² and meet regularly with agency officials, congressional aides, and staff members from the outgoing administration.¹³

4. See *infra* Part II; see also, e.g., LAURIN L. HENRY, *PRESIDENTIAL TRANSITIONS* 30, 138 (1960).

5. See *infra* Part II; see also, e.g., HENRY, *supra* note 4, at 276–79.

6. Presidential Transition Act (PTA) of 1963 § 3(c), 3 U.S.C. § 102 note.

7. See *infra* Part IV.A.

8. See *infra* Part I.

9. See *infra* Part III.A.1; see also, e.g., John McCormick & Mike Dorning, *Barack Obama Campaign Raised Nearly \$1 Billion, Shattering Records*, CHI. TRIB. (Dec. 5, 2008), <https://www.chicagotribune.com/chi-obama-moneydec05-story.html> [<https://perma.cc/AW4P-AMGC>] (“As of Nov. 15, Obama’s transition fundraising committee had already raised \$1.1 million from 1,776 donors . . .”).

10. See *infra* Part III.A.1.

11. See *infra* Part III.A.1.

12. See, e.g., Aishvarya Kavi, *Biden’s 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html> [<https://perma.cc/9Q8W-VC5W>].

13. See *infra* Part III; Applicability of 18 U.S.C. § 207(c) to President-Elect’s Transition Team, 12 Op. O.L.C. 264 (1988) (describing the unique nature of presidential transitions).

Similarly, the President-elect straddles two worlds. Even before the election, major party candidates enjoy certain public benefits, such as Secret Service protection.¹⁴ Following the November election, contemporary Presidents-elect announce incoming White House staff and Cabinet members;¹⁵ some intended nominees even receive Senate confirmation hearings prior to inauguration.¹⁶ Yet the President-elect does not take the constitutionally prescribed presidential oath until inauguration;¹⁷ is unable to sign or veto laws, issue executive orders, appoint officers, or command the military; and can dispose of documents without regard to the Presidential Records Act.¹⁸

Transitions are hugely important moments,¹⁹ both symbolically and practically. Symbolically, they represent something at the core of any constitutional democracy: the peaceful transfer of power, in particular from one political party to another.²⁰ They are also periods of significant practical consequence: Over the course of approximately 75 days, the keys to the machinery of government, together with the operating instructions, are transferred from one leadership team to another. How this happens can have significant consequences for the policy agenda and governance capabilities of the incoming administration,²¹ the legacy of the outgoing administration, and the country more broadly.

14. See 18 U.S.C. § 3056(a)(7).

15. See Melanie Geller & Drew Flanagan, *Pre-Inaugural Nominee Announcements: Trump-Clinton*, Ctr. for Presidential Transition, P'SHIP FOR PUB. SERV. (Dec. 16, 2020), https://presidentialtransition.org/wp-content/uploads/sites/6/2020/12/Pre-Inaugural-Nomination-Tables_12-16-20.pdf [<https://perma.cc/9JDT-LS7U>].

16. *Id.*

17. U.S. CONST. art. II, § 1 (“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.”); Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067, 1068 (2009) (“[T]he constitutional moment represented by the presidential transition is instantiated in a single act: the taking of the presidential oath.”).

18. See *infra* Part I.

19. Though “moment” is a loaded term here given the conceptual uncertainty as to whether the presidential transition is a moment or a period. Cf. Frederick C. Mosher, *Presidential Transitions and Foreign Policy: The American Experience*, 45 PUB. ADMIN. REV. 468, 472 (1985) (“Legally . . . there is no period of ‘transition’; there is only a moment.”).

20. Raymon R. Bruce, *The Succession of the President and the Vice President: Managing the Change*, 20 PUB. ADMIN. Q. 26, 26 (1996) (“Our constitutional presidential succession is a *peaceful revolution* based on the consent of the governed.”).

21. See MICHAEL LEWIS, *THE FIFTH RISK* 26 (2018) (“People don’t understand that a bungled transition becomes a bungled presidency.” (quoting Partnership for Public Service’s Max Stier)).

The administration of Donald Trump has laid bare the degree to which the presidency is governed by norms—that is, the “unwritten or informal rules of political behavior” that “provide the infrastructure that any particular President inhabits.”²² Historically, that characterization applied even more strongly to presidential transitions; for most of the nation’s history, there simply was no law of presidential transitions, which were structured wholly by norms and customs.²³ Over the last half century, Congress has moved to fund, formalize, and regulate transitions, including cementing their relationship to outgoing administrations and members of the career civil service.²⁴ Still, many aspects of presidential transitions remain largely grounded in a set of norms.

True to form, the Trump Administration slighted and, in some instances, ignored both the law and norms of transitions both on its way in and on its way out. Consider two examples, which illustrate both the centrality of norms to transitions and the kinds of legal questions transitions can sometimes present.

First, outgoing Presidents have long granted their successors access to the “presidential daily briefing” or “PDB”—the daily compiled threat assessment that Presidents since Harry Truman have received in one form or another.²⁵ President-elect Biden was not given the PDB until November 30, almost four full weeks after the election.²⁶ One could imagine an even more recalcitrant outgoing President seeking to deny his successor access to that briefing altogether. What role do

22. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189 (2018); see also Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1435–36 (2018).

23. See *infra* Part II. See generally Joshua P. Zoffer, *The Law of Presidential Transitions*, 129 YALE L.J. 2500 (2020) (highlighting the “sparse” law governing presidential transitions).

24. See *infra* Part III.A.

25. *The Evolution of the President’s Daily Brief*, CIA: NEWS & INFO. (Feb. 27, 2014), <https://web.archive.org/web/20200506230926/https://www.cia.gov/news-information/featured-story-archive/2014-featured-story-archive/the-evolution-of-the-presidents-daily-brief.html>; see also Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1444 (2005) (“[T]he Presidential Daily Briefings [are] a kind of personal daily newspaper containing intelligence headlines most relevant to the Chief Executive.”); DAVID PRIESS, *THE PRESIDENT’S BOOK OF SECRETS: THE UNTOLD STORY OF INTELLIGENCE BRIEFINGS TO AMERICA’S PRESIDENTS FROM KENNEDY TO OBAMA xi–xiii* (2016).

26. Julian E. Barnes, *Biden Begins Receiving Intelligence Briefings as President-Elect*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/us/biden-begins-receiving-intelligence-briefings-as-president-elect.html> [<https://perma.cc/C5YM-XT9J>]; David Priess, *The President’s Daily Brief and Presidents-Elect: A Primer*, LAWFARE (Nov. 17, 2020), <https://www.lawfareblog.com/presidents-daily-brief-and-presidents-elect-primer> [<https://perma.cc/J2UF-UAMF>].

law and norms play here, and what frameworks, both legal and extra-legal, govern the provision of critical intelligence to the President-elect?

Second, transition staff members are traditionally granted broad access to federal agencies, both so that they can generally familiarize themselves with agency operations and processes, and sometimes to make actual use of government resources, such as by obtaining opinions from the Office of Legal Counsel.²⁷ The 2020 record here was mixed. Of most significance, legally required financial support and agency access were delayed for several weeks because the General Services Administration (GSA) Administrator refused to formally acknowledge that Biden was, in the words of the PTA, the “apparent successful candidate.”²⁸ Even after the Administrator pulled that trigger, some agencies were far more forthcoming and helpful than others. Can transition officials be denied access to both physical spaces and the resources of the federal government prior to inauguration, and what tools might prevent such denial of access? And is the current statutory framework, under which the GSA Administrator controls the start of the post-election transition, a workable one?

The delay and lack of cooperation by the outgoing Trump administration were surely in part the result of the person in charge. But given the nation’s profound polarization and the general breakdown of many of the norms of political culture, it would be a mistake to assume that as long as Donald Trump is not the President, we can expect future outgoing administrations to approach incoming administrations in the spirit of cooperation that characterized modern transitions prior to 2020. Richard Pildes and Daryl Levinson wrote in 2006 that “the two major parties today are as coherent and polarized as they have been in perhaps a century”²⁹ Those characteristics have only hardened in the intervening years. A 2014 Pew Survey found that “Republicans and Democrats are more divided along ideological lines” than at any point in the preceding two decades; in addition, “ideological thinking is now much more closely aligned with partisanship than in the past,” with “‘ideological silos’ . . . now common on both the left and right.”³⁰ A more recent Pew Survey found that partisan antipathy

27. See, e.g., Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Off., 41 Op. O.L.C. 1 (2017).

28. PTA § 3(c), 3 U.S.C. § 102 note. We argue below that this delay was a flat statutory violation. See *infra* at Part VI.A.

29. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2332 (2006).

30. *Political Polarization in the American Public*, PEW RSCH. CTR. 1–3 (June 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/M2AY-9GCR>].

increased substantially from 1994 to 2017: “The shares of Republicans and Democrats who express *very* unfavorable opinions of the opposing party have increased dramatically Currently, 44% of Democrats and Democratic leaners have a very unfavorable opinion of the GOP, . . . 45% of Republicans and Republican leaners view the Democratic Party very unfavorably.”³¹ This is a striking increase since 1994, when less than 20% of individuals in each party viewed those in the opposing party “very unfavorably.”³² There is perhaps no starker illustration of these trends than the divergent partisan responses to President Trump’s refusal to accept, and his efforts to overturn, the results of the 2020 election.³³

This refusal to accept the election results had significant consequences for the 2020 transition, parts of which were delayed for weeks as a result. As we show in what follows, the extensive apparatus of law and practice that surrounds presidential transitions—with career civil servants playing a central role—generally serves as a bulwark against many of the ways an outgoing administration might seek to undermine transition, and it meant that despite President Trump’s best efforts, a real transition in 2020–21 did occur. Unfortunately, as

31. *The Partisan Divide on Political Values Grows Even Wider*, PEW RSCH. CTR. 5 (Oct. 5, 2017) [hereinafter *The Partisan Divide*], <https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider> [<https://perma.cc/KL8B-CZQ4>]; see also Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in AM. POL. SCI. ASS’N, TASK FORCE ON NEGOTIATING AGREEMENT IN POLITICS 19–26 (Jane Mansbridge & Cathie Jo Martin eds., 2013); David Schleicher, *Things Aren’t Going That Well over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433, 439–40; Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 940 (2018) (“[S]ince the 1970s, Republicans have moved further to the right than Democrats have moved to the left.”); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008) (finding that polarization is increasing as Americans move into increasingly homogenized neighborhoods).

32. *The Partisan Divide*, *supra* note 31; see also Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129 (2019) (describing the origins and consequences of partisan animosity); EZRA KLEIN, *WHY WE’RE POLARIZED* (2020) (studying the rise of political polarization in the twentieth century).

33. Christopher Keating, *Quinnipiac Poll: 77% of Republicans Believe There Was Widespread Fraud in the Presidential Election; 60% Overall Consider Joe Biden’s Victory Legitimate*, HARTFORD COURANT (Dec. 10, 2020), <https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyep-story.html> [<https://perma.cc/6Q7N-J3H8>]; Peter Baker, *Trump’s Final Days of Rage and Denial*, N.Y. TIMES (Dec. 5, 2020), <https://www.nytimes.com/2020/12/05/us/politics/trump-presidency-election-loss.html> [<https://perma.cc/P4BN-FKRW>]; Richard L. Hasen, *We Can’t Let Our Elections Be This Vulnerable Again*, ATLANTIC (Jan. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-our-elections-be-vulnerable-again/617542> [<https://perma.cc/W22E-AN39>].

the 2020–21 experience also showed, that bulwark is incomplete and in need of key reinforcements.³⁴

A handful of caveats are in order before proceeding further. First, we have little to say about the outgoing President's entrenchment efforts through "midnight rulemaking," last-minute pardons, burrowing, or similar techniques. Although important, these are topics about which others have written extensively,³⁵ and they are distinct from the transition-specific questions that are our focus here. Such activities are an effort to complete and protect the outgoing administration's substantive project; apart from the fact that imminent departure focuses the mind, they are ordinarily an extension of whatever came before. Our subject is instead the transition operation as such, as well as the interaction between outgoing and incoming administration.

Second, we do not exhaustively catalogue every body of law that may be implicated by presidential transitions. This is an area that has been subject to very little study in the legal literature,³⁶ although that is beginning to change,³⁷ and the number of specific legal questions transitions raise is vast. In particular, we largely avoid consideration of a President-elect's involvement in the foreign affairs sphere or the limitations on such activity the Logan Act, other federal law, or the Constitution might impose.³⁸ We also do not attempt any comparative

34. See Lara Seligman & Bryan Bender, *'Really Quite Shocking': Inside the Ugly Transition at the Pentagon*, POLITICO (Jan. 20, 2021), <https://www.politico.com/news/2021/01/20/biden-pentagon-transition-460768> [https://perma.cc/9QFH-M35H].

35. See, e.g., Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011); William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533 (2005); 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); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives*, 78 N.Y.U. L. REV. 557, 590–92 (2003); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1247 (2017); see also L. ELAINE HECKLAND, CONG. RSCH. SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 29–32 (2017).

36. The only real exceptions are Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006), and Zoffer, *supra* note 23.

37. See Zoffer, *supra* note 23.

38. See 18 U.S.C. § 953 ("Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries 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, shall be fined under this title or impris-

analysis of U.S. transitions and other transitions around the world, in either presidential or parliamentary systems.³⁹

Finally, transitions vary. We are concerned primarily with transitions that involve the transfer of power from one President to another following an election under conditions, like a change in party, that could give rise to challenges or complications. We do not address the passage of power from President to Vice President under circumstances other than an election, such as the death or resignation of a sitting President.⁴⁰ And the transfer of power from President to Vice President following the latter's election as President does not present the tensions and perils on which we focus (Adams to Jefferson being the rule-proving exception). Likewise for the "transition," such as it is, between a President's first and second term.

We begin with an overview of the constitutional status of presidential transitions. We then provide a brief history of presidential transitions. We next ask what we can learn about the nature of presidential transitions from the bodies of law and practice that surround them. As we show, presidential transitions have historically been governed more by norms than positive law.⁴¹ But over the past fifty years, Congress has slowly but steadily formalized the legal status of presidential transitions, so that today transitions have many formal and functional attributes of government entities.⁴² In addition, Congress

oned not more than three years, or both."); Daniel B. Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 HARV. J. ON LEGIS. 443, 446 (2018) ("By and large, the Logan Act is no longer regarded as a duly enacted law of the United States.").

39. For works that focus on transitions in comparative context, see David Fontana, *The Permanent and Presidential Transition Models of Political Party Policy Leadership*, 103 NW. U. L. REV. COLLOQUY 393 (2009); Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087; Mark Eisen, Note, *Who's Running This Place? A Comparative Look at the Political Appointment System in the United States and Britain, and What the United States Can Learn*, 30 B.U. INT'L L.J. 295 (2012); Gillian Metzger & Peter L. Strauss, *Power Transitions in a Troubled Democracy*, LIBER AMICORUM D'ALBERTI (May 2021), <https://ssrn.com/abstract=3859714> [<https://perma.cc/HF3U-Y4TS>].

40. See, e.g., BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION FOUR OF THE TWENTY-FIFTH AMENDMENT (2019); CHARLES O. JONES, PASSAGES TO THE PRESIDENCY 14 (1998) ("[There are] three forms of transitions: *originated*—those associated with presidents elected for the first time, *regenerated*—those of reelected presidents and takeover presidents who win election on their own, and *received*—those of vice presidents assuming the office.").

41. See *infra* Parts II, III.D.

42. See *infra* Part III.A.

has vested increasing, and now substantial, transition-related authority directly in career officials inside federal agencies,⁴³ and the executive branch has responded to these grants of authority and duty by formalizing their provision of support and assistance to incoming administrations (and even, to a degree, to each presidential campaign prior to the election).⁴⁴ So while it is true that as a formal matter, we have only one President at a time—and that that President, from the perspective of the outside world, is the outgoing President—as a functional matter, in particular inside the government, things are substantially more complicated.

As this discussion reveals, the basic framework of law and practice that surrounds transitions does much to facilitate the smooth transfer of power. But the scheme contains both gaps and vulnerabilities, some of which were on display in the 2020–21 transition. Our final sections, therefore, offer a number of recommendations for strengthening future transitions.

I. THE CONSTITUTIONAL FRAMEWORK

The received wisdom is, in the words of one leading scholar of presidential transitions, that “[t]here are no constitutional requirements or guidelines for the shape of the transition nor the actions that the incoming and outgoing administrations should take during this period.”⁴⁵ This is an overstatement, but only a slight one.

By specifying that the President shall serve a four-year term and making provision for selection of a successor, the Constitution contemplates a transfer of power. But it ignores *how* the transfer is to occur. One indication of this disregard is the silence of the original Constitution as to when a presidential term begins. The Constitution set a default date for a new Congress to meet,⁴⁶ and Congress was to determine the date on which presidential electors would meet and cast their ballots,⁴⁷ but there was no mention of when the winner of that election would take office. The magic date of March 4, 1789, on which the new Constitution was to kick in, was chosen by the old, Articles of

43. *See infra* Part III.A.

44. *See infra* Part III.C.

45. MARTHA JOYNT KUMAR, *BEFORE THE OATH: HOW GEORGE W. BUSH AND BARACK OBAMA MANAGED A TRANSFER OF POWER* 8 (2015).

46. U.S. CONST. art. I, § 4, cl. 2 (“The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.”).

47. *Id.*

Confederation Congress.⁴⁸ Washington's first term formally started on March 4; because a presidential term lasts four years his next, and every subsequent, term had to begin on that date.⁴⁹ Only with ratification of the Twentieth Amendment did the *Constitution* establish inauguration day.⁵⁰

The silence of the document is replicated by silence at the convention, in *The Federalist Papers*, and, as far as we can tell, in the ratification debates. Presidential transitions were just not something the framers thought about,⁵¹ or at least not something they spoke or

48. In submitting the new draft Constitution to Congress, the Constitutional Convention requested that, if and when the new document was ratified, Congress would set a date for appointment of presidential electors, the selection of a President, and "the Time and Place for commencing Proceedings under this Constitution." RESOLUTIONS OF THE CONVENTION SUBMITTING THE CONSTITUTION TO THE CONFEDERATION CONGRESS (Sept. 17, 1787) [hereinafter RESOLUTIONS], reprinted in 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 6 (Merrill Jensen & Robert A. Becker eds., 1976). On September 13, 1788, Congress resolved that those dates would be January 7, February 4, and March 4, respectively. See *id.* at 132–33; JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 522–23 (Roscoe R. Hill ed., 1937).

49. It was initially a matter of great uncertainty when the terms of the first President, Vice President, Senators, and Representatives commenced. By statute, all terms were to have begun on March 4, 1789, but neither house had a quorum on that date or for several weeks thereafter. RON CHERNOW, WASHINGTON: A LIFE 551 (2010). Washington was not inaugurated until April 30. *Id.* at 567. Without knowing when the terms began, it was impossible to know when they would end. In 1790, the Senate opted for March 4 as the official starting date. 1 ANNALS OF CONG. 974 (1789–1790) (Joseph Gales ed., 1834). That date appears in the Twelfth Amendment, but the Twelfth Amendment assumes rather than requires that the inauguration occur on March 4. See U.S. CONST. amend. XII, § 1.

The Confederation Congress set a date but not a *time* "for commencing proceedings under the said Constitution." RESOLUTIONS, *supra* note 48, at 133. That failing led to fights over whether the new presidential term and, more contentiously, the new Congress began at midnight, noon, or some other time. The Twentieth Amendment resolves all this. See U.S. CONST. amend. XX (providing that congressional terms begin at noon on January 3, unless Congress otherwise provides, and presidential terms begin at noon on January 20).

50. See sources cited *supra* note 49.

51. The framers did of course consider the change from one President to another, actively debating both the length of the presidential term and the possibility of limiting the number of terms one individual could serve. The convention initially approved a presidential term of seven years and a one-term limit, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69, 88 (Max Farrand ed., 1911), before opting for a four-year term and no term limit. See U.S. CONST. art. II, § 1, cl. 1. A recurrent concern was a desire to ensure stability and constancy. See THE FEDERALIST NO. 72, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A[nother] ill effect of the exclusion [of one from holding office after a certain time] would be that it would operate as a constitutional interdiction of stability in the administration. By necessitating a change of men, in the first office in the nation, it would necessitate a mutability of measures. It is not generally to be expected that men will vary and measures remain uniform. The contrary is the usual course of things.").

wrote about. It would seem the framers had plenty to think about regarding how the government would operate when in place without considering or making provisions for personnel transitions.

Section 3 of the Twentieth Amendment, ratified in 1933, contains the Constitution's only explicit reference to a President-elect, focusing on scenarios in which the President-elect either dies or "fails to qualify." That section provides as follows:

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.⁵²

The reference to the death of the President-elect is straightforward, as is the reference to a scenario in which the Constitution's complex system of presidential selection, commonly known as the electoral college, has failed to produce a winner. In both cases the Vice President elect steps in.⁵³ The mention of the President-elect's "failure to qualify" is somewhat more puzzling. As a textual matter, it might best be read to refer to the situation in which the individual elected President proves constitutionally ineligible to serve under the Constitution's Presidential Qualifications Clause.⁵⁴ But the legislative history suggests a broader understanding of what it means to be "qualified," one that includes but is not limited to constitutional disability or inability.⁵⁵ And the relevant House Report suggests that "failure to qualify" refers to a range of circumstances in which the process has failed to select an individual who is ready, willing, and able to take office, including death or the failure of the House to make a selection.⁵⁶

52. U.S. CONST. amend. XX, § 3.

53. *Id.*

54. See U.S. CONST. art. II, § 1, cl. 4 (requiring that the President be a "natural born citizen," at least 35 years of age, and a resident of the United States for at least 14 years).

55. See, e.g., *Proposed Constitutional Amendment: Hearing on S. J. Res. 14 Before the Comm. on the Election of President, Vice President and Representatives in Cong.*, 72d Cong. 8-10 (1932) (statement of Rep. Clarence F. Lea) (identifying "nonelection" as one reason there would be no one "qualified" as of inauguration day and mentioning constitutional disability, illness, death, insanity, kidnapping, and imprisonment as other ways in which a President-elect might not be "qualified").

56. H.R. REP. NO. 72-345, at 2 (1932) ("Congress is given power to provide for the case where neither a President nor a Vice President has qualified before the time fixed

The Constitution's only explicit discussion of the President-elect, then, is limited to that individual's *identity*; it is conspicuously silent regarding any powers or duties of the President-elect. The negative implication is that there are none. Several other provisions also hint at this one-President-at-a-time model. Most important is Section 1 of the Twentieth Amendment, which moved the start of the President's term from March 4 to January 20: "The terms of the President and Vice President shall end at noon on the 20th day of January, . . . and the terms of their successors shall then begin."⁵⁷ It is hard to imagine a clearer demarcation between President and not-President.⁵⁸

This model is also reflected in the Vesting Clause in Article II. It is sometimes said that the most important word in Article II is "a," as in "[t]he executive power shall be vested in *a* President of the United States of America."⁵⁹ There is only one President; the executive power is not shared. On this account, the notion that an incoming President might somehow share in the powers of the presidency is inconsistent with the exclusivity of presidential power.⁶⁰

for the beginning of the term, whether the failure of both to qualify is occasioned by the death of both, by the failure of the House to choose a President . . . or by any other cause . . .").

57. U.S. CONST. amend XX, § 1.

58. This is true notwithstanding the fact that the Amendment's principal purpose was to reduce (if not eliminate entirely) the lame-duck *congressional* period. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 477-78 (1997) (noting broad consensus that the purpose of the Twentieth Amendment was to abolish lame-duck sessions of Congress); Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 739-44 (discussing how supporters of the Twentieth Amendment wanted to abolish the so-called short session of Congress). See generally GEORGE W. NORRIS, *FIGHTING LIBERAL: THE AUTOBIOGRAPHY OF GEORGE W. NORRIS* 328-43 (1945) (describing the author's involvement in the development and passage of the Lame Duck Amendment).

59. U.S. CONST. art. II, § 1, cl. 1 (emphasis added). One of the most important decisions at Philadelphia was to opt for a single President, as urged by James Wilson. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 51, at 65, 97. Some of the most enduring portions of *The Federalist Papers* justify that decision. See, e.g., THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stressing the need for "energy in the executive," which could not exist if two or more people were at the helm).

60. *Contra* Nina A. Mendelson, *Quick Off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464 (2009) (arguing that giving the President-elect a role in governance is both constitutionally permissible and normatively attractive). Mendelson proposes, among other things, that after the election agencies should have to obtain the President-elect's approval before promulgating a significant regulation. *Id.* at 470. As we read her argument, the claim is not that the Constitution permits "two presidents at a time," but rather that it permits shared responsibility for certain decisions among the president and other actors who are not the president. That

Thus, it is challenging to articulate a constitutional law of transitions. Joshua Zoffer makes the interesting argument that the Take Care and Oath Clauses impose a duty of probity on Presidents-elect, a requirement not to take actions “that put them in a morally compromised position, lack good faith, and undermine the rule of law and constitutional order.”⁶¹ This approach might be taken further, for example to imply an affirmative obligation of conscientious preparation. To be an effective President starting on January 20 requires meaningful advance preparation; without such efforts, a brand-new President would be unable to take care that the laws are faithfully executed. And the transition’s governmental characteristics might be sufficient to give it a sort of quasi-governmental status that—like, say, Amtrak—subjects it to constitutional constraints.⁶²

In our view, though this reading is appealing, and though it supports a norm with constitutional underpinnings, as a principle of constitutional law it is a bridge too far. In general terms, it is in some tension with the Constitution’s one-President-at-a-time approach. It is not flatly inconsistent, because Zoffer’s position is not that the President-elect literally is President, only that the Constitution imposes obligations on this non-President because certain pre-presidential conduct may undermine a President’s ability to discharge the office after taking the oath.⁶³ Still, it is not clear that a provision that by its terms

is indisputably correct as an abstract proposition; the more the President-elect is perceived as a governmental rather than private actor, the more it feels constitutionally acceptable to allow such involvement.

61. Zoffer, *supra* note 23, at 2566–69.

62. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 374 (1995) (holding that Amtrak is a governmental actor for purposes of the First Amendment). Zoffer does not make the analogy, but his argument might be tied to the question whether a President can be impeached and removed from office for actions that occurred prior to inauguration. See Zoffer, *supra* note 23. See generally Philip C. Bobbitt, *Impeachment: A Handbook*, 128 *YALE L.J.F.* 515, 543–47 (2018) (describing the problem and concluding that impeachment is appropriate for a narrow set of substantial pre-incumbency acts involving efforts to obtain the office through corrupt means); Christopher L. Peterson, *Trump University and Presidential Impeachment*, 96 *OR. L. REV.* 57, 100–13 (2017) (arguing that there is no bar on impeachment for pre-presidential conduct). The House has always forgone impeaching any officer for conduct that occurred before the defendant held office. This practice is consistent with the formalist position—which is also supported by the standard reading of “high” as involving a breach of public trust—that, by its nature, impeachment is available only as a remedy for in-office conduct and the President-elect (or a candidate) is not in office. Yet many would argue that at least some sorts of pre-incumbency misdeeds, especially those that were hidden from the public or involved obtaining office illegally, are impeachable offenses. We are grateful to Jon Michaels for pointing out the connection.

63. Zoffer, *supra* note 23.

applies exclusively to the person who *is* President can impose obligations on someone who is *not* the President. And it is a jurisprudential challenge to explain how on January 20 the new President suddenly has an obligation to have done something before that date.

The President-elect may be a constitutionally cognizable role even if it is not one created by the Constitution. In particular, transitions are often referred to, and even more frequently refer to themselves, as “The Office of the President-Elect.”⁶⁴ Should we think of the President-elect as an “officer of the United States” in a constitutional sense?

Under the governing tests, no. The Constitution frequently uses the term “officer” or “officer of the United States” or refers to “an office of trust or profit.”⁶⁵ A well-developed body of law governs who is an “officer” for purposes of the Appointments Clause, which regulates how “officers” are appointed.⁶⁶ Because the elects’ and other transi-

64. That usage is common; for example, it appears in the standard text of the Memorandum of Understanding between the GSA and the incoming administration. See *Memorandum of Understanding Between the General Services Administration and Joseph R. Biden, Jr.* 8 (Sept. 3, 2020), https://presidentialtransition.org/wp-content/uploads/sites/6/2020/09/2020_MOU_between_GSA_and_Eligible_Candidate_Biden.pdf [<https://perma.cc/RN32-FTKU>]. Barack Obama took things a step further by using a kind of seal for the office, mimicking the presidential seal. See Charles Dharapak, Photograph of President-Elect Obama standing at a podium displaying a seal for “The Office of the President Elect,” in *At First News Conference as President-Elect, Obama Offers Plans for the Economy*, Mercury News, N.Y. TIMES (Nov. 7, 2008), <https://www.mercurynews.com/2008/11/07/at-first-news-conference-as-president-elect-obama-offers-plans-for-the-economy> [<https://perma.cc/M6TP-WDEX>]. Donald Trump used a different image for his logo; appropriately for a real estate magnate, his featured an image of the White House. See Evan Vucci, Photograph of President-Elect Trump standing at a podium displaying a seal for “The Office of the President Elect,” in Kelly Phillips Erb, *What’s a Blind Trust, Anyway, and Why Won’t It Work for President-Elect Trump?*, FORBES (Jan. 12, 2017), <https://www.forbes.com/sites/kellyphillipserb/2017/01/12/whats-a-blind-trust-anyway-and-why-wont-it-work-for-president-elect-trump> [<https://perma.cc/ZZK7-ESTT>]. President-Elect Biden returned to the Obama iconography. See Carolyn Kaster, Photograph of President-Elect Biden standing at a podium displaying a seal for “The Office of the President Elect,” in Michael Hamad, *With Results Still Unofficial, President-Elect Joe Biden Appears to Turn More than 30 Connecticut Towns from Red to Blue in 2020 Election*, HARTFORD COURANT (Nov. 10, 2020), <https://www.courant.com/politics/hc-pol-connecticut-town-results-presidential-race-20201110-jh74lzm5btzgp4wa7exgu-story.html> [<https://perma.cc/44AW-EE5C>].

65. U.S. CONST. art. I, §§ 3, 6, 8–9; *id.* art. II, §§ 2–4; *id.* art. VI; *id.* amend. XIV, § 3.

66. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

tion officials' duties are "occasional or temporary" rather than "continuing and permanent,"⁶⁷ and because they do not "exercise significant authority pursuant to the laws of the United States,"⁶⁸ it seems clear they are not officers for Appointments Clause purposes.

Still, the President-elect and Vice President elect do exercise *some* governmental authority: under the PTA, discussed in the next Part, an agency or congressional staffer detailed to the transition remains a federal employee but "shall be responsible only to the President-elect or Vice President-elect for the performance of his duties."⁶⁹ In addition, the President-elect and Vice President elect receive federal funding, office space, email accounts, staffing, and access.⁷⁰ And the President-elect and Vice President elect are "United States officials" under the statute making it a crime to assault, kidnap, or murder a "United States official"⁷¹ or a family member of a "United States official."⁷² While that statute has no direct significance for the constitutional question—Congress merely sought to protect these individuals, for good reason—their inclusion underscores that they are in some sense a part of the government.

67. *Id.* at 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 511–12 (1879)).

68. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). We hasten to stress that even if the Presidents-elect did fit within the definition, the Appointments Clause would not apply to them since they would not hold positions created "by law" (i.e., by statute) or ones whose selection is not otherwise provided for by the Constitution. And the criteria for being an "officer" for purposes of the Appointments Clause do not necessarily apply in other settings.

69. PTA § 3(a)(2), 3 U.S.C. § 102 note. As to transition employees *other than* detailees, the statute provides that, with the exception of five specific statutes relating to employment compensation, insurance, and health benefits, "persons receiving compensation under this subsection, other than those detailed from agencies, shall not be held or considered to be employees of the Federal Government." *Id.*

70. *See infra* Part III.A.1.

71. 18 U.S.C. § 1751.

72. *Id.* § 115. On the other hand, under the statutes regarding government personnel, the President-elect and Vice President elect do *not* meet the definition of "officer," which reaches only individuals who have been *appointed*. 5 U.S.C. § 2104(a)(1). That has no bearing on the issue one way or the other, however, since the President and Vice President are also not "officers" under these provisions, for the same reason, but are indisputably officers.

The question is potentially relevant when a member of Congress is elected President⁷³ or Vice President.⁷⁴ The Incompatibility Clause prohibits anyone “holding any office under the United States” from serving in Congress.⁷⁵ Thus, a person cannot be simultaneously President or Vice President and also a member of Congress. When a sitting member of Congress is elected President or Vice President, no one, to our knowledge, has ever suggested that they must resign from Congress immediately. The arrangement may be an awkward one,⁷⁶ but the assumption is that for constitutional purposes it is necessary only that the resignation occur before inauguration.⁷⁷ And yet, the Presidents-elect always resign well before inauguration.⁷⁸ It is precisely the hybrid nature of the transition—formally non-governmental, but

73. This has happened four times: the elections of Representative James Garfield (1880), Senator Warren G. Harding (1920), Senator John F. Kennedy (1960), and Senator Barack Obama (2008). Then Vice President Thomas Jefferson resigned as President of the Senate only four days before his inauguration as President (though that was also only two weeks after his election). See Letter from Thomas Jefferson to the U.S. Senate (Feb. 28, 1801), <https://founders.archives.gov/documents/Jefferson/01-33-02-0087> [<https://perma.cc/H29B-RBW9>].

74. The list of sitting Members who became Vice President is longer. All were Senators: William King (1852), Hannibal Hamlin (1860), Henry Wilson (1872), Richard Nixon (1952), Charles Fairbanks (1904), Charles Curtis (1928), Harry Truman (1944), Alben Barkley (1948), Lyndon Johnson (1960), Hubert Humphrey (1964), Dan Quayle (1988), Al Gore (1992), Joe Biden (2008), and Kamala Harris (2020).

75. U.S. CONST. art. I, § 6, cl. 2 (“[N]o person holding any office under the United States, shall be a member of either House during his continuance in office.”).

76. See, e.g., Peter Baker, *Obama’s Senate Role Creates Odd Overlap*, N.Y. TIMES (Nov. 13, 2008), <https://www.nytimes.com/2008/11/13/world/americas/13iht-13bakerwebcol.17803294.html> [<https://perma.cc/34FX-GEYP>] (discussing issues that arose when Senators Barack Obama and Joe Biden were elected President and Vice President, respectively).

77. The issue was salient in 2008, when both the President-elect and Vice President elect were sitting Senators and that body was quite closely divided by party. The general understanding was that both Senator Obama and Senator Biden *could* continue to vote in the Senate, but they opted not to do so. See, e.g., Peter Baker, *If the Senate Reconvenes, Two Seats May Be Empty*, N.Y. TIMES (Nov. 13, 2008), <https://www.nytimes.com/2008/11/14/us/politics/w13bakerwebcol.html> [<https://perma.cc/H39L-GT2R>] (“Nothing in the rules prevents either Mr. Obama or Mr. Biden from voting as senators But the Obama camp decided it would be inappropriate for them to act as senators when bigger roles are on the horizon.”).

78. Garfield resigned from the House days after being elected. See *Garfield, James Abram*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/13641> [<https://perma.cc/T429-MCK9>]. Harding resigned from the Senate on January 13, while his inauguration was March 4. See H.R. DOC. NO. 108-222, at 1194 (2005). Kennedy resigned on December 22. See H.R. DOC. NO. 108-222, at 1372. Obama resigned on November 13, effective November 16. See Letter from Barack Obama, Sen., U.S. Senate, to Rod Blagojevich, Governor, State of Illinois (Nov. 13, 2008), https://upload.wikimedia.org/wikipedia/commons/a/a5/Obama_resignation_from_US_Senate%2C_2008.jpg [<https://perma.cc/EVE8-YYQN>].

functionally more complicated—that makes it problematic to wear both hats.⁷⁹

Of course, the incumbent President, Vice President, and members of the administration, *are* officers and do have constitutional obligations. While the Constitution says nothing about the transition and very little about the President-elect, it does impose general obligations on government officials that are relevant to everything they do, presumably including their role in facilitating the passage of power the Constitution contemplates. In particular, what Kent, Leib, and Shugerman call the “Faithful Execution Clauses”⁸⁰—the Presidential Oath Clause⁸¹ and the Take Care Clause⁸²—would seem to apply to the incumbent President’s participation in the transition. Kent and his co-authors derive a comprehensive fiduciary theory of the presidency from these provisions, an enterprise in which they have good company.⁸³ Whether or not one views the President as a fiduciary, it is clear that the President is constrained by law and has an obligation—grounded in the Constitution and expressed through his promise to preserve, protect, and defend it—to pursue the overall welfare of the country, ensure the success of its leaders, and respect the electoral choices of the people. This adds up to an obligation of cooperation and assistance during the transition.

In the most thorough discussion of the outgoing President’s constitutional obligations vis-à-vis the transition, Jack Beermann and William Marshall conclude that the Take Care Clause “requires the outgoing President to prepare the new President to be able to

79. Context matters here. The norm is stronger for the President-elect than the Vice President elect; if Congress is not in session, then the incongruity of this quasi-dual office holding is less striking; an elect may be slower to resign a congressional position if their vote may be consequential. Kamala Harris, who resigned her Senate seat just three days before being sworn in as Vice President, is a case in point. See Chelsea Janes, *Kamala Harris Resigns Her Senate Seat*, WASH. POST (Jan. 17, 2021), https://www.washingtonpost.com/politics/kamala-harris-resigns-senate/2021/01/16/03cd0e90-5869-11eb-a817-e5e7f8a406d6_story.html [https://perma.cc/G8RH-3U3B?type=image].

80. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2112 (2019).

81. U.S. CONST. art. II, § 1, cl. 8 (“Before 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.’”).

82. *Id.* § 3 (“[The President] shall take care that the laws be faithfully executed . . .”).

83. See, e.g., GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 907–08 (2016) (exploring the significance of the Take Care Clause).

immediately execute the law upon taking office.”⁸⁴ They also rely on the constitutional provisions limiting the President’s term to four years,⁸⁵ which they read to mean the President has to leave at term’s end and must do everything possible to ensure elections take place.⁸⁶

In sum, the Constitution contemplates but does not in any way structure or control transfers of power between Presidents other than by imposing an implicit obligation of cooperation and assistance on the outgoing President. Focused on the selection and authorities of office holders, the Constitution is silent about the period between the selection and the holding. The fact that the Constitution ignores the President-elect does not mean that that individual cannot or should not have an important role. This is a gap, not a prohibition. And over the past 230 years, historical practice, positive law, and a range of conventions have filled that constitutional gap.

II. A HISTORICAL SKETCH OF PRESIDENTIAL TRANSITIONS

Like every other aspect of government over the past 230 years, the historical trend of presidential transitions has been characterized by a steady growth in complexity, bureaucracy, expense, and scope. At the outset, and for many decades thereafter, there existed a constitutionally clear dividing line between outgoing and incoming administration, an on/off switch that flicked exactly at noon on March 4, and later January 20. With modest exceptions, incoming administrations were remarkably casual about preparation and were meaningfully separate from the functioning government.

Over time, transitions have become more focused, more expansive, and more expensive. They start earlier, have larger staffs, make more personnel decisions, and work not just on personnel, but on policy as well. Beginning in the 1960s, first prompting and then prompted by the PTA, these trends accelerated. In particular, at least four characteristics distinguish modern from historical transitions.

First, transition efforts have begun ever earlier. An early start is useful but also delicate; candidates are loath to waste campaign resources and also do not want to appear presumptuous—to appear to be “measuring the drapes.”⁸⁷ But both concerns have become more di-

84. Beermann & Marshall, *supra* note 36, at 1280.

85. See U.S. CONST. art. II, § 1 (“He shall hold his office during the term of four years . . .”); *id.* amend. XX, § 1 (“The terms of the President and Vice President shall end at noon on the 20th day of January . . .”).

86. See Beermann & Marshall, *supra* note 36, at 1272–73.

87. In 1976 Jimmy Carter began transition planning not just before the election

luted over time; indeed, the most recent rounds of transition legislation permit both major-party candidates to access transition resources well before the election itself, and future presidential campaigns seem likely to avail themselves of such resources openly.⁸⁸

Second, transitions have become increasingly concerned not just with identifying and vetting appointees, but also with policy planning. Transitions have always been about the who; increasingly, they have become about the what. This shift began with FDR's brain trust, was elaborated by JFK's task forces, was further stimulated by the PTA's creation of transition councils in the outgoing administration, and is now standardized in the form of "agency review teams."⁸⁹

Third, transition staffing today is enormous. Although the PTA provides federal funds for salaries only after the election, many people work on transitions as volunteers, or for a dollar a year, or are paid out of private or National Committee funds. The Reagan transition team had a staff of over 1000 people, which remains a record.⁹⁰ Obama had about half that, which is still a significant operation.⁹¹

Fourth, transition teams have ever greater contact and coordination with those in the government. Historically, transition operations were located anywhere but Washington,⁹² and contact with those in

but before the convention and was the first candidate to divert campaign funds to the transition. CARL M. BRAUER, *PRESIDENTIAL TRANSITIONS: EISENHOWER THROUGH REAGAN 180* (1986). He met with Jack Watson, designating him head of the transition effort in June. Still, Watson only assembled a staff and got down to serious business after the convention, and PTA funds only became available after the election. *Id.* at 182–83.

88. See *infra* at notes 197–199 and accompanying text.

89. KUMAR, *supra* note 45, at 126–27; see Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 66–70 (2019).

90. James P. Pfiffner, *The Carter-Reagan Transition: Hitting the Ground Running*, 13 PRESIDENTIAL STUD. Q. 623, 626 (1983) (noting that the transition telephone directory had 588 entries, but including the people on the one hundred or so agency teams would double that number).

91. John P. Burke, *The Contemporary Presidency: The Obama Presidential Transition: An Early Assessment*, 39 PRESIDENTIAL STUD. Q. 574, 579 (2009) (noting Obama transition planned to employ 450 people). Comparisons are challenging, however, because transitions rely heavily on volunteers and advisors.

92. Nixon ran his operation from the Hotel Pierre in New York City. See Laurin Henry, *Presidential Transitions: The 1968–69 Experience in Perspective*, 29 PUB. ADMIN. REV. 471, 474 (1969). Eisenhower ran his operation from the Hotel Commodore. See HENRY, *supra* note 4, at 488–89. "Roosevelt headquarters was wherever Roosevelt happened to be." *Id.* at 325. Herbert Hoover seems an exception; he booked a suite at the Mayflower Hotel in Washington. Mike Livingston, *Mayflower Hosts History when Presidents Stop in*, WASH. BUS. J. (Feb. 12, 2001), <https://www.bizjournals.com/washington/stories/2001/02/12/focus15.html> [<https://perma.cc/4Y9D-RZFK?type=image>]. But Hoover was the outgoing Secretary of Commerce, already ensconced in Washington, and retained most of his predecessor's key appointees. See Interview

the outgoing administration was sporadic and ad hoc. In recent decades, the operation has been firmly headquartered in Washington,⁹³ and contacts have been regularized through changes in both norms and law. Pursuant to the PTA, the transition team has space in a federal building—whether or not the team chooses to use it—receives significant support from the GSA for its operations, uses @ptt.gov email addresses, and receives millions of taxpayer dollars.⁹⁴

A. EARLY PRACTICE

When George Washington first took office, the transition was from no President to a President. With no one in place, one might imagine that Washington would have started to assume some aspects of the role prior to his swearing in. Nature abhors a vacuum, and there would have been no one to object or stand in the way. Strikingly, Washington took the opposite approach.

Washington won the unanimous vote of all 69 presidential electors on February 4, 1789.⁹⁵ Congress was supposed to assemble on March 4 to verify the election, but they were unable to muster a quorum and did not officially count the electoral votes and certify Washington's victory until April 6.⁹⁶ "Since a landslide victory for him was widely assumed, Washington would have been entitled to travel to New York for the opening of Congress. But detained by a punctilious regard for form, he refused to budge until Congress officially counted the votes."⁹⁷ In fact, Washington did not budge even then, waiting until Charles Thomson, the secretary of Congress, officially delivered the news to him in person at Mount Vernon on April 14.⁹⁸ Washington obviously already knew what was coming—indeed, everyone had known for years that he would be the first President—but not until

by Martha Joynt Kumar of Chase Untermeyer, Dir. of the Off. of Presidential Pers. in the Admin. of President George H. W. Bush, in Houston, Tex. (July 6, 1999), <https://www.archives.gov/files/presidential-libraries/research/transition-interviews/pdf/untermeyer.pdf> [<https://perma.cc/K79H-ES5C>].

93. Pfiffner, *supra* note 90, at 626.

94. See *infra* Part III.A.1 (describing provisions of the Presidential Transition Act). For the Obama-Trump transition, for example, Congress appropriated \$7 million for post-election activities by the incoming administration, of which \$4.39 million was spent. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-615R, PRESIDENTIAL TRANSITION: INFORMATION ON ETHICS, FUNDING, AND AGENCY SERVICES 24 (2017).

95. RON CHERNOW, WASHINGTON: A LIFE 551 (2010).

96. *Id.*

97. *Id.*

98. *Id.* at 560.

the formalities were observed did he head to New York on April 16.⁹⁹ He was sworn in on April 30.¹⁰⁰

The model set by Washington was adhered to by the first actual transition, from Washington to John Adams, in 1797. This was an intra-party transition in which the incoming President was the outgoing Vice President, so not a lot of gearing up was necessary. Moreover, Adams decided to retain Washington's four department heads.¹⁰¹ Historians have little to say about this transition; it is not clear that any process deserving of the name occurred.

The political circumstances were altogether different four years later, when Thomas Jefferson replaced Adams. To be sure, as had been the case in 1797, the President-elect was the sitting Vice President. However, Jefferson and Adams were at that point bitter political enemies and belonged to different parties. So one might have imagined a "real" transition. It did not occur. In part, there was no time. The electoral college did not produce a victor, throwing the presidential election to the House.¹⁰² Jefferson was only elected, after thirty-six ballots, on February 17, 1801, less than three weeks before inauguration day.¹⁰³ But apart from the practical constraint imposed by this delay, at this point in history there was no idea of a transition in anything like the modern sense.¹⁰⁴

Jefferson did make some arrangements before taking office. His pre-inauguration correspondence includes several letters about staffing at Monticello¹⁰⁵ and acknowledgements of offers to resign from certain members of Adams's cabinet.¹⁰⁶ He stepped down as President

99. *Id.* at 560.

100. *Id.* at 567.

101. He later explained: "Washington had appointed them and I knew it would turn the world upside down if I removed any one of them. . . . I had no particular objection to any of them." DAVID McCULLOUGH, JOHN ADAMS 471 (2001).

102. *Tally of Electoral Votes for the 1800 Presidential Election*, CTR. FOR LEGIS. ARCHIVES, <https://www.archives.gov/legislative/features/1800-election/1800-election.html> [<https://perma.cc/7QL3-ABMQ>].

103. *Id.*

104. *Cf.* James P. Pfiffner, *Presidential Transitions*, in THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY 85, 87 (George C. Edwards III & William G. Howell eds., 2009) (noting that scholars were late to the study of presidential transitions in part because until the second half of the twentieth century Presidents-elect did not organize their transition into office "in any elaborate way").

105. *See* Letter from Thomas Jefferson to Thomas Whitlaw (Feb. 19, 1801), <https://founders.archives.gov/documents/Jefferson/01-33-02-0019> [<https://perma.cc/YZT6-GYFH>].

106. *See* Letter from Thomas Jefferson to Samuel Dexter (Feb. 20, 1801), <https://founders.archives.gov/documents/Jefferson/01-33-02-0021> [<https://perma.cc/U4A9-289P>]; Letter from Thomas Jefferson to Benjamin Stoddert (Mar. 30, 1801),

of the Senate,¹⁰⁷ made arrangements for taking the oath, received inquiries from office-seekers,¹⁰⁸ had an interesting exchange with John Marshall in the latter's dual capacities as Secretary of State (who would countersign presidential seal letters) and Chief Justice (who would administer the oath of office).¹⁰⁹ But that's essentially it.

Meanwhile Adams was less than helpful. Jefferson and Adams barely communicated. A brief and unsatisfactory mid-February meeting concerned the still-uncertain election, not the transition.¹¹⁰ The only direct communication history records regarding the transition is a February 20 letter from Adams to Jefferson, noting that Jefferson did not have to purchase horses or carriages, as Adams was leaving behind those in the White House stable.¹¹¹ In keeping with his general attitude, Adams left Washington early in the morning on March 4, without meeting with his successor or attending the inauguration.¹¹² Still, if Adams was unhelpful, even petulant, the more fundamental precedent being set was that of the peaceful transition of power.¹¹³

<https://founders.archives.gov/documents/Jefferson/01-33-02-0434> [<https://perma.cc/EY7C-JRJB>].

107. Letter from Thomas Jefferson to the U.S. Senate, *supra* note 73.

108. See Letter from Thomas Jefferson to Henry Dearborn (Feb. 18, 1801), <https://founders.archives.gov/documents/Jefferson/01-33-02-0009> [<https://perma.cc/AP3X-FDCL>].

109. See Letter from Thomas Jefferson to John Marshall (Mar. 2, 1801), <https://founders.archives.gov/documents/Jefferson/01-33-02-0102> [<https://perma.cc/FSQ6-CPML>].

110. MCCULLOUGH, *supra* note 101, at 561–62 (2001).

111. Letter from John Adams to Thomas Jefferson (Feb. 20, 1801), <https://founders.archives.gov/documents/Jefferson/01-33-02-0020> [<https://perma.cc/NYT3-NE4F>]. The letter reads, in its entirety:

Sir,

In order to save you the trouble and Expence of purchasing Horses and Carriages, which will not be necessary, I have to inform you that I shall leave in the stables of the United States seven Horses and two Carriages with Harness the Property of the United States. These may not be suitable for you: but they will certainly save you a considerable Expence as they belong to the studd of the Presidents Household.

I have the Honor to be with great respect, Sir your most obedient and humble
Servant

John Adams

Id.

112. Louis Fisher, *John Adams, in THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 34, 43 (Ken Gormley ed., 2016). Fisher notes that Adams's son Charles had recently died, leaving him "saddened and depressed." *Id.* at 46.

113. *Id.* at 43 ("Yet this quiet transfer of power to his successor (to a person of a different party) was noteworthy because it was not marked by resistance or violence, but was instead a peaceful and respectful transition of leadership.").

Adams and Jefferson took, at least implicitly, opposing positions on the one-President-at-a-time question. Right up until the end of his term, Adams was doing what he could to cement a Federalist legacy.¹¹⁴ The appointment of the midnight judges (including William Marbury) is the famous example, but there were many additional appointments, not least Chief Justice John Marshall, nominated and confirmed in late January 1801. These infuriated Jefferson, who took the position that once Adams knew for sure he would not serve a second term—i.e., by December 12, 1800, when the last of the electoral college votes was reported in Washington—continued appointments were illegitimate.¹¹⁵

Jefferson at least purported to maintain this view when he himself was preparing to leave office. In January 1809, with six weeks left in his term, he wrote to James Monroe:

I am now so near the moment of retiring that I take no part in affairs beyond the expression of an opinion. I think it fair that my successor should now originate those measures of which he will be charged with the execution [and] the responsibility, and that it is my duty to clothe them with the forms of authority.¹¹⁶

Whether or not this fully and fairly characterizes Jefferson's actual conduct in his final days as President, his stated position remained

114. Letter from James Madison to Thomas Jefferson (Feb. 28, 1801), <https://founders.archives.gov/documents/Madison/01-17-02-0318> [<https://perma.cc/S336-DFVP>] (“Instead of smoothing the path for his successor, [Adams] plays into the hands of those who are endeavoring to strew it with as many difficulties as possible.”). See generally John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317 (2003) (describing Adams's actions during the lame-duck period and the reactions to them); Kathryn Turner, *The Midnight Judges*, 109 U. PENN. L. REV. 494, 519–21 (1961) (describing Republican outrage at Adams's appointments).

115. 2 NATHAN SCHACHNER, *THOMAS JEFFERSON: A BIOGRAPHY* 670–71 (1951) (quoting Jefferson as stating that all of Adams's appointments made after December 12 were to be “considered as Null”). In a letter to Benjamin Rush, Jefferson promised he would “expunge the effects of Mr. A's indecent conduct, in crowding nominations after he knew that they were not for himself, till 9 o'clock of the night, at 12 o'clock of which he was to go out of office.” Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), https://tile.loc.gov/storage-services/service/mss/mtj//mtj1/023/023_0389_0390.pdf [<https://perma.cc/898V-77ZT>]. Whether Jefferson is right in stating that Adams knew that he was done as President as of December 12 is debatable. Bruce Ackerman and David Fontana argue that Jefferson himself, as President of the Senate, ensured that Adams's name would not go to the House of Representatives for consideration through a questionable decision to count a highly suspect submission regarding the electors from Georgia. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551 (2004). On this account, it was not certain that Adams was out of the running until February 11, when the votes were counted and the election thrown to the House. *Id.* at 585.

116. Letter from Thomas Jefferson to James Monroe (Jan. 21, 1809), <https://founders.archives.gov/documents/Jefferson/99-01-02-9666> [<https://perma.cc/M8XS-22MW>].

consistent: The outgoing office-holder should ease off long before reaching the finish line.

B. THE NEXT HUNDRED YEARS

This sort of slender, modest transition effort characterized changes in administration for the next century.¹¹⁷ In part this reflects the fact that the executive branch was relatively limited in size and scope, so there was not so much to get ready *for*. Yes, a cabinet had to be selected, but that was a small group; even by 1860–61, Abraham Lincoln had to come up with just seven names. “The White House,” as currently understood, simply did not exist (and would not until the mid-twentieth century).¹¹⁸ And even as the government grew, transitions remained informal and modest. In general, the first thing the new President-elect did was not hunker down with advisors and get ready to hit the ground running; he went on vacation.

As late as 1912, for example, Woodrow Wilson met with advisors on the day after his election, spent ten days putting together what one leading account labels “a holding operation,” and then headed to Bermuda for a month’s vacation.¹¹⁹ On his return from Bermuda to Trenton, where he continued to serve as Governor of New Jersey, Wilson did start to plan for the inauguration and to put together a cabinet.¹²⁰ Wilson made clear that, as was customary, he would not announce his cabinet until inaugurated.¹²¹ Taft and Wilson had a meager and strikingly non-substantive correspondence; in particular Wilson wanted to know Taft’s “candid opinion” of the White House housekeeper.¹²² Taft replied with a letter about the operation of the White House, including

117. U.S. GOV’T ACCOUNTABILITY OFF., GGD-82-17, THE REAGAN-BUSH TRANSITION TEAM’S ACTIVITIES AT SIX SELECTED AGENCIES 1 (1982) (noting that “[f]or most of this country’s history” incoming Presidents undertook almost no planning or preparation prior to taking office, leading to confusion and delay during the first months of a new administration).

118. Franklin Delano Roosevelt created The Executive Office of the President in 1939 pursuant to his reorganization authority. See Reorganization Plan No. 1, 4 Fed. Reg. 2727, 2727 (July 1, 1939).

119. HENRY, *supra* note 4, at 30. During the vacation, Wilson spent a few hours a day on correspondence and corrected the proofs of a book of his campaign speeches. *Id.* at 31. For five days the cable was completely down, leaving him wholly incommunicado, “which pleased him very much.” *Id.*

120. The big issue was what to do with William Jennings Bryan, the leading Democrat of the day and a larger-than-life figure. He became Secretary of State. See Off. of the Historian, *Biographies of the Secretaries of State: William Jennings Bryan (1860–1925)*, U.S. DEP’T OF STATE, <https://history.state.gov/departmenthistory/people/bryan-william-jennings> [[https://perma.cc/8S\]X-X3KP](https://perma.cc/8S]X-X3KP)].

121. HENRY, *supra* note 4, at 58.

122. *Id.* at 60.

a floor plan, and arrangements were made to have tea on inauguration day.¹²³ That was it.

C. THE EARLY MODERN, PRE-PRESIDENTIAL TRANSITION ACT ERA

Taft-Wilson is often seen as the last old-style transition. Symbolically, this was captured by the fact that it was the last time the ingoing and outgoing President shared a horse-drawn carriage to the Capitol. When Warren Harding was inaugurated, he rode in a Packard Twin 6 supplied by the Republican National Committee.¹²⁴ The *Washington Post* took note: “President-elect Harding’s action in choosing the more modern method of transportation probably sounds the death knell of the carriage as a presidential conveyance on inauguration day.”¹²⁵ More substantively, Harding did gather an informal group of advisors—informally known as “the best minds”¹²⁶—to begin preparations. The primary focus of this activity was selecting the cabinet.

The shift to the modern regime that began with Harding was still extraordinarily incremental. Four days after the election, Harding headed off to Texas to begin a four-week vacation.¹²⁷ He went to Washington to give a farewell speech to the Senate but did not meet with Wilson (although Mrs. Harding and Mrs. Wilson had tea at the White House).¹²⁸ He then took another vacation, staying in Miami almost until inauguration day.¹²⁹

Similarly, after his election in 1928, Herbert Hoover headed off for a ten-nation goodwill tour of Latin and South America, traveling by battleship.¹³⁰ He then spent time in Florida before returning to Washington two weeks before the inauguration.¹³¹

It was with Franklin Delano Roosevelt that something closer to modern practice was born. FDR was the first President-elect to develop a formal team of advisors who got to work not just identifying nominees but developing policy proposals before inauguration. His

123. *Id.* at 60–61.

124. Hillary Mannion, *Motor Cars Come to the White House*, WHITE HOUSE HIST. ASS’N (Fall 2010), <https://www.whitehousehistory.org/motor-cars-come-to-the-white-house> [<https://perma.cc/3BA7-K3JW>].

125. *Harding Will Ride in Auto to Capitol*, WASH. POST, Jan. 1, 1921, at 1.

126. During the campaign, Harding had told the country that if elected he would put “the best minds” to work on the nation’s problems. HENRY, *supra* note 4, at 148.

127. *Id.* at 138.

128. *Id.* at 147.

129. *Id.* at 181.

130. Alexander DeConde, *Herbert Hoover’s Good Will Tour*, 12 HISTORIAN 167, 170 (1950).

131. JOHN P. BURKE, PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE 4 (2000).

three-person “Brain Trust”¹³² began work not only before the election but before the Democratic party convention; the team expanded after FDR was elected.¹³³ This approach, prompted by the sense of national emergency, enabled a robust and active “first 100 days” and an enduring legacy that includes an understanding that the early days of an administration are an important time of opportunity if the new administration can “hit the ground running.”¹³⁴

The Hoover-Roosevelt transition was notoriously uncooperative at the top. Hoover and FDR could not get along, each thought the other dangerous to the nation, and FDR and his advisors were politically wary about cooperation.¹³⁵ For example, the day after the election, England approached the United States proposing to adjust its war debt; other European nations made similar requests.¹³⁶ Hoover and his advisors decided to consult FDR, sending him a telegram that laid out the situation and invited him to the White House for a meeting.¹³⁷ The two met and agreed on broad principles, but Roosevelt kept his distance, insisting that dealing with the immediate problem was for those who currently held office.¹³⁸ The following month Hoover again sought to initiate contact and was again rebuffed, leading to dueling press releases in which Hoover asserted that FDR was not interested in cooperation and FDR insisted he was.¹³⁹

That inauspicious start was followed by other failures to communicate. Hoover repeatedly sought to engage Roosevelt substantively, and Roosevelt steadfastly refused to be drawn in. This refusal was in part an unwillingness to let Hoover succeed or get credit, but

132. The phrase is generally credited to *New York Times* reporter James Kieran, who started using it in 1932. Kieran initially floated “brains department,” but a week later switched “department” to “trust.” AARON LECKLIDER, *INVENTING THE EGGHEAD: THE BATTLE OVER BRAINPOWER IN AMERICAN CULTURE* 119–20 (2013).

133. HENRY, *supra* note 4, at 276–79.

134. See, e.g., JOHN P. BURKE, *BECOMING PRESIDENT: THE BUSH TRANSITION, 2000–2003*, at 2–3 (2004); JAMES P. PFIFFNER, *THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING* (Univ. Press of Kan. 1996) (1988) (contending that a newly transitioned President’s will most likely achieve their policy goals at the beginning of a term); S. REP. NO. 100-317, at 6 (1988) (noting that pre-election transition planning is indispensable “[i]n order for the President-elect to ‘hit the ground running’”).

135. For a recent examination of the strained relationship between Hoover and Roosevelt, see ERIC RAUCHWAY, *WINTER WAR: HOOVER, ROOSEVELT, AND THE FIRST CLASH OVER THE NEW DEAL* (2018).

136. See ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945*, at 23 (1979).

137. See *id.* at 23–24.

138. Specifically, Roosevelt told Hoover “responsibility for government action remained with ‘those now vested with executive and legislative authority.’” *Id.* at 24.

139. See *id.* at 24–34; HENRY, *supra* note 4, at 297–98.

at least as much a substantive disagreement on the merits; FDR was not going to facilitate or endorse Hooverian policies with which he disagreed.¹⁴⁰ The tensions came to a particular head in the week before the March 4 inauguration. With the economy in a particular moment of crisis, Hoover sought to do something to ensure the security of bank deposits. One possibility, of uncertain legality, was to declare a bank holiday, restricting withdrawals. Hoover solicited FDR's endorsement of both the bank holiday and many of Hoover's economic policies; FDR refused, and Hoover did nothing.¹⁴¹ And then, of course, immediately following inauguration, FDR declared a bank holiday.¹⁴²

The shift to the modern regime continued in 1948, even though no transition ultimately took place. That year the Republican nominee, Thomas Dewey, became the first candidate to receive *pre*-election national security briefing.¹⁴³ In 1952, Harry Truman offered to meet with both major-party candidates before the election¹⁴⁴ and, after the election, instructed the Budget Bureau and individual agencies to prepare briefing materials, cooperate with representatives of the incoming administration, and keep him informed of what they were up to.¹⁴⁵ Though these efforts apparently met with mixed success,¹⁴⁶ they

140. See DALLEK, *supra* note 136, at 25.

141. HENRY, *supra* note 4, at 353 ([“Roosevelt’s position was that, i]f Hoover wanted to close the banks[,] he could do so on his own authority; he was, after all, still the President.”]).

142. See generally William L. Silber, *Why Did FDR’s Bank Holiday Succeed?*, 15 *ECON. POL’Y REV.* 19 (2009). Each saw the other as placing personal reputation and the desire for credit ahead of the public welfare, a disagreement that divides historians to this day. Compare JONATHAN ALTER, *THE DEFINING MOMENT: FDR’S HUNDRED DAYS AND THE TRIUMPH OF HOPE* 179–81 (2006) (“It is hard to avoid the conclusion that [Roosevelt] intentionally allowed the economy to sink lower so that he could enter the presidency in a more dramatic fashion.”), with Jeremi Suri & Jeffrey K. Tulis, *The Dangerous Interregnum*, *BULWARK* (Nov. 2, 2020), <https://www.thebulwark.com/the-dangerous-interregnum> [<https://perma.cc/KJG6-7VPG>] (“Hoover was so committed to a vision of the public interest at odds with that of his opponent that, during the interregnum, he sought to advance it and to thwart the policy designs of the incoming administration with every tool in his constitutional arsenal.”).

143. HENRY, *supra* note 4, at 468–69. The State Department also briefed John Foster Dulles, in his capacity as a Dewey advisor, also including him in a UN delegation and allowing him to hold informal talks with certain European nations. *Id.* at 468–69.

144. The effort was characterized by a series of misunderstandings and missteps and some sniping. Adlai Stevenson accepted the offer but Dwight Eisenhower declined; annoyance reigned in both the Truman and Eisenhower camps. *Id.* at 473–77.

145. *Id.* at 513–14.

146. Henry’s account sounds remarkably contemporary:

The effectiveness of these liaison efforts varied greatly from agency to agency. At the very least, they eased the procedural aspects of changing the guard, and in some areas, particularly the budget and national security fields,

marked a meaningful step toward a more institutionalized transition operation.¹⁴⁷

The Eisenhower transition team was larger than that of any prior incoming administration.¹⁴⁸ Based in the Hotel Commodore in New York City, it employed “plenty of volunteered resources.”¹⁴⁹ The transition heads, both former associates of the President-elect, assembled a list of recommended cabinet choices within a few weeks of the election, and Eisenhower accepted all of them. Eisenhower remained hands-off on the selection of White House personnel, leaving it largely to his Chief of Staff Sherman Adams.¹⁵⁰

Things changed in 1960. First, Kennedy began thinking about the transition as early as August, when he approached Clark Clifford and asked him for a “plan of takeover” that would be complete and ready the day after the election.¹⁵¹ Clifford enlisted Richard Neustadt, who had just published his famous *Presidential Power*, to produce a set of transition memos for Kennedy.¹⁵²

Second, during the summer of 1960, the Brookings Institution assembled a bipartisan, thirteen-member Transition Advisory Committee chaired by George Graham.¹⁵³ Both campaigns assigned a liaison to the Committee, as did the White House.¹⁵⁴ The Committee put together nine different confidential memos for the President-elect; these were given to Kennedy on November 18, 1960.¹⁵⁵ Think tanks have played a significant role in transitions ever since.¹⁵⁶

they contributed significantly to an effective turnover of the substantive business. But in many agencies the efforts had little success, for a variety of reasons. Aside from personal incompatibility between incoming and outgoing individuals, the advice offered was often too rigid, and the material too detailed to be grasped quickly. Many of the Eisenhower appointees had neither the time nor the inclination to engage in serious discussion with their predecessors of the subtleties of departmental administration . . .

Id. at 697.

147. *Id.* at 468.

148. *Id.* at 489.

149. *Id.* at 488–89, 690.

150. STEPHEN HESS & JAMES P. PFIFFNER, ORGANIZING THE PRESIDENCY 50 (3d ed. 2002).

151. CLARK CLIFFORD, COUNSELOR TO THE PRESIDENT: A MEMOIR 319 (1991).

152. See PREPARING TO BE PRESIDENT: THE MEMOS OF RICHARD E. NEUSTADT (Charles O. Jones ed., 2000) (collecting the transition memos).

153. Fred Dews, *What Brookings Did for the 1960 Presidential Transition*, BROOKINGS (Nov. 9, 2016), <https://www.brookings.edu/blog/brookings-now/2016/11/09/what-brookings-did-for-the-1960-presidential-transition> [https://perma.cc/9MVU-LE6L].

154. *Id.*

155. *Id.*

156. See KURT M. CAMPBELL & JAMES B. STEINBERG, DIFFICULT TRANSITIONS: FOREIGN

Third, immediately upon election, in a massive elaboration of the FDR brain trust, Kennedy counselor Ted Sorenson set about establishing task forces focused on specific policy areas, both foreign and domestic, producing extensive reports and precise recommendations.¹⁵⁷

Perhaps in response to this energetic and organized approach, and no doubt in response to disappointment over the outcome of the election, the Eisenhower White House was wary about a premature takeover.¹⁵⁸ The day after the election, the cabinet formally approved Cabinet Paper 60-110/1, titled “Preparatory Arrangements for Turn-Over of Executive Responsibility.”¹⁵⁹ The paper pledged cooperation and an orderly transfer on January 20, 1961, but was careful to insist on “maintaining until then, without compromise, Executive authority and responsibility in this Administration. Under the Constitution, there can be no ‘sharing’ of responsibility with the new Administration prior to that time.”¹⁶⁰

POLICY TROUBLES AT THE OUTSET OF PRESIDENTIAL POWER 6 (2008) (“There is a veritable cottage industry of transition and government affairs experts who form working groups and issue expert reports during every election cycle on how to perfect this unruly process . . .”). Think tanks participate in two distinct ways. One is procedural and non-partisan. That is, several self-appointed entities have developed guides and materials as resources for the incoming administration. A prominent example is Partnership for Public Service’s Center for Presidential Transition. *See Campaign Teams*, Ctr. For Presidential Transition, P’SHP FOR PUB. SERV. (2021), <https://presidentialtransition.org/campaign-teams> [<https://perma.cc/EP3E-5RZH>] (“[T]he Center supports the smooth and effective transfer of power by providing critical assistance for candidates on how to organize and execute a successful presidential transition.”).

The second role for think tanks is more partisan and substantive. Transition team staff members are drawn in part from think tanks, and the teams in general tend to be in frequent consultation with think tanks. *See generally* Heath Brown, *Presidential Transitions and Think Tanks*, HILL (May 21, 2012), <https://thehill.com/blogs/congress-blog/presidential-campaign/228567-presidential-transitions-and-thnk-tanks> [<https://perma.cc/47LT-3NTA>].

157. CONG. Q. INC., *Pre-Inaugural Task Forces Unprecedented in History*, 14 CONG. Q. WKLY. REP. 620 (1961).

158. *Id.*

159. *See* JOHN T. SHAW, *RISING STAR, SETTING SUN: DWIGHT D. EISENHOWER, JOHN F. KENNEDY, AND THE PRESIDENTIAL TRANSITION THAT CHANGED AMERICA* 130–31 (2018) (describing Cabinet Paper 60-110/1).

160. *Id.* at 130. The paper also reflected wariness about the Kennedy team infiltrating the agencies:

Contact by representatives of the President-Elect within the Executive Branch is to be limited and controlled. Normally, no more than one designated representative, who may of course be the individual intended for appointment to the Cabinet post in the new Administration, should be in contact in any Department . . . Obviously there is to be no general movement into the Executive Branch by personnel from the Administration to come.

D. THE MODERN ERA

Kennedy emerged from the long and bruising campaign for the White House with significant concerns about campaign finance—at the time, a largely unregulated area. In November 1961, he established by executive order the President’s Commission on Campaign Costs.¹⁶¹ The Commission was to make recommendations on “improved ways of financing expenditures required of nominees for the offices of President and Vice President” as well as other relevant costs associated with presidential campaigns. The executive order did not mention transitions, and the resulting report was devoted primarily to campaign finance.¹⁶² However, one of the report’s twelve recommendations called to “institutionalize” and publicly fund presidential transitions.¹⁶³ Transmitting a draft bill to Congress, President Kennedy wrote to recommend “that the outgoing President be authorized to extend needed facilities and services of the Government to the President-elect and his associates. For this purpose, funds should be appropriated to be spent for specified activities through normal government channels.”¹⁶⁴ Congress took heed, and the result was the Presidential Transition Act of 1963.¹⁶⁵

We save the details of the PTA and its various amendments for the next section. The essential reform, however, was to charge the GSA with providing office space and other support to the transition team, and to provide government funding for the operation. Subsequent amendments have expanded the mandatory transition bureaucracy

Id. at 130–31. See also Russell Riley, *Presidential Transitions Were Not Always a Thing*, HILL (Dec. 18, 2020), <https://thehill.com/opinion/white-house/529892-presidential-transitions-were-not-always-a-thing> [<https://perma.cc/BVS6-H4AJ>] (suggesting that the failure of the Bay of Pigs invasion, planned during the waning days of the Eisenhower administration but executed by JFK, was largely attributable to breakdowns in communication during the presidential transition).

161. Exec. Order No. 10,974, 26 Fed. Reg. 10,585 (Nov. 10, 1961).

162. FINANCING PRESIDENTIAL CAMPAIGNS, REPORT OF THE PRESIDENT’S COMMISSION ON CAMPAIGN COSTS (Apr. 1962). Among other things, the report proposed an income tax credit or deduction for campaign contributions, raised the possibility of public funding and endorsed reporting and other transparency requirements. These went nowhere.

163. *Id.* at 23–24 (“Recommendation No. 8—Financing the Transition Between Administrations.”).

164. Letters from John F. Kennedy, President, U.S., to Lyndon B. Johnson, President, U.S. Senate, & John W. McCormack, Speaker, U.S. House of Representatives (May 29, 1962), <https://www.presidency.ucsb.edu/documents/letter-the-president-the-senate-and-the-speaker-the-house-transmitting-bills-carry-out-0> [<https://perma.cc/7KPS-EGHL>].

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

and imposed duties of cooperation and assistance on executive agencies.

Scholars generally identify Ford-Carter or Carter-Reagan as the first modern transition; Carter's because the future President-elect got a meaningful start earlier than ever before,¹⁶⁶ and Reagan's because of its unprecedented size and elaborateness.¹⁶⁷ Not all old-timers were impressed by the expansiveness of this effort. For example, Clark Clifford, who had worked on the Kennedy transition team, lamented that the "transfer of power from one President to another is a solemn and important task" that had become "a sorry example of the government's penchant for self-indulgence at the taxpayer's expense."¹⁶⁸ But the Reagan effort is now almost universally seen as successful and effective,¹⁶⁹ even if the thousand-person operation is also described as "bloated."¹⁷⁰

The Reagan team drew heavily on input from conservative think tanks, particularly The Heritage Foundation (which provided the team with a pre-publication draft of an almost eleven-hundred-page tome that set out a sweeping, and influential, plan for remaking the executive branch), the American Enterprise Institute, and the Hoover Institution.¹⁷¹

166. See Richard Skinner, *Jimmy Carter Changed Presidential Transitions Forever*, VOX (Oct. 5, 2016), <https://www.vox.com/mischiefs-of-faction/2016/10/5/13142390/jimmy-carter-changed-presidential-transitions> [<https://perma.cc/2UX5-VFVL>].

167. See, e.g., James P. Pfiffner, *The Bush Transition: Symbols and Substance*, in PRESIDENTIAL TRANSITIONS: THE REAGAN TO BUSH EXPERIENCE 61, 62 (Kenneth W. Thompson ed., 1993).

168. CLIFFORD, *supra* note 151, at 328.

169. See, e.g., JONES, *supra* note 40, at 172; Alvin S. Felzenberg, *Introduction to THE KEYS TO A SUCCESSFUL PRESIDENCY 1* (Alvin S. Felzenberg ed., 2000).

170. Pfiffner, *supra* note 167, at 63; Tom Morganthau, *A Bloated Transition*, NEWSWEEK, Dec. 29, 1980, at 18.

171. See, e.g., BRAUER, *supra* note 87, at 226 ("[T]he Heritage Foundation's detailed work[] proved useful and their policy recommendations were adopted, either immediately or eventually."); JONES, *supra* note 40, at 70 (noting the Heritage Foundation's 1100-page contribution to the Reagan transition); *id.* at 80 (mentioning Reagan's reliance on policy research from the Heritage Foundation); Heath Brown, *A Recommendation for Presidential Transition Transparency*, PUB. CITIZEN 7 (Apr. 29, 2016), <https://www.citizen.org/wp-content/uploads/presidential-transition-recommendations-report-2016.pdf> [<https://perma.cc/UAQ5-4J3W>] (noting that the Reagan "transition team was famously influenced by the Heritage Foundation"); Skinner, *supra* note 166 (mentioning Hoover and AEI, in addition to Heritage, as having influence on the Reagan transition); Wallace Earl Walker & Michael R. Reopel, *Strategies for Governance: Transition and Domestic Policymaking in the Reagan Administration*, 16 PRES. STUD. Q. 734, 740 (1986) ("Intellectual spade work on the proper themes and issues to be pursued by a conservative Republican Administration were generated

In sheer size, the Reagan operation has not been matched since. However, all subsequent transitions have shared its essential features. And in one respect there has been further meaningful expansion: the *pre*-election operation has grown significantly. In no small measure, this is the result of amendments to the PTA described in the next section.

It is difficult to say anything conclusive about contemporary presidential transitions because the last few have been so fundamentally different from one another and several took place in highly unusual circumstances. Clinton-Bush was dramatically shortened by the uncertain election outcome.¹⁷² When it finally happened, it seems clear that there was at least some ill will (the full extent of the shenanigans involving removal of the letter “W” from White House keyboards is unclear),¹⁷³ though it was by all accounts cooperative at the top. Bush-Obama is generally seen as highly professional and successful, characterized by a remarkable level of good will, cooperation, and communication between the outgoing and incoming administrations.¹⁷⁴ Everyone other than members of the Trump administration describes Obama-Trump as chaotic, unfocused, and inadequate,¹⁷⁵ notwithstanding significant planning, preparation, and efforts at assistance by

by such think tanks as the Hoover Institute, Center for the Study of the Presidency, the Heritage Foundation and the Institute for Contemporary Studies, and by various scholars at the American Enterprise Institute and the Georgetown Center for Strategic and International Studies.”). For a self-aggrandizing account of Heritage’s outsized influence from Heritage itself, see Andrew Blasko, *Reagan and Heritage: A Unique Partnership*, HERITAGE FOUND. (July 7, 2004), <https://www.heritage.org/conservatism/commentary/reagan-and-heritage-unique-partnership> [<https://perma.cc/DH3M-FBW2>] (lauding Heritage’s role in the transition and asserting that “[n]early two-thirds of [its] 2,000 recommendations were adopted or attempted by the Reagan administration”).

172. See *infra* note 268 and accompanying text.

173. See U.S. GEN. ACCT. OFF., GAO-02-360, *THE WHITE HOUSE: ALLEGATIONS OF DAMAGE DURING THE 2001 PRESIDENTIAL TRANSITION* (2002); Alicia Montgomery & Kerry Lauerman, *The White House Vandal Scandal That Wasn’t*, SALON (May 23, 2001), <https://www.salon.com/2001/05/23/vandals> [<https://perma.cc/Y3M7-Z74C>].

174. See KUMAR, *supra* note 45, for a book-length account. See also interview by Donald A. Ritchie with Sen. Edward E. (Ted) Kaufman in Washington, D.C. (Aug. 23, 2011), https://www.senate.gov/artandhistory/history/resources/pdf/Kaufman_5.pdf [<https://perma.cc/7ZDM-7W6R>] (“And the other thing that was amazing was that the Bush White House was incredibly cooperative. I mean incredibly cooperative. Looking back historically, because we got a lot of historical data, it probably was one of the most cooperative transitions.”).

175. See generally LEWIS, *supra* note 21 (examining Trump’s transition to the presidency and political appointments); Fintan O’Toole, *Saboteur in Chief*, N.Y. REV. BOOKS (Dec. 6, 2018), <https://www.nybooks.com/articles/2018/12/06/trump-saboteur-in-chief> [<https://perma.cc/8MV9-BVHP?type=image>] (describing how

the outgoing Obama administration.¹⁷⁶ The Trump-Biden transition took place in the shadow of the outgoing President's efforts to delegitimize the election and refusal to concede defeat. Still, the combination of an experienced and prepared transition team, and the framework of law and practice that surrounds transitions, managed to produce a remarkably effective transition under the circumstances.¹⁷⁷

Despite this variation, the essential features of the modern transition operation have become relatively fixed. It is a major undertaking, carefully structured, beginning well before the election, centered in Washington, and reliant on the federal government for most funding, space, and equipment. It coordinates closely with the outgoing administration and agency staff, and endeavors to ensure that before the new President takes office, the administration will know not just who will hold the key positions, but what their policies and priorities will be.

III. LAW AND CONVENTION IN PRESIDENTIAL TRANSITIONS

Against the backdrop of this history, the Sections that follow examine the ways that both law and practice have structured the transfer of power. They catalogue the ways each branch has expressed, either through positive law or its course of conduct, its understanding of the character and legal status of the transition and the President-elect. The final Section shifts away from positive law to examine the norms, customs, and practices of transition.

Trump's obliviousness and ineptitude are discrediting government); Walter M. Shaub Jr., *Ransacking the Republic*, N.Y. REV. BOOKS (July 2, 2020), <https://www.nybooks.com/articles/2020/07/02/trump-corruption-ransacking-republic> [<https://perma.cc/GLU2-BAT2?type=image>] (describing Trump's impact on government ethics programs).

176. *Agency Transition Guide*, Ctr. for Presidential Transition, P'SHIP FOR PUB. SERV. & BOS. CONSULTING GRP 72 (June 2020), <https://presidentialtransition.org/wp-content/uploads/sites/6/2017/08/Agency-Transition-Guide-2020.pdf> [<https://perma.cc/P7KX-HGU8>]; Julie Hirschfeld Davis, Mark Mazzetti & Maggie Haberman, *Firings and Discord Put Trump Transition Team in a State of Disarray*, N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2016/11/16/us/politics/trump-transition.html> [<https://perma.cc/B5AL-EZB4>].

177. Martha Joynt Kumar, *Joseph Biden's Effective Presidential Transition: "Started Early, Went Big"*, 51 PRESIDENTIAL STUD. Q. 852 (2021).

A. TRANSITIONS AND CONGRESS

1. The Presidential Transition Act

The Presidential Transition Act of 1963¹⁷⁸ fundamentally changed transitions in at least three ways. The first has to do with scope. The PTA provided transitions with significant funding, direct assistance, and, more subtly but just as important, the seal of approval for early and extensive activity. Simultaneously, transitions became larger, more professional, and more expensive. It is difficult to disentangle how causation flows—that is, to what extent the law and its amendments codified changes already underway, and to what extent they produced those changes. But at least in part, the shifts in transitions can be attributed to the legislation.

The second shift involves routinization and consistency. Transitions—with the notable exception of 2016—have come to look more alike.¹⁷⁹ This is especially true of the efforts of the incumbent administration, on which the amended PTA now imposes a number of specific obligations and structures of cooperation, such as designation of a career staff member in each agency as transition director, the establishment of an Agency Transition Directors Council and a White House Transition Coordinating Council, and memoranda of understanding between the GSA and the transition. By establishing a particular set of requirements, requiring Memoranda of Understanding (MOU) between the transition teams and the GSA (which are based on prior MOUs), and providing for particular kinds of assistance, the PTA has narrowed the room for variation.

The third result of creating a statutory regime has been a change in the nature of transitions, from purely private entities into quasi-governmental ones.¹⁸⁰

a. *The Original Presidential Transition Act*

The original PTA's statement of purpose explained that "[t]he national interest requires that . . . transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign."¹⁸¹ It continued: "Any disruption occasioned by

178. PTA, Pub. L. No. 88-277, 78 Stat. 153 (1964) (codified as amended at 3 U.S.C. § 102 note).

179. *Id.*

180. See JONES, *supra* note 40, at 10–11 (describing post-PTA transitions as "government- and taxpayer- sponsored event[s]" with a concomitant obligation to "perform competently").

181. PTA § 2.

the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people.” Congress intended that government officials “be mindful of problems occasioned by transitions in the office of the President,” and, significantly, that they “take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power,” and generally “promote orderly transitions in the office of President.”¹⁸²

In addition to the desire to facilitate smooth transfers and minimize disruption, doubts about private funding animated the statute’s drafters. Representative Dante Fascell, one of the bill’s sponsors, argued that transition expenses “are a legitimate part of the operation of our Federal Government and should be appropriated for like other Government expenses.”¹⁸³ And Congressman Benjamin Rosenthal highlighted the dangers of private funding of transitions, noting that contributors would feel “entitled to special consideration” from the new administration.¹⁸⁴

Reflecting these concerns, the law requires the General Services Administration (GSA), after ascertaining “the apparent successful candidates for the office of President and Vice President, respectively,”¹⁸⁵ to provide extensive support to the incoming administration. The process resembles that for setting up a new agency. The GSA is to provide the President-elect with the “necessary services and facilities,” including “[s]uitable office space,” and funds for an office staff. Staff members can be federal employees; “any employee of any agency of any branch of the Government, or an employee of a committee of either House of Congress, a joint committee of the Congress, or an individual Member of Congress, may be detailed to such staffs on a reimbursable basis . . . and while so detailed such employee shall be responsible only to the President-elect or Vice-President-elect”¹⁸⁶ Although the transition receives federal funds, the PTA explicitly provides that the transition—unlike, for example, an agency—must be organized as a § 501(c)(4) entity under the Internal Revenue Code.¹⁸⁷ Accordingly, transitions can and do receive private contributions in addition to their government funding.

182. *Id.*

183. 109 CONG. REC. 13,349 (1963).

184. *Id.* at 13,346.

185. PTA § 3(c).

186. PTA § 3(a)(2).

187. PTA § 3(h)(3)(A); *see also* HENRY B. HOGUE, CONG. RSCH. SERV., R46602, PRESIDENTIAL TRANSITION ACT: PROVISIONS AND FUNDING 5 (2020).

b. *Amendments*

The PTA has been frequently amended, most recently in 2020. The amendments seem to have been driven not so much by congressional innovation as by congressional receptiveness to (1) initiatives adopted by outgoing, or sometimes incoming, administrations, and (2) the suggestions of non-partisan think tanks, most notably the Pew Center and the Partnership for Public Service.¹⁸⁸

A set of 1988 amendments require that transitions provide to the GSA Administrator, and that the Administrator in turn make public, reports detailing all private funds received and spent by the transition, both before and after the election.¹⁸⁹ They also require transitions to make public the names and recent employment of all transition personnel—full-time, part-time, and volunteer—who are members of agency transition teams.¹⁹⁰ Finally, reflecting ongoing concerns about influence and conflicts of interest, the PTA capped the amount any individual person or entity could contribute to the transition at \$5,000.¹⁹¹

In 2000, Congress provided funding for “briefings, workshops, or other activities to acquaint key prospective Presidential appointees

188. See, e.g., S. REP. NO. 116-13, at 3–4 (2019) (explaining that key provisions were adopted because the Partnership for Public Service had identified a particular problem with the existing statute); S. REP. NO. 114-94, at 3 n.13 (2015) (acknowledging debt to, and relying on *Ready to Govern: Improving the Presidential Transition*, P'SHIP FOR PUB. SERV. (Jan. 2010), https://ourpublicservice.org/wp-content/uploads/2020/12/PMI_Transition10.pdf [<https://perma.cc/8KJQ-58ZK>]); S. REP. NO. 111-239, at 3–6 (2010) (doing the same).

189. Presidential Transition Effectiveness Act, Pub. L. No. 100-398, § 5(a), 102 Stat. 985, 986 (1988) (codified as amended PTA § 6(a), 3 U.S.C. § 102 note); see John McCormick & Mike Dorning, *Barack Obama Campaign Raised Nearly \$1 Billion, Shattering Records*, CHI. TRIB. (Dec. 5, 2008), <https://www.chicagotribune.com/chi-obama-moneydec05-story.html> [<https://perma.cc/HJ45-JW22>] (“As of Nov. 15, Obama’s transition fundraising committee had already raised \$1.1 million from 1,776 donors . . .”). Concerns about buying influence through support of the transition have largely disappeared. More serious ethical issues arise, however, with regard to enormous private donations to fund the inauguration, a one-time blowout with costs exceeding those of the transition. See, e.g., Maggie Haberman, Sharon LaFraniere & Ben Protess, *At Trump’s Inauguration, \$10,000 for Makeup and Lots of Room Service*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/trump-inauguration-spending.html> [<https://perma.cc/8VPH-G3SW>]; Merrit Kennedy, *District of Columbia Sues Inaugural Committee for ‘Grossly Overpaying’ at Trump Hotel*, NPR (Jan. 22, 2020), <https://www.npr.org/2020/01/22/798500880> [<https://perma.cc/9J63-MG3Y>]; Kenneth P. Vogel & Maggie Haberman, *Melania Trump Parts Ways With Adviser Amid Backlash Over Inaugural Contract*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/us/politics/melania-trump-inauguration-adviser.html> [<https://perma.cc/V82B-QSSR>].

190. PTA § 6(b), 3 U.S.C. § 102 note.

191. PTA § 6(c).

with the types of problems and challenges that most typically confront new political appointees”¹⁹² It tasked the GSA with coordinating with candidates to “develop a systems architecture plan for the computer and communications systems of the candidate to coordinate a transition to Federal systems,”¹⁹³ and with developing a detailed transition directory.¹⁹⁴

The 2004 Intelligence Reform and Terrorism Prevention Act,¹⁹⁵ adopted in response to concerns that one factor contributing to a lack of preparedness for 9/11 was the shortened and inadequate 2000–01 presidential transition, allowed for the national security advisors of each nominee to begin an expedited security clearance process prior to the general election. The statute also directed the preparation of a detailed classified summary of “specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force,” and directed that this summary be provided to the President-elect immediately following the election.¹⁹⁶

Transition observers frequently argue that the transition team can never get started too early. As detailed in the previous section, a significant shift in the twentieth century was that candidates started to work on the transition before the election, although to a limited extent and without government funding. After taking modest steps toward pre-election transition support in 2000 and 2004, in 2010 Congress authorized significant funding and a broader process for obtaining staff security clearances for serious candidates—the major-party nominees and any other candidate who is a realistic contender¹⁹⁷—*prior to* the election.¹⁹⁸ The services provided are only a subset of those provided the President-elect, but are still meaningful and include office space and communications services.¹⁹⁹

192. Presidential Transition Act of 2000, Pub. L. No. 106-293, § 2, 114 Stat. 1035, 1035 (2000) (codified as amended at PTA § 3(a)(8)(A)(i), 3 U.S.C. § 102 note).

193. Presidential Transition Act of 2000 § 2, 114 Stat. at 1036.

194. *Id.*

195. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

196. PTA § 3(a)(8)(A)(v), 3 U.S.C. § 102 note.

197. PTA § 3(h)(4)(a).

198. See Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, §§ 2(b), 2(c)(1), 124 Stat. 3045.

199. PTA §§ 3(h)(2)(B)(i), (ii). The Romney Readiness Project spent \$9 million in federal funds for office space, furniture, and IT services. Katy Steinmetz, *The Cost of Romney's Government-Assisted Transition: \$8.9 Million*, TIME (Dec. 19, 2012) <https://swampland.time.com/2012/12/19/the-cost-of-romneys-government-assisted-transition-8-9-million> [<https://perma.cc/TF5N-N9BZ>].

In 2016, Congress turned to the structure of supporting services provided by the incumbent administration. In 2000, Bill Clinton had established a White House Transition Coordinating Council, chaired by the White House chief of staff and composed largely of senior White House officials.²⁰⁰ President Bush followed suit in 2008,²⁰¹ and in 2016 Congress wrote the practice into law, requiring the incumbent to set up a Transition Coordinating Council at least six months before a presidential election.²⁰² The Council consists of senior White House officials and eventually representatives from each presidential campaign²⁰³ and is responsible for providing agencies with guidance on transition preparations, facilitating communication between candidates and the agencies, and hosting emergency preparedness exercises.²⁰⁴

The 2016 law also requires the GSA to designate a senior career staffer as “Federal Transition Coordinator.”²⁰⁵ The Coordinator fulfills the GSA’s responsibilities, coordinates transition efforts across agencies, and negotiates an MOU with each eligible presidential candidate addressing “conditions of access to employees, facilities, and documents of agencies by transition staff.”²⁰⁶ The law also requires each agency to name a senior official as “Transition Director”;²⁰⁷ among other things, many of these Transition Directors are to sit on a new group called the Agency Transition Directors Council (ATDC),²⁰⁸

200. See Exec. Order No. 13,176, 65 Fed. Reg. 71,223, at § 1 (Nov. 27, 2000) (creating a Presidential Transition Coordinating Council).

201. See Exec. Order No. 13,476, 73 Fed. Reg. 60,605, at §1 (Oct. 9, 2008) (creating a Presidential Transition Coordinating Council charged with “assist[ing] the major party candidates and the President-elect by making every reasonable effort to facilitate the transition between administrations”).

202. PTA § 4(d), 3 U.S.C. § 102 note, amended by Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-136, § 4, 130 Stat. 301, 302 (2016).

203. *Id.*

204. HOGUE, *supra* note 187, at 3; see Exec. Order No. 13,727, 81 Fed. Reg. 29,465 § 2 (2016) (creating a White House Transition Coordinating Council).

205. PTA § 4(c), 3 U.S.C. § 102 note.

206. PTA § 4(g).

207. PTA § 4(f)(1); see S. REP. NO. 114-94 (2015); HOGUE, *supra* note 187. The PTA defines “agency” as “an Executive agency” as defined in 5 U.S.C. § 105, which in turn defines “Executive agency” to mean “an Executive department, a Government corporation, and an independent establishment.” PTA § 4(a)(2).

208. Council members include the transition director from each cabinet agency, EPA, NASA, OPM, the Office of Government Ethics, and the National Archives and Records Administration. PTA § 4(e). The amendments built on the 2010 amendments, which had authorized, but not required, the creation of these transition councils. The 2010 act was modeled on the councils set up by Presidents Clinton and Bush. See S. REP. NO. 114-94 (2015).

chaired by the Federal Transition Coordinator and the Deputy Director of OMB. This group is a continuing body that must meet at least once a year and then “on a regular basis as necessary” beginning in May of an election year.²⁰⁹ It is charged with assisting the Federal Transition Coordinator, facilitating the assembly of transition-related briefing materials, and ensuring that career officials are prepared to lead federal agencies on an interim basis during the transition.

Finally, in 2020, Congress further centered the role of career officials by specifying that each agency representative on the ATDC be “a senior representative” “serving in a career position” rather than just a “senior representative.”²¹⁰ It also, for the first time, required the transition to implement and enforce an ethics plan “to guide the conduct of the transition beginning on the date on which the eligible candidate becomes the President-elect.”²¹¹ Like so many previous changes, the ethics requirement began with initiatives from incoming administrations. In 2008, all Obama transition team members signed an ethics pledge aimed primarily at conflicts of interest.²¹² The Trump transition adopted a very similar pledge prior to the election,²¹³ and then

209. PTA § 4(e)(4)(B).

210. Presidential Transition Enhancement Act of 2019, Pub. L. No. 116-121, § 2, 134 Stat. 138, 140 (2020).

211. PTA § 4(g)(3). The ethics plan must be included in the MOU negotiated with the GSA and include “a description of the ethics requirements that will apply to all members of the transition team, including any specific requirement for transition team members who will have access to nonpublic or classified information.” PTA § 4(g)(3)(b)(i). Transition ethics plans must also address the presence on transition teams of lobbyists and foreign agents registered under Foreign Agents Registration Act. PTA § 4(g)(3)(b)(ii)(I)(bb).

212. *Obama-Biden Transition Project Code of Ethical Conduct*, Ctr. for Presidential Transitions, P'SHIP FOR PUB. SERV. (NOV. 7, 2008), <https://presidentialtransition.org/wp-content/uploads/sites/6/2008/11/Obama-Biden-Code-of-Ethical-Conduct-2008.pdf> [<https://perma.cc/S4F9-5FMG>]. The principle that members of the transition team should be subject to ethical obligations is much older. The Reagan transition team circulated *Guidelines for Standards of Conduct*, and a 1988 Recommendation of the Administrative Conference proposed such standards. See *Recommendation 88-1: Presidential Transition Workers' Code of Ethical Conduct*, ADMIN. CONF. OF THE U.S. (June 9, 1988), <https://www.acus.gov/sites/default/files/documents/88-1.pdf> [<https://perma.cc/8WQZ-GAHY>]. Both the Bush transition and the Clinton transition used similar codes. See *Bush-Cheney Code of Ethical Conduct*, Ctr. for Presidential Transition, P'SHIP FOR PUB. SERV. (Dec. 15, 2000), <https://presidentialtransition.org/wp-content/uploads/sites/6/2000/12/Bush-Cheney-Code-of-Ethical-Conduct.pdf> [<https://perma.cc/K8WS-V4NV>]; *Clinton-Gore Transition Code of Ethical Conduct*, Ctr. for Presidential Transition, P'SHIP FOR PUB. SERV. (Dec. 2, 1992), <https://presidentialtransition.org/wp-content/uploads/sites/6/1992/12/Clinton-Gore-Ethical-Code-of-Conduct.pdf> [<https://perma.cc/5NTG-DEP9>].

213. *President-Elect Trump Transition Code of Ethical Conduct* (Nov. 16, 2016), <https://presidentialtransition.org/wp-content/uploads/sites/6/2020/09/Trump-ethics-code.pdf> [<https://perma.cc/DB8L-ARLD>].

revised and toughened it after the election.²¹⁴ The Obama code and the Trump code read exactly like a set of ethical standards for government employees. In all their details, they reflect the same concerns over conflicts of interest, favoritism, and self-dealing that are at the heart of ethical guidelines and requirements applicable to public officials. Both suggest that, at least with regard to ethics, transition officials should be understood as functionally government actors.

These amendments have three consistent characteristics. The first is a move from the ad hoc to the structured and formal. The second is the imposition of obligations, like disclosure and ethics requirements, that are far more common in governmental entities (or those adjacent to the federal government, like campaigns for federal office) than private ones. Third, the amendments increasingly require that important transition-related duties be performed by *career* staff inside the federal government.

2. Other Statutes

Several other statutes warrant brief mention here. The first is the Freedom of Information Act (FOIA). Transitions have always taken the position, and courts have consistently held, that the transition is not an “agency” for purposes of FOIA.²¹⁵ Similarly, the general understanding is that the Presidential Records Act (PRA) does not apply to the transition.²¹⁶ The PRA defines presidential records to include any document “created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President.”²¹⁷ It is silent as to the President-elect, and it excludes “personal records,”²¹⁸ which is how some transition records have been classified.²¹⁹ Whether these positions are correct as a matter of law or policy is not our focus, but it is worth noting the argument that both FOIA and the PRA should apply to transitions, or at least parts of them, will only get stronger

214. Isaac Arnsdorf & Kenneth P. Vogel, *Trump Team Announces Tough Lobbying Ban*, POLITICO (Nov. 16, 2016), <https://www.politico.com/story/2016/11/Donald-trump-lobbying-ban-231534> [<https://perma.cc/7RK6-N95U>].

215. See *infra* notes 249–255 and accompanying text (describing the caselaw).

216. See *e.g.*, Laurence Brewer, NAT’L ARCHIVES & RECS. ADMIN., AC 09.2017, GUIDANCE RELATING TO PRESIDENT-ELECT TRANSITION TEAM MATERIALS (2016), <https://www.archives.gov/records-mgmt/memos/ac09-2017> [<https://perma.cc/C2TQ-JX7F>] (“The materials that PETT [President-Elect’s Transition Team] members create or receive are not Federal or Presidential records, but are considered private material.”).

217. 44 U.S.C. § 2201(2).

218. *Id.* at § 2201(2)(B)(ii).

219. See Brewer, *supra* note 216 (providing guidance regarding the private status of transition documents).

over time. Transition records are at least a significant part of the historic record, which is why, for example, Presidents traditionally save many records from the transition for their presidential library.²²⁰ Beyond that, as transitions look ever more governmental, it becomes increasingly plausible to subject them to the obligations of transparency and accountability applicable to government entities generally.²²¹

In addition to these records-related statutes, one federal employment statute treats transition employees as federal employees for purposes of federal relocation expenses.²²² The PTA does the same with regard to federal retirement plans and health insurance.²²³ And the federal criminal code treats the President-elect and Vice President-elect as “United States officials” for purposes of a provision that makes it a crime to threaten to, or actually, assault, kidnap, or murder a “United States official” or a member of their family with the intent to impede the performance of the official’s duties.²²⁴ Thus, for certain limited purposes, the law does treat the transition as a governmental operation.

3. Nomination and Confirmation

The Senate interacts with transitions in another way: by considering the intended nominees of the President-elect during the transition period.²²⁵ Here again, the government functions in a manner inconsistent with the proposition that the President-elect possesses no

220. See, e.g., *Environmental Programs and Policies - Transition Planning*, CLINTON DIGIT. LIBR. 3, <https://clinton.presidentiallibraries.us/items/show/77038> [<https://perma.cc/S8QT-QU84>] (collecting transition documents regarding environmental policy preserved in presidential library).

221. See Zoffer, *supra* note 23, at 2564–65 (arguing that transitions should have to abide by the PRA).

222. 41 C.F.R. § 302.31 (“A new appointee is . . . an individual who has performed transition activity under Section 3 of the Presidential Transition Act of 1963 . . .”).

223. PTA § 3(a)(2), 3 U.S.C. § 102 note (“Notwithstanding any other law, persons receiving compensation as members of office staffs under this subsection, other than those detailed from agencies, shall not be held or considered to be employees of the Federal Government except for purposes of the Civil Service Retirement Act, the Federal Employees’ Compensation Act, the Federal Employees’ Group Life Insurance Act of 1954, and the Federal Employees Health Benefits Act of 1959.” (internal citations omitted)).

224. 18 U.S.C. § 115. See § 115(c)(4) (“As used in this section, the term . . . ‘United States official’ means the President, President-elect, Vice President, Vice President-elect . . .”).

225. See e.g., Paul Kane, Karoun Demirjian & Anne Gearan, *Biden in Danger of Having No Confirmed Cabinet Secretaries on First Day of Presidency*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/politics/biden-cabinet-confirmations/2021/01/07/a5e99198-4fbc-11eb-bda4-615aaefd0555_story.html [<https://perma>

legal authority. The President-elect cannot formally nominate anyone to any office²²⁶ and does not purport to do so, but he can announce an intention to nominate, allowing the Senate to hold hearings and consider the nomination.²²⁷ Then, immediately upon inauguration, the President can formally nominate the individual and the Senate can vote. At least as far back as the Carter administration, the Senate has held hearings on the President-elect's intended nominees for cabinet positions, and some have even received committee votes prior to inauguration.²²⁸ Of the fifty-six cabinet nominations announced prior to inauguration by Presidents Clinton, Bush, Obama, and Trump, forty-nine received pre-inauguration hearings.²²⁹ For example, President-Elect Obama announced his intent to nominate Hillary Clinton as Secretary of State on December 1, 2008;²³⁰ and her hearing was held on January 13, 2009, a week before his inauguration.²³¹ Clinton was formally nominated on January 20, approved by the committee that afternoon, and confirmed by the full Senate the next day.²³² This sequence of events is not unusual. Indeed, Ronald Reagan's entire cabinet was in place within a few days of his inauguration because all

.cc/D9AJ-MTWL] (stating that presidential appointees are usually considered during the transition period).

226. See U.S. CONST. art. II, § 2, cl. 2 (placing the appointment power in the President or, in certain circumstances and should Congress so decide, the courts of law or the heads of departments).

227. See Kane et al., *supra* note 225 (describing the Senate's practice of considering the incoming President's nominees prior to inauguration day).

228. See *Jimmy Carter Cabinet Nominations*, U.S. SENATE, https://www.senate.gov/legislative/nominations/Carter_cabinet.htm [<https://perma.cc/85ZC-KGEU>] (indicating that all twelve of Jimmy Carter's initial cabinet nominees had hearings before the inauguration, eight were confirmed on inauguration day, and the remaining four were confirmed within a week thereafter).

229. Geller & Flanagan, *supra* note 15. Hearings on non-cabinet nominees have not been as rapid, and actual confirmation may be delayed by other circumstances. *Id.* Average confirmation time after inauguration for cabinet nominees has risen with every President since Clinton, with a significant jump from Obama (4.9 days) to Trump (23.9 days). *Id.*

230. Peter Baker, *Appointments Begin a New Phase for Obama*, N.Y. TIMES (Dec. 1, 2008), <https://www.nytimes.com/2008/12/02/us/politics/02obama.html> [<https://perma.cc/6CPG-D98K>].

231. See Glenn Kessler, *At Confirmation Hearing, Clinton Talks of Engagement with Iran*, WASH. POST (Jan. 14, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011301145_pf.html [<https://perma.cc/7TM2-3SRP>] (noting the dates of Clinton's confirmation hearing).

232. See PN64-1, *Hillary Clinton, Sec'y of State*, CONGRESS.GOV (Jan. 2009), <https://www.congress.gov/nomination/111th-congress/64/1> (last visited Nov. 2, 2021).

cabinet heads had received hearings in the preceding two weeks.²³³ In these situations, the nomination is formally pending for only a few hours, but for all practical purposes it has been pending for weeks or months.

This practice suggests that Congress—or at least the Senate—has a more nuanced understanding of the complicated relationship between outgoing and incoming administrations than the one-President-at-a-time truism would suggest. A President-elect who was in no way the President would not be entitled to have his nominees considered by the Senate. The Senate's willingness to consider nominees-to-be suggests that it deems the President-elect to be something more than a purely private actor. It also suggests that in the eyes of a chief institutional partner and rival (the Senate), the President-elect already possesses some of the powers, and enjoys some of the prerogatives, of the Presidency.

Note also that none of this is about *law*. The Senate's role in appointments in general is not meaningfully restricted by constitutional standards; it varies enormously with the political circumstances and the office in question. Any consistent practice results almost wholly from accepted norms, not legal or constitutional constraint.²³⁴ So it is not a complete surprise that the consistent practice regarding pre-inauguration nominees neared collapse in 2021, against the background of Republican control of the Senate, Trump's refusal to concede, pervasive Republican intransigence, and the January 6 assault on the Capitol.²³⁵ Just four nominees were given pre-inauguration hearings—those for Secretaries of Defense, Treasury, State, and Homeland Security and for Director of National Intelligence—and these only occurred on January 19, the eve of inauguration.²³⁶

233. *Final Draft of the Presidential Transition Report* 34 (Aug. 19, 1982), Edwin Meese Files, RONALD REAGAN LIBRARY (on file with the authors); *Ronald Reagan Cabinet Nominations*, U.S. SENATE https://www.senate.gov/legislative/nominations/Reagan_cabinet.htm [<https://perma.cc/XEK6-K6LQ>] (showing that all thirteen of Reagan's cabinet nominees had hearings prior to inauguration and all but one were confirmed by January 22).

234. *See, e.g.*, Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 *CARDOZO L. REV.* 443, 451–52 (2005) (noting that there are three appointments clauses in practice, despite there being only one in the Constitution's text).

235. *See Kane et al., supra* note 225 (noting the chaos that prevented Biden's nominees from being considered).

236. Daniel Strauss, *Biden Cabinet Picks: Confirmation Hearings Begin One Day Before Inauguration*, *GUARDIAN* (U.K.) (Jan. 19, 2021), <https://www.theguardian.com/us-news/2021/jan/19/biden-cabinet-picks-confirmation-hearings-kick-off> [<https://perma.cc/L8SA-V5WN>].

4. Congressional Staff Details

Congress interacts with the transition in one other way: it loans, or “details,” staff members to the transition.²³⁷ The PTA authorizes this practice, and transitions have availed themselves of this resource. Moreover, each House has gone further than the PTA requires, permitting staff members to assist transitions not only as reimbursable detailees but also as part of their “congressional duties,” or alternatively as volunteers.²³⁸ This practice is revealing. Congressional staff members routinely work closely with agency staff—though in such cases the assistance ordinarily runs from the agency to Congress, rather than the reverse—but congressional staff are never assigned to private firms. Congressional approval of staff involvement with transitions again suggests that Congress views the transition as something quite different from a purely private entity.

B. TRANSITIONS AND THE COURTS

The Supreme Court has never squarely addressed the legal status of presidential transitions, but lower courts have dealt with a range of legal questions involving transitions. They have mostly treated transitions as hybrids: not government entities, but still subject to different treatment and analysis than would be appropriate in the context of purely private entities.

First, in *Nixon v. General Services Administration*,²³⁹ the Supreme Court upheld the constitutionality of the Presidential Recordings and Materials Preservation Act, which directed the retention in government custody of the President’s official records.²⁴⁰ The Court made no

237. PTA § 3(a)(2), 3 U.S.C. § 102 note.

238. See H. COMM. ON ETHICS, 114TH CONG., GUIDANCE ON STAFF ASSISTING IN THE PRESIDENTIAL TRANSITION (Comm. Print 2016) (authored by Charles W. Dent & Linda T. Sánchez). The 2020 PTA amendments were aimed in part at facilitating these assignments. See S. REP. NO. 116-13, at 3-4 (2019) (noting that under the existing statute an agency head had to approve such details, and that shifting this responsibility to the member for whom the staffer works would reduce delays).

239. 433 U.S. 425, 425-28 (1977).

240. The Presidential Recordings and Materials Preservation Act focused narrowly on the Nixon presidential tapes and documents. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, §§ 101(a)(1)-(3), 88 Stat. 1695, 1695 (1974) (codified as amended at 44 U.S.C. § 2111 note). The Presidential Records Act of 1978 now governs the official records of the President and Vice President. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201-09) (rendering such records public and creating a statutory regime in which first Presidents, and then the National Archives and Records Administration, manage administration records).

reference to transitions or Presidents-elect, but the three-judge district court opinion under review did.²⁴¹ In a lengthy discussion of the purposes of the Act, the court explained that “preservation of these materials is needed to ensure their availability for successive administrations engaged in policymaking.”²⁴² Invoking history, it elaborated: “In both the first presidential transition, from George Washington to John Adams, and the most recent transition following Mr. Nixon’s resignation, as well as in many others, the importance of this need has been recognized by making some provision for continued access to documents of the outgoing administration.”²⁴³ The court thus explicitly acknowledged the importance of an incoming administration’s access to its predecessor’s records, presumably at least in part for the purpose of facilitating a smooth transition, and credited that important government interest in affirming the law’s constitutionality.²⁴⁴

Other cases have noted the importance of transition access to various governmental resources. For example, in *United States v. Cisneros*, the D.C. Circuit explained that “[f]or a smooth transition, the selection of potential nominees, the investigations of their backgrounds, and the adjudications of their security clearances must begin well before the President takes the oath on January 20th.”²⁴⁵ While the first step in this chain is internal to the transition, the second and third steps—background investigations and security clearance adjudications—are performed entirely by the government and are generally performed exclusively for the intended nominees and other appointees of the President (as well, in other circumstances, for other government workers and contractors, and prospective employees).²⁴⁶ In noting that the transition is entitled to utilize these resources, the court acknowledged that both transition officials and the President-elect are in some sense government actors.²⁴⁷ In another case, a federal magistrate judge explicitly noted the hybrid or dual status of the

241. See *Nixon v. Adm’r of Gen. Servs.*, 408 F. Supp. 321, 350 (D.D.C. 1976), *aff’d*, 433 U.S. 425 (1977).

242. *Id.* at 350.

243. *Id.* The court continued: “That practice has not, to be sure, been uniform, but that nonuniformity may only reinforce the validity and cogency of a congressional view that records of past executive policymaking ought to be preserved so that future administrations can have ready access to them” *Id.* at 350–51.

244. *Id.* at 350–53 (describing the “significant” government interest in having presidential records “availab[le] for successive administrations engaged in policymaking”).

245. 169 F.3d 763, 764 (D.C. Cir. 1999).

246. See *id.* at 765.

247. See *id.*

President-elect, observing that “a [P]resident-elect by statute and policy may be accorded security briefings and other transitional prerogatives,” but also cautioning that “he or she has no constitutional power to make any decisions on behalf of the Executive Branch.”²⁴⁸

Courts also have consistently held that transitions and transition teams are not “agencies” under the Freedom of Information Act. One district court reasoned that the fact that “transition staff is clearly not in the control of the incumbent President” but “answers only to the President-elect” meant that “the staff is not within the executive branch of government and hence not an ‘agency’” under FOIA.²⁴⁹ The D.C. Circuit has concluded, without grappling with the status of the transition, that a report prepared by a transition team, although located at the Department of Health and Human Services, “was not an ‘agency record’ subject to disclosure under the Freedom of Information Act, since the documents were not ‘created’ by an agency within the meaning of the FOIA and were never ‘obtained’ by the Department.”²⁵⁰ On the same reasoning, another district court recently rejected a FOIA request seeking Trump transition team emails that were in the possession of, but did not involve communications with, the GSA.²⁵¹

A separate question concerns whether communications between the transition and an agency may be withheld under FOIA, which exempts from disclosure certain “inter-agency” documents.²⁵² The fact

248. *Fish v. Kobach*, No. 16-2105-JAR, 2017 WL 1373882, at *6 (D. Kan. Apr. 17, 2017) (holding that executive privilege does not protect communications with the President-elect) (emphasis omitted).

249. *Ill. Inst. for Continuing Legal Educ. v. U.S. Dep’t of Lab.*, 545 F. Supp. 1229, 1232–33 (N.D. Ill. 1982) (holding that a transition team briefing book on the Department of Labor was not an agency record because it was not prepared or used by a government official). An alternative ground for such a holding might be that the transition operation is so intimately tied to the President-elect that, even if it is part of the government, it is not an “agency” within the meaning of FOIA. *See* 5 U.S.C. § 552(f)(1) (defining “agency” to include the Executive Office of the President and so, by implication, not the President himself); *Armstrong v. Exec. Off. of the President*, 90 F.3d 553, 555 (D.C. Cir. 1996) (holding that the National Security Council is not an agency under FOIA because it operates in close proximity to the President, who chairs it, and does not exercise substantial independent authority); *Schwarz v. U.S. Dep’t of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (holding that offices within the White House whose functions are limited to advising and assisting the President are not agencies under FOIA).

250. *Wolfe v. Dep’t of Health & Hum. Servs.*, 711 F.2d 1077, 1079–80 (D.C. Cir. 1983).

251. *Democracy Forward Found. v. U.S. Gen. Servs. Admin.*, 393 F. Supp. 3d 45, 46, 52–53 (D.D.C. 2019) (stressing that GSA did not create, review, search, or consult requested records).

252. *Am. Oversight v. U. S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 341–44 (D.D.C.

that the transition is not considered an agency would seem to cut in favor of disclosure, and a 2018 decision deemed this exemption inapplicable precisely because the transition was not an agency.²⁵³ But another opinion that same year held that even “assuming that the transition team is not in fact an ‘agency’ under FOIA,” it did not necessarily follow that communications between agencies and a transition team were outside the scope of the exemption.²⁵⁴ The court went on to find that the deliberative process privilege might encompass transition communications, suggesting that transitions were functional counterparts of the White House.²⁵⁵

In sum, the limited judicial authority supports the view that transitions defy easy categorization. Much depends on context. It also suggests that transitions and the President-elect are fundamentally liminal or dual entities, not quite the government, but connected to the outgoing administration and the permanent structures of government in a way that distinguishes them from any purely private entity.

C. TRANSITIONS AND THE EXECUTIVE

Various executive branch entities have issued guidelines or opinions, of varying degrees of force and formality, pertaining to presidential transitions. They have also entered into agreements in which they pledge to provide resources, services, and support to transitions.

1. Regulations and Agency Guidance Documents

Regulations issued by the Office of Government Ethics (OGE) require each agency’s chief ethics official to begin evaluating, no later than one year before a presidential election, whether “the agency’s ethics program has an adequate number of trained agency ethics officials to effectively support a Presidential transition.”²⁵⁶ The regulations require OGE to provide extensive support to transitions and incoming officials, mandating that it “proactively assist the Presidential Transition Team in preparing for Presidential nominations.”²⁵⁷ In addition, OGE produces a “Presidential Transition Guide,” which pledges

2018).

253. *Id.* at 342 (“[T]ransition teams are considered nonagencies for purposes of the FOIA.” (internal quotations and citations omitted)).

254. *Protect Democracy Project, Inc. v. U.S. Dep’t of Energy*, 330 F. Supp. 3d 515, 527 (D.D.C. 2018).

255. *Id.*; *cf.* TODD GARVEY, CONG. RSCH. SERV., LSB10094, DOES EXECUTIVE PRIVILEGE APPLY TO THE COMMUNICATIONS OF A PRESIDENT-ELECT? (2018).

256. 5 C.F.R. § 2638.210(a).

257. *Id.* § 2638.210(b)(2). The regulation suggests that it may be appropriate for

the support of OGE “in order to minimize potential disruptions in the transfer of executive power if a new President is elected.”²⁵⁸ The guide encourages presidential campaigns to “contact OGE’s Director in August to schedule an initial briefing for campaign officials engaged in planning Presidential transition activities,” and offers OGE’s assistance on the presidential nomination process, financial disclosure requirements, nominee ethics review, and any ethics-related initiatives.²⁵⁹

The Office of Management (OMB) and Budget has issued a series of memoranda providing agencies with guidance on implementation of the PTA.²⁶⁰ The most recent such memorandum, from April 2020, largely restates the requirements of the most recent round of amendments to the PTA, in particular its requirement that agencies designate senior career officials to act as Agency Transition Directors and participate in the Agency Transition Directors Council.²⁶¹ It also describes the responsibilities of the ATDC, which include ensuring that “the Federal Government has an integrated strategy for addressing interagency challenges and responsibilities around Presidential transitions and turnover of non-career appointees,” and working to “[c]oordinate transition activities among the Executive Office of the President, agencies, and the transition team of eligible candidates and the President-elect and vice-President-elect.”²⁶² In addition, it lists a number of other agencies, ranging from the Federal Reserve to the International Pacific Halibut Commission, that do not participate in the ATDC but are nevertheless required to designate a “Transition Communication Point of Contact.”²⁶³

government ethics officials to provide assistance not only to transitions but to campaigns prior to the election. “The Office of Government Ethics . . . to the extent practicable, may provide Presidential campaigns with advice and counsel on preparing for Presidential transitions.” Executive Branch Ethics Program Amendments, 81 Fed. Reg. 76,277 (Nov. 2, 2016) (codified at 5 C.F.R. § 2638.108).

258. *The Presidential Transition Guide*, OFF. OF GOV’T ETHICS (Aug. 3, 2020), [https://oge.gov/Web/OGE.nsf/0/29BDCA10DAA7FFC6852585BA006B6ACC/\\$FILE/Transition%20Guide_2020.pdf](https://oge.gov/Web/OGE.nsf/0/29BDCA10DAA7FFC6852585BA006B6ACC/$FILE/Transition%20Guide_2020.pdf) [<https://perma.cc/TPZ7-GQC7>].

259. *Id.*

260. *See, e.g.*, EXEC. OFF. OF THE PRESIDENT, M-20-24, IMPLEMENTING THE PRESIDENTIAL TRANSITION ACT (2020), <https://www.whitehouse.gov/wp-content/uploads/2020/04/M-20-24.pdf> [<https://perma.cc/H45W-RQLN>]. *See generally* Off. of Mgmt. & Budget, *Memoranda*, THE WHITE HOUSE, <https://www.whitehouse.gov/omb/information-for-agencies/memoranda> [<https://perma.cc/TB2E-LSNX>] (collecting White House memoranda beginning in 1995).

261. EXEC. OFF. OF THE PRESIDENT, *supra* note 260, at 1–2.

262. *Id.* at 2.

263. *Id.* at 5–7.

As the presidential election approaches, the GSA provides regular reports to Congress, pursuant to the PTA, describing the work of the federal government to comply with the PTA and prepare for transition.²⁶⁴ The most recent such report, from August 2020, detailed ongoing transition-related efforts of the Office of the Director of National Intelligence to provide “classified briefings and transition materials to the President-elect, Vice President-elect, and their transition teams should there be a transition.”²⁶⁵ It also described ongoing efforts by the DOJ and FBI to hire additional personnel to assist in completing background investigations and grant security clearances for transition personnel on an expedited timeline.²⁶⁶

In addition, the Office of Personnel Management (OPM) and the GSA have both compiled resources to aid the President-elect and transition staff. As required by the PTA, the GSA produces and regularly updates a “Transition Directory” designed to “connect the people helping to plan and design our next federal government with information and resources related to that effort.”²⁶⁷ The OPM produces a “Presidential Transition Guide to Federal Human Resources Management Matters” containing ethics and other guidance to both departing and incoming political appointees during a change in administrations.²⁶⁸ Additionally, the GAO has conducted after-the-fact reviews of transitions at the request of members of Congress.²⁶⁹

264. PTA § 3(h)(1)(c)(i), 3 U.S.C. § 102 note.

265. Letter from Mary Gibert, Fed. Transition Coordinator, U.S. Gen. Servs. Admin., to Ron Johnson, Chair, and Gary Peters, Ranking Member, S. Comm. on Homeland Sec. & Gov’t Affairs (Aug. 3, 2020), https://presidentialtransition.org/wp-content/uploads/sites/6/2020/11/2020-GSA-Three-Month-Report-to-Congress_Senate.pdf [<https://perma.cc/8KAM-TGSV>].

266. *Id.*

267. Arian D. Ravanbakhsh, *Transition Post 1: General Resources from NARA and GSA*, NAT’L ARCHIVES (Oct. 9, 2020), <https://records-express.blogs.archives.gov/2020/10/09/transition-post-1-general-resources-from-nara-and-gsa> [<https://perma.cc/87MR-G54H>].

268. *Presidential Transition Guide to Federal Human Resources Management Matters*, U.S. OFF. OF PERS. MGMT. (Dec. 2020), <https://www.opm.gov/about-us/our-people-organization/office-of-the-director/executive-secretariat/presidential-transition-guide-2020.pdf> [[https://perma.cc/4A2\]-JE98](https://perma.cc/4A2]-JE98)]; *Presidential Transition Guide to Federal Human Resources Management Matters*, Ctr. for Presidential Transition, P’SHIP FOR PUB. SERV. (Sept. 1, 2016), <https://presidentialtransition.org/wp-content/uploads/sites/6/2016/09/OPM-2016-Presidential-Transition-Guide-to-HR-Resources.pdf> [<https://perma.cc/JJH5-M5G8>].

269. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-615R, PRESIDENTIAL TRANSITION: INFORMATION ON ETHICS, FUNDING, AND AGENCY SERVICES (2017).

2. Advice of the Department of Justice

On occasion, the Justice Department's Office of Legal Counsel (OLC), which functions as the authoritative source of legal advice inside the executive branch,²⁷⁰ has answered questions involving the status of a transition or legal obligations that surround a transition. For example, in a November 2000 opinion, OLC concluded that the PTA did not permit the GSA Administrator to provide transition services, facilities, and funding to more than one potential transition team where the outcome of the presidential election was unclear. In that circumstance, OLC concluded, no transition could be accorded transition status until there was a single apparent winner.²⁷¹

In 1988, OLC advised that restrictions on contacts between former agency officials and the agency for which they worked do extend to transition staffers being paid by a private employer but do not apply to volunteers or those being paid from public funds.²⁷² The Office has also issued a series of opinions addressing the extent to which an agency can spend its own funds (rather than using GSA transition funding) to provide office space and support services to the transition team.²⁷³

These memos, at least those that are public, are too few and too narrow to support any broad conclusions about OLC's position on the

270. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460–69 (2010) (describing the power of OLC opinions). But see Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 811 (2017) (charting changes over time in the understanding of “OLC supremacy,” i.e., the “authority of OLC to decide among potential legal interpretations”).

271. Auth. of the Gen. Servs. Adm'r to Provide Assistance to Transition Teams of Two Presidential Candidates, 17 Op. O.L.C. 322, 326 (2019). Relatedly, OLC found that GSA could reimburse the Bush/Cheney transition team for expenses incurred after the election but before GSA had determined the apparent winner. Reimbursing Transition-Related Expenses Incurred Before the Adm'r of Gen. Servs. Ascertained Who Were the Apparent Successful Candidates for the Offs. of President and Vice President, 25 Op. O.L.C. 7, 12 (2001). Perhaps notably, this determination was made by the Clinton Justice Department.

272. Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team, 12 Op. O.L.C. 264, 266 (1988).

273. Use of Agency Resources to Support Presidential Transition, 24 Op. O.L.C. 309, 309–10 (2000) (first citing Memorandum from Timothy E. Flanigan, Assistant Att'y Gen., O.L.C., to C. Boyden Gray, Couns. for the President (Dec. 14, 1992); and then Memorandum from Douglas W. Kmiec, Assistant Att'y Gen., O.L.C., to Arthur B. Culvahouse, Jr., Couns. to the President (Jan. 3, 1989)). OLC has also opined on questions related to former Presidents, including advising a sitting President on his ability to make military aircraft available to a former President for official or personal business. Presidential Transition Act (3 U.S.C. § 102 note)—Provision of Mil. Aircraft and Hosp. Corpsman to a Former President (31 U.S.C. § 638), 2 Op. O.L.C. 319, 321 (1977).

legal or constitutional status of a presidential transition or the President-elect. However, there are important signs that OLC treats transition-team requests in the same way that it treats requests from government agencies or the White House. For one thing, OLC has rendered legal advice during the transition period in response to questions from the incoming President or administration. A recent example is an opinion from inauguration day in 2017 advising that the federal anti-nepotism laws do not preclude White House employment of close relatives of the President.²⁷⁴ The opinion explicitly noted that the occasion giving rise to the opinion was the desire of the President—who at the time of the opinion’s preparation was the President-elect—to hire his son-in-law for a White House position.²⁷⁵ The decision was dated January 20, 2017; given its depth and length (17 pages), it must have been in the works in the waning days of the Obama administration. While the opinion was issued only after the formal change in administrations, the office’s lawyers were clearly at work on the analysis—in response to a request from the counsel to the President-elect—well before the President-elect took his oath of office.²⁷⁶

Many questions OLC receives do not result in formal, written opinions, so this memo likely represents the tip of the iceberg in terms of legal advice. For example, the Biden administration issued a slew of day-one executive orders and other directives.²⁷⁷ Issued within hours of inauguration, these were clearly reviewed by OLC for form and le-

274. Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Off., 41 Op. O.L.C. 1, 5 (2017).

275. See *id.* at 1 (“You have asked whether section 3110 of title 5, U.S. Code, which forbids a public official from appointing a relative ‘to a civilian position in the agency . . . over which [the official] exercises jurisdiction or control,’ bars the President from appointing his son-in-law to a position in the White House Office, where the President’s immediate personal staff of advisors serve.” (quoting 5 U.S.C. § 3110)).

276. Other components of DOJ have offered transition-related legal opinions, in particular to echo the limited caselaw holding that a presidential transition is not an “agency” for purposes of FOIA. The key memorandum was issued in 1988 and updated in 2016. See *FOIA Update: FOIA Counselor: Transition Team FOIA Issues*, U.S. DEP’T OF JUST. (1988, rev. 2016), <https://www.justice.gov/oip/foia-update-foia-counselor-transition-team-foia-issues> [<https://perma.cc/R6MU-AEU6>]. Other entities in the executive branch have reached the same conclusion. See U.S. GEN. ACCOUNTING OFF., GGD-89-91, REMOVAL OF AGENCY DOCUMENTS BY SENIOR OFFICIALS UPON LEAVING OFFICE (1989); Brewer, *supra* note 216 (“The materials that [presidential transition team] members create or receive are not Federal or Presidential records, but are considered private materials.”).

277. Aishvarya Kavi, *Biden’s 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html> [<https://perma.cc/9Q8W-VC5W>].

gality well before noon on January 20, 2021. This practice of pre-inaugural consultation appears longstanding: a report of the Reagan transition team expressly recommended that the transition turn to OLC if any question arose prior to inauguration regarding the legality of a planned designation of an acting head of a department by the new President.²⁷⁸

3. Memoranda of Understanding

As described above, the 2016 amendments to the PTA require that by September 1 of every election year the GSA Administrator enter into “a memorandum of understanding with each eligible candidate, which shall include, at a minimum, the conditions for the administrative support services and facilities.”²⁷⁹ The most recent such publicly available MOU, between the GSA and the Biden Campaign, was signed on September 3, 2020, and covered matters including office space and hours, employee payroll, and technology and security.²⁸⁰ Recent transitions have also featured other MOUs, entered into without any statutory requirement, including MOUs between the transition and the White House²⁸¹ and the transition and the Department of Justice or the FBI.²⁸²

MOUs are widely used coordination instruments across the executive branch.²⁸³ Agencies use these memoranda to formalize information-sharing arrangements, assign responsibility for various parts of a multi-step process, and enter into other sorts of collaborative arrangements.²⁸⁴ Prominent examples of inter-agency MOUs include an agreement between the Department of Homeland Security and the

278. *Final Draft of the Presidential Transition Report*, *supra* note 233, at 41.

279. PTA § 3(i), 3 U.S.C. § 102 note.

280. *Memorandum of Understanding Between the General Services Administration and Joseph R. Biden, Jr.*, *supra* note 64.

281. *Memorandum of Understanding Between the Administration and the President-Elect's Transition Team* (Nov. 15, 2016), <https://presidentialtransition.org/wp-content/uploads/sites/6/2016/11/2913a11c367791bc5cbe730d7893c777-490911271.pdf> [<https://perma.cc/672K-QXN3>].

282. *See e.g., Memorandum of Understanding Between the Department of Justice and Presidential Candidate Barack Obama Regarding the 2008 Presidential Transition Clearance Adjudication Plan* (Oct. 1, 2008), <https://presidentialtransition.org/wp-content/uploads/sites/6/2008/10/4c1353a83a49c605c5fbbc3dbced8134-1461091158.pdf> [<https://perma.cc/3YCM-8P6W>] (agreeing on security clearance details with the presidential transition).

283. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1161 (2012) (“A typical MOU assigns responsibility for specific tasks, establishes procedures, and binds the agencies to fulfill mutual commitments.”).

284. *See id.* at 1161–65.

National Security Agency to collaborate on matters of cyber-security,²⁸⁵ and multiple memoranda between the Army Corps of Engineers and the Environmental Protection Agency concerning their shared authorities under the Clean Water Act.²⁸⁶

MOUs are similar to contracts. But while elaborate bodies of law govern contract enforcement in the private-law domain, MOUs between government entities are generally understood to rest on the good faith of the parties and not be subject to enforcement in courts or elsewhere.²⁸⁷ Even bracketing questions of enforcement, it is striking that entities of the federal government view transitions as appropriate partners for MOUs, and that Congress has directed the GSA to enter into such agreements.

D. TRANSITION BY CONVENTION

As the preceding discussion makes clear, some basic legal scaffolding surrounds presidential transitions. But in the same way that much of the actual work of government—the task of “making things work under conditions of uncertainty”²⁸⁸—is structured by norms, practices, and conventions,²⁸⁹ so too do the operations of transitions turn as much or more on conventions as on positive law.

285. See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 258 (2015) (discussing DHS/NSA “interdepartmental collaboration”).

286. See, e.g., *Enforcement for the Section 404 Program of the Clean Water Act: Memorandum Between the Department of the Army and the Environmental Protection Agency* (Jan. 1989), <https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act> [<https://perma.cc/EVS7-AZ9M>] (allocating responsibilities between the two agencies); *Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines* (Feb. 6, 1990), https://www.epa.gov/sites/default/files/2019-05/documents/1990_army-epa_mitigation_moa.pdf [<https://perma.cc/QKN7-32N8>]; *Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army* (Aug. 11, 1992), https://www.epa.gov/sites/default/files/2015-03/documents/1992_moa_404q.pdf [<https://perma.cc/G9XQ-L6J3>] (setting out the respective roles of the Army Corps of Engineers and EPA in individual permitting decisions, as required by CWA § 404(q)).

287. Freeman & Rossi, *supra* note 283 (“These agreements resemble contracts, yet they are generally unenforceable and unreviewable by courts.”).

288. Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CAL. L. REV. 1913, 1917 (2020).

289. See generally Katherine Shaw, *Conventions in the Trenches*, 108 CAL. L. REV. 1955, 1957 (2020) (discussing conventions and norms in the context of judicial review of executive branch action); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013) (discussing the centrality of conventions to the American administrative state).

Conventions—whether conceived of as “unwritten political norms,”²⁹⁰ or “social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”²⁹¹—are everywhere in the executive branch. They include the allocation of decisional authority within agencies, processes of policy development and policy planning, and document clearance practices.²⁹²

Conventions have long been central to the operation of transitions.²⁹³ In contemporary transitions, the primary conventions, both longstanding and bipartisan, involve substantial assistance from the outgoing to the incoming administration.²⁹⁴ Accounts and oral histories of recent transitions are replete with anecdotes of cross-ideological cooperation; most emphasize the way that respect for the presidency as an institution, and for the democratic process, compelled outgoing officials to provide extensive guidance and counsel to incoming officials, even across vast ideological divides.²⁹⁵

One mechanism, and indicator, of the powerful role of convention in operation of transitions is the central role of think tanks and the manuals and guidance they produce. Especially important here are the “Presidential Transition Guide”²⁹⁶ and the “Agency Transition

290. Vermeule, *supra* note 289.

291. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); *see also* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998) (“Informal systems of external social control are far more important than law in many contexts.”).

292. *See, e.g.*, Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 505 (2017) (noting that many agency heads have subdelegated authority “through highly informal means”); Metzger & Stack, *supra* note 35, at 1253–54 (“Agencies generate a vast amount of rules, procedures, and specifications geared at agency personnel to govern how they undertake their jobs and to supervise their actions. Some are officially promulgated and clearly identified as internally binding requirements; others emerge over time and take the form of unwritten norms and practices.” (internal citation omitted)).

293. *See, e.g.*, BRAUER, *supra* note 87, at 96–100 (discussing the Eisenhower-Kennedy transition); HENRY, *supra* note 4, at 445–48 (discussing the Hoover-Roosevelt transition).

294. Ctr. for Presidential Transition, P’SHP FOR PUB. SERV. & BOS. CONSULTING GRP., *supra* note 1 (providing a comprehensive guide of resources for transition planning).

295. *See generally* KUMAR, *supra* note 45 (discussing the transition between the Bush and Obama administrations). Of course, not every transition convention is intimately connected to preparations for governance; for example, the long-standing practice of an outgoing President inviting the incoming first family to spend the pre-inauguration night at Blair House, just down the street from the White House, is a courtesy with no obvious nexus to the presidency. For our purposes, the distinction is between decorum and governance.

296. Ctr. for Presidential Transition, P’SHP FOR PUB. SERV. & BOS. CONSULTING GRP., *supra* note 1.

Guide,”²⁹⁷ prepared by the Partnership for Public Service and the Boston Consulting Group. These are privately created manuals have no legal force; they are simply statements of best practices. But it would be hard to overstate their influence or the reliance that the participants place upon them.²⁹⁸

IV. TRANSITIONS AND THE “DEEP STATE”

Much of the commentary on transitions has focused on, or been produced by, *political* officials. They are, after all, the ones who lead the actual transitioning in and out. And they are the ones who are either immediately or a few years later out of government, free to speak, and perhaps in a reflective mood. But much of the on-the-ground work of transition is performed by career officials who span regimes—serving as the connective tissue between outgoing and incoming administrations. In this Part, we consider the role career staff play in transitions.

As the foregoing Parts make clear, transitions defy easy categorization, both legally and conceptually. Indeed, the status of both transitions and transition personnel appears to depend on the context in which, and the purpose for which, questions of legal status arise.²⁹⁹

297. Ctr. for Presidential Transition, P'SHIP FOR PUB. SERV. & BOS. CONSULTING GRP., *supra* note 176 (elucidating best practices and key choices for presidential transitions); see also SEA Pro. Dev. League, *A Handbook on Presidential Transition for Federal Career Executives*, SENIOR EXECs. ASS'N (2016), available at https://seniorexecs.org/page/presidential_transition_resources_open [<https://perma.cc/97KJ-V9ZE>] (facilitating support and guidance for federal career executives in presidential transitions).

298. Here is one telling quote. At one point during investigations of contacts with Russia in late 2016 and early 2017 by Michael Flynn and/or the Trump transition team, the White House lawyer handling the matter, Ty Cobb, defended the legality of the transition team's actions thus: “It would have been political malpractice not to discuss sanctions . . . the presidential transition guide specifically encourages contact with and outreach to foreign dignitaries.” Michael S. Schmidt, Sharon LaFraniere & Scott Shane, *Emails Dispute White House Claims that Flynn Acted Independently on Russia*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/russia-mcfarland-flynn-trump-emails.html> [<https://perma.cc/7GAY-9U7W>]. That Cobb's go-to citation was this non-governmental document shows just how much weight these guides have.

299. In some ways transitions resemble “hybrid entities,” or government corporations like Amtrak. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543 (outlining the legal implications of governmental corporations as public and private entities); JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 196–97* (2017) (discussing government corporations). And Joshua P. Zoffer recently suggested that a transition team is best understood as “a quasi-governmental ‘Special Government Branch’ that wields quasi-executive powers merits legal treatment analogous to the executive branch.” See Zoffer, *supra* note 23, at 2506. On the other hand, the Administrative Conference of the United

But however we understand the status of transitions, one central dynamic is the relationship of transitions to the career officials who constitute the bulk of the federal work force.³⁰⁰ Both positive law and settled norms center career officials in transitions.³⁰¹ But one lesson of the Trump-Biden transition is that we have not gone far enough to empower career officials in discharging their transition-related duties.

A. “SERVANTS OF THE COUNTRY AND NOT OF A PARTY”³⁰²

By “career officials,” we refer to the federal government’s professional civil (and foreign) service: individuals hired through a competitive, merit-based hiring process, who frequently spend their entire

States has specifically concluded that “private citizens are not, and should not be considered, special government employees.” See ADMIN. CONF. OF THE U.S., *supra* note 212, at 2. See generally Philip J. Harter, *Standards of Conduct for Presidential Transition Workers*, ADMIN. CONF. OF THE U.S. (May 1988), <https://www.acus.gov/sites/default/files/documents/1988-01%20Presidential%20Transition%20Workers%27%20Code%20of%20Ethical%20Conduct.pdf> [<https://perma.cc/Z3Z8-Z6XG>] (accompanying report Administrative Conference of the United States Rec. 88-1).

The Administrative Conference of the United States, and Harter, did urge that members of the transition team be subject to standards of conduct prohibiting self-dealing, conflicts of interest, and benefiting from or making professional use of inside information. Congress has not directly applied executive branch ethics requirements to members of the transition team. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-615R, PRESIDENTIAL TRANSITION: INFORMATION ON ETHICS, FUNDING, AND AGENCY SERVICES 7–8 (2017). However, past Transition/GSA MOUs have committed the transition to adopting a Code of Ethics, and in 2020 Congress amended the PTA expressly to require that the MOUs do so. PTA § 4(g)(3), 3 U.S.C. § 102 note. The Code of Ethical Conduct must, among other things, “prohibit a transition team member with conflicts of interest similar to those applicable to Federal employees under” 5 C.F.R. §§ 2635.402(a) and 2635.502(a) from working on matters related to that conflict. PTA § 4(g)(3)(B)(ii)(II), 3 U.S.C. § 102 note.

300. See Ctr. for Presidential Transition, P’SHP FOR PUB. SERV. & BOS. CONSULTING GRP, *supra* note 176, at 5.

301. See PTA § 4(g)(3)(B)(ii)(II), 3 U.S.C. § 102 note; Ctr. for Presidential Transition, P’SHP FOR PUB. SERV. & BOS. CONSULTING GRP., *supra* note 1, at 143–45.

302. The quotation is from the 1882 Senate Report accompanying the Pendleton Act. S. REP. NO. 47-576, at xi (1882).

careers in government, and whose job protections insulate them during changes in political leadership.³⁰³ The roots of the federal civil service trace back to the 1883 Pendleton Act,³⁰⁴ which began the long and laborious process of eliminating patronage hiring in the federal government. That process continued through a number of subsequent enactments. A watershed year was 1978, which saw the post-Watergate passage of the Civil Service Reform Act,³⁰⁵ the Ethics in Government Act,³⁰⁶ and the Inspector General Act.³⁰⁷ The Civil Service Reform Act in particular was “designed to protect career employees against improper political influences or personal favoritism . . . and to protect individuals who speak out about government wrongdoing from reprisals.”³⁰⁸ The Act strengthened merit-based personnel decisions and replaced the Civil Service Commission with the Office of Personnel Management³⁰⁹ and the Merit Systems Protection Board.³¹⁰

There are two opposing perspectives on this protected, semi-permanent bureaucracy. As Rebecca Ingber has detailed, some view career staff, with their independence and expertise, as “benevolent constraints” on the President and political leaders; others lament an

303. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984) (“The civil service, largely insulated from politics, may appropriately be regarded as the fourth effective branch of government.” (footnote omitted)); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 395 (2016) (“Nested within each of these [executive] agencies . . . are political appointees and career civil servants. The latter can be further grouped into lawyers, economists, engineers, and social workers, all serving specific functions and operating according to distinctive professional norms and commitments.”).

304. Act of Jan. 16, 1883, ch. 27, 22 Stat. 403. Passage of the Pendleton Act is usually traced to President Garfield’s 1881 assassination by a “disappointed office seeker.” *The Merit System and the Parties*, N.Y. TIMES, June 24, 1904, at 8. On the goals of the Act in general, see CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1904) (outlining the history of patronage and civil service in the United States); David E. Lewis, *Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1073, 1086 (2007) (“One of the primary motivations for the 1883 passage of the Pendleton Act was to ensure competent administration of federal programs by creating a merit-based civil service system.” (internal citation omitted)); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1378 (2010).

305. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

306. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 4 §§ 101–505 and scattered sections of 2 and 28 U.S.C.).

307. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. 3 § 1–13).

308. S. REP. NO. 95-969, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2740.

309. 5 U.S.C. § 1101.

310. 5 U.S.C. §§ 1201–04.

insulated and unresponsive bureaucracy whose members wield power at the expense of political leadership and basic principles of democratic accountability.³¹¹ This descriptive and normative debate took on a new urgency during the Trump administration, as the President conjured up and repeatedly attacked a shadowy “deep state”³¹² he claimed was hard at work to thwart his policy agenda. At the same time, many praised the bureaucracy for providing an essential check on a President who undermined both long-standing norms of governance and basic rule-of-law values, in particular in the face of a moribund Congress unwilling to rein in presidential excesses.³¹³

At the end of the day, of course, career officials are generally lower on the organizational chart than political appointees. They have bosses and have an obligation to follow (legal) instructions from those bosses.³¹⁴ The nuances of when and how a career official who thinks her boss is making an error might legitimately push back, offer alternatives, slow-walk implementation, and so on are not our topic.³¹⁵ But it is important to see that (1) career officials are not a mechanical transmission belt between the boss and agency action and, as we discuss immediately below, (2) during a transition and on matters of transition, the identity of the “boss” may best be understood as a member of the incoming, not the outgoing, administration.

B. CAREER OFFICIALS DURING THE TRANSITION

As detailed in the preceding Part,³¹⁶ the PTA reflects a clear congressional judgment to empower career officials in transitions, and

311. Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 142–43 (2018). See generally Josh Chafetz, *Constitutional Maturity, or Reading Weber in the Age of Trump*, 34 CONST. COMMENT. 17 (2019); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).

312. See, e.g., Donald J. Trump (@realdonaldtrump), TWITTER (Oct. 16, 2019, 11:06:57 PM) (“Tonight, we forcefully condemn the blatant corruption of the Democrat Party, the Fake News Media, and the rogue bureaucrats of the Deep State. The only message these radicals will understand is a crushing defeat on November 3, 2020! #KAG2020”), archived, Brandan Brown, TRUMP TWITTER ARCHIVE V2, <https://www.thetrumparchive.com/?searchbox=%22https%3A%2F%2Fco%2FQW1Rk9904b%22> [https://perma.cc/EYY4-FAUV]; Evan Osnos, *Trump v. The “Deep State”*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [https://perma.cc/5HPD-ZCLK].

313. Ingber, *supra* note 311, at 150.

314. Metzger & Stack, *supra* note 35, at 1244, 1252–54 (describing the “many internal measures, ranging from substantive guidelines to management structures” through which higher-ups control agency operations and arguing that these are themselves a form of law).

315. These matters are the topic of Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019).

316. See *supra* Part III.A.1.

each successive round of amendments to the PTA has placed additional transition-related responsibilities expressly in the hands of career officials.³¹⁷ Today, each agency's transition efforts must be *led* by a senior career official, who is responsible for directing transition efforts within the agency, as well as in some cases serving on a government-wide council designed to coordinate government-wide transition efforts.³¹⁸ The PTA appears to contemplate each agency director operating independently from agency political leadership so as to further the important national interest in "assur[ing] continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign."³¹⁹

Beyond this statutory directive to each agency director, established conventions create a general duty on the part of career officials to assist in facilitating transition.³²⁰ Indeed, in the case of those federal employees detailed to the transition, who may face competing directives from outgoing and incoming administrations, their duty clearly runs to the incoming administration.³²¹ But the point holds for all career officials who interact with the transition, not just those on detail. The *external* enforceability of these conventions, like all conventions, is uncertain.³²² A possible hook is the oath career officials take to support and defend the Constitution and to well and faithfully discharge the duties of their offices.³²³ And the well-settled norms of transitions have come to be understood as a component of the duties of office for those involved in transition.³²⁴ But whether enforceable or not, these background norms, combined with professional training and background socialization, will, as a general matter, operate to make career officials attentive to the needs of the incoming administration and to

317. See, e.g., PTA § 2(b)(3), 3 U.S.C. § 102 note.

318. *Id.*

319. PTA § 2.

320. See *supra* notes 293–295 and accompanying text.

321. PTA § 3(a)(2).

322. On judicial enforcement of conventions, compare Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 284 (2015) ("[W]hile courts may and should recognize conventions, they may not and should not enforce them."), with Farrah Ahmed, Richard Albert & Adam Perry, *Enforcing Constitutional Conventions*, 17 INT'L J. CONST. L. 1146, 1147 (2019).

323. 5 U.S.C. § 3331 (requiring federal officials other than the President to take the following oath: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.").

324. See, e.g., *supra* note 295 and accompanying text.

the general importance of a smooth and effective transition. The inauguration-day OLC memo regarding the federal anti-nepotism statute, prepared at the behest of President-Elect Trump, supplies a useful case study.³²⁵ The opinion was clearly requested and drafted during the transition period; when it was issued following the change in administrations, it was signed by a career deputy, rather than the political appointee who by then had become the acting head of OLC.³²⁶ Each step here suggests the willingness and duty of career officials to perform appropriate work for the transition.

Prior to enactment of the PTA, the transitions from Adams to Jefferson in 1800, Buchanan to Lincoln in 1860, Hoover to FDR in 1932, and Eisenhower to Kennedy in 1960 were all strained and difficult affairs in which the outgoing administration made little effort to ease the path for its successor.³²⁷ But in the modern, post-PTA era, transitions have received real assistance from those already in government. This record of relative cooperation surely is due in meaningful part to the central role of career staff. Because so much of the day-to-day support is assigned to career staff, there is only so much harm that political appointees can do.

The importance of career staff is all the more apparent when one considers the ways in which outgoing administrations *have* sought to place obstacles in their successors' paths. When we say the modern era has been one of cooperation, we mean that outgoing administrations have generally not worked to undermine or thwart the ability of an incoming administration to use the transition period as effectively as possible, to quickly get up to speed on the major issues of interest and concern in each agency, and to use that information to identify priorities and plan for the post-inauguration period. What outgoing administrations *have* done is promulgate midnight regulations,³²⁸

325. See Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Off., 41 Op. O.L.C. 1 (2017).

326. See *supra* notes 276–277 and accompanying text.

327. In addition to the accounts in Part II, see BRAUER, *supra* note 87, at 96–100 (discussing the Eisenhower-Kennedy transition); HENRY, *supra* note 4, at 445–48 (discussing the Hoover-Roosevelt transition); Rebecca Onion, *The Presidential Transition that Shattered America*, SLATE (Oct. 28, 2020), <https://slate.com/news-and-politics/2020/10/worst-presidential-transition-1860-abraham-lincoln-james-buchanan.html> [<https://perma.cc/Y7VY-BGU4>] (interviewing historian Susan Schulten regarding the Buchanan-Lincoln transition).

328. See generally Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285 (2013) (examining phenomenon of agencies rushing regulations out the door at the very end of a presidential administration).

“burrow in” by placing political appointees in career positions,³²⁹ adopt new policies,³³⁰ and abandon ethical restrictions on soon-to-be former officials.³³¹ Such actions all create substantive barriers to the ability of the incoming administration to realize its goals once in office. Not surprisingly, such actions all come from political appointees. Our point is twofold. First, at the same time such activity may be occurring, at the staff level the picture is one of at least relative and often complete cooperation and mutual assistance. Second, precisely because the outgoing administration is likely to be focused on tools of entrenchment, it cannot be counted on to really focus on facilitating the transition and maximizing the effectiveness of a group that may be setting out to undo exactly what they are striving to preserve.

To be sure, the Trump-Biden transition tested this assessment. Relatively, the pattern held: The most striking efforts to derail the Biden administration were in the form of last-minute regulations, appointments, guidance documents, and contracts. But problems also arose on the ground regarding the transition. Reporting suggests that there were at least two key problem areas: an initial refusal to share national security information and some agency access³³² and the GSA’s delay in making the formal “ascertainment” that triggers the provision of transition resources after the election.³³³ We consider the shortcomings around intelligence briefing and agency access in the next subsection; we turn to the question of ascertainment in Part VI.

329. See generally Mendelson, *supra* note 35 (describing practice of placing political appointees from an outgoing administration in career positions so as to ensure their continued influence in the next administration).

330. See, e.g., Karen DeYoung, *Pompeo’s Last-Minute Actions on Foreign Policy Will Complicate Biden’s Plans for a New Direction*, WASH. POST (Jan. 16, 2021), https://www.washingtonpost.com/national-security/pompeo-undercut-biden-foreign-policy/2021/01/16/8c430e12-55be-11eb-a08b-f1381ef3d207_story.html [<https://perma.cc/D9HU-FS7A>].

331. See, e.g., Exec. Order No. 13,983, 86 Fed. Reg. 6835 (Jan. 25, 2021) (last-minute revocation by Donald Trump of previously imposed five-year ban on lobbying by former executive branch officials); Exec. Order No. 13,184, 66 Fed. Reg. 697 (Jan. 3, 2001) (late-term revocation by Bill Clinton of previously imposed five-year ban on lobbying by former executive branch officials).

332. Laurie McGinley, Amy Goldstein, Lena H. Sun & Isaac Stanley-Becker, *Experts Warn of Vaccine Stumbles ‘Out of the Gate’ because Trump Officials Refused to Consult with Biden Team*, WASH. POST. (Jan. 14, 2021), <https://www.washingtonpost.com/health/2021/01/14/transition-biden-trump-vaccine> [<https://perma.cc/8G6P-5XKS?type=image>].

333. Virginia Heffernan, Opinion, *The GSA Administrator Vies for the Lead Among Trump’s Loyal Liars*, L.A. TIMES (Nov. 19, 2020), <https://www.latimes.com/opinion/story/2020-11-19/emily-murphy-general-services-administration-donald-trump-joe-biden-transition> [<https://perma.cc/3468-Z3NG>] (“[The Administrator’s] determination to jam the gears is . . . putting the nation at risk from hostile actors . . .”).

C. INTELLIGENCE BRIEFINGS AND AGENCY ACCESS

Two specific examples help illustrate these dynamics: intelligence briefings and access to agencies. With regard to both, the PTA's provisions are spare but important. Beyond those provisions, transition practice has developed in ways that expand and elaborate on the obligations of career officials vis-à-vis the incoming administration. In the most recent transition, these obligations appear to have mostly been discharged, but the law's indeterminacy means there remains the possibility, even if so far largely unrealized, that political officials might work to thwart effective transition.

First, the PTA directs that the President-elect receive "a detailed classified, compartmented summary of . . . specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force" as soon as possible after the election.³³⁴ No other statute entitles the President-elect to ongoing intelligence briefings. Nonetheless, for many years, the President-elect has been provided the President's daily intelligence briefing upon request.³³⁵ We believe that the consistent and unbroken practice of providing such access to Presidents-elect has solidified to the point that career officials are expected, and indeed required by the PTA and their oaths of office, to provide the President-elect with the PDB on request.³³⁶ To be sure, the PTA's text seems to refer only to a one-time briefing. But the purposes of the provision are much better served if it is read to impose a continuing obligation. Suppose a new development—a significant new covert operation or operational threat—arises after the initial post-election briefing. It would be perverse to ensure that upon taking office the new President will know just how

334. PTA §3(a)(8)(A)(v), 3 U.S.C. § 102 note. Former Acting Director of the CIA Michael Morrell has explained that major party *candidates*, not just Presidents-elect, now receive an intelligence briefing, in large part so that the candidates "don't say something during the campaign that undermines the national security of the United States." Transition Lab: A Podcast from the Ctr. for Presidential Transition, *Intelligence Briefings During Presidential Transitions*, P'SHIP FOR PUB. SERV., at 16:32 (Aug. 17, 2020), <https://presidentialtransition.org/transition-lab> (last visited Nov. 2, 2021).

335. Priess, *supra* note 26.

336. On general practice, see Priess, *supra* note 26. The PTA does not mention the PDB as such. However, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, it does require "the preparation of a detailed classified, compartmented summary by the relevant outgoing executive branch officials of specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force" and provision of that summary to the President-elect "as soon as possible" after election day. PTA § 3(a)(8)(A)(v), 3 U.S.C. § 102 note, *amended by* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601, 118 Stat. 3638, 3857 (2004).

things stood back in early November but not how they stand on inauguration day.

A variant on this scenario arose in the Bush-Obama transition and has been publicly described by Michael Morrell, former Acting Director of the CIA.³³⁷ As Morell, who served as President Bush's intelligence briefer, has explained, following the 2008 election, President Bush directed that President-Elect Obama's first regular post-election briefing be given to Obama alone.³³⁸ But evidently that limitation was not communicated to Obama's team, and Obama appeared for the briefing accompanied by several staff members.³³⁹ Then-Director of National Intelligence Mike McConnell, heeding Bush's instruction, explained to Obama that the briefing would only be made available to him, and Obama complied with that limitation and directed his staff to leave. In recounting these events, former Acting Director Morrell has suggested that McConnell should have proceeded differently—that is, should have briefed the President-elect and his chosen team, and “asked for forgiveness” from the Bush team later.³⁴⁰ The precise composition of the group that receives such briefings may involve a judgment call, but it is implicit in Morrell's description that it would have been impermissible to deny Obama intelligence briefings—including the PDB—altogether.

Note, however, that the apparent internalization of this norm—that intelligence briefings must be provided to Presidents-elect upon request—does not necessarily extend to the political appointees calling the shots. It is in the national security setting that the transition team's access to information and career staff most has to go through political appointees.³⁴¹ In 2020–21, some of those appointees seem to have been blindly loyal to the President; moreover, they had served only briefly and had apparently internalized no norms of any sort.³⁴² But even they held off on providing President-Elect Biden the PDB only as long as they had the cover of the GSA's failure to “ascertain” Biden as the apparently successful candidate.³⁴³

337. See Transition Lab: A Podcast from the Ctr. For Presidential Transition, P'SHIP FOR PUB. SERV., *supra* note 334, at 21:20.

338. *Id.* at 21:30.

339. *Id.* at 22:24–23:42.

340. *Id.* at 22:15.

341. Mike Allen & Jonathan Swan, *Scoop: Pentagon Halts Biden Transition Briefings*, AXIOS (Dec. 18, 2020), <https://www.axios.com/pentagon-biden-transition-briefings-123a9658-4af1-4632-a6e6-770117784d60.html> [<https://perma.cc/ZBE9-Y4RM>].

342. *Id.*

343. Deb Riechmann & Zeke Miller, *Top Secret: Biden Gets Access to President's Daily Brief*, ASSOCIATED PRESS (Nov. 30, 2020), <https://apnews.com/article/joe-biden>

The PTA requires agencies to have briefing materials prepared by November 1³⁴⁴ and requires the President to “take such actions as the President determines necessary and appropriate”—a major qualifier—“to plan and coordinate activities by the Executive branch of the Federal Government to facilitate an efficient transfer of power to a successor President.”³⁴⁵ In general, Trump did not deny members of the transition team access to agencies and agency officials. To do so would not only have run counter to settled norms, it would have plainly violated the PTA and arguably the Constitution.³⁴⁶ Again, whether those obligations are externally enforceable is a separate question, and whether a President-elect would want to turn to the courts even if they were is yet another. We do not know how complete and useful the briefing materials prepared by agencies were—presumably they varied—and it seems that in certain agencies political appointees insisted on sitting in on transition meetings, with the effect of chilling the exchange of information and ideas.³⁴⁷ But once the GSA determined that Biden was the President-elect for purposes of the PTA, even the truculent Trump White House did not stand in the way of access in general.

V. REFORMING TRANSITIONS

During the 2000 presidential campaign, there was a kerfuffle—later overshadowed by all the drama that followed—about a Republican National Committee ad attacking Al Gore’s health care proposals. The ad included this sentence, articulated by the narrator and appearing on the screen: “The Gore prescription plan: Bureaucrats decide.”³⁴⁸ Just before those words appeared, there was a moment in

-receive-intelligence-briefing-d235a1e5bdc4bb8587de5c15d2945a38 [https://perma.cc/5LS2-YW29]. *But see* Allen & Swan, *supra* note 341 (“Acting Defense Secretary Chris Miller ordered a Pentagon-wide halt to cooperation with the transition of President-elect Biden, shocking officials across the Defense Department . . .”).

344. PTA §§ 4(e)(2)(B)–(C), 3 U.S.C. § 102 note.

345. PTA § 4(b).

346. *See* Beermann & Marshall, *supra* note 36 (concluding that presidential transitions do impose some, though uncertain and limited, constitutional obligations on the outgoing President); *see also supra* notes 80–86.

347. Lisa Friedman, *Trump Administration Is Planting Loyalists in Biden Transition Meetings*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/climate/biden-transition-trump.html> [https://perma.cc/L76B-6USM].

348. For a contemporary description of the ad and the controversy, see Richard L. Berke, *The 2000 Campaign: The Ad Campaign; Democrats See, and Smell, Rats in G.O.P. Ad*, N.Y. TIMES (Sept. 12, 2000), <https://www.nytimes.com/2000/09/12/us/the-2000-campaign-the-ad-campaign-democrats-see-and-smell-rats-in-gop-ad.html> [https://perma.cc/G4DV-LFG7].

which just the last four letters of the penultimate word appear, in capital letters: “RATS.”³⁴⁹ The subliminal message is familiar in our politics. Nonetheless, our pitch is to rely on the bureaucrats.

This is hardly the place for a general defense of bureaucracy and civil servants, even were one necessary.³⁵⁰ No sweeping endorsement of bureaucracy is necessary to the claim that the mechanics of presidential transitions should rely primarily on career staff. Of course, bureaucrats are never good or bad in absolute terms; the question is whether they are good as compared to particular alternatives. Choosing between the government and markets, or between government employees and government contractors, are profound and divisive questions. But our question is narrower: Who in government will be most helpful to an incoming administration, and who in government is best able to facilitate the smooth transfer of power from one administration to the next? As between career employees and political appointees, the question answers itself. It is not that career staff are *always* knowledgeable, neutral, and non-strategic; they are not.³⁵¹ But relatively speaking, they are much more so than political appointees, especially vis-à-vis members of the opposing party.

The shortcomings of the Trump-Biden transition and the possibility of another transition like it—perhaps with still more recalcitrant political leadership—underscore the need both to further empower career officials and to limit opportunities for interference on the part of outgoing political leadership. A number of changes to the law and practice of presidential transitions, varying in size and scope, are worth considering.

First, returning to the point that transitions operate according to norms as much as according to law, we would encourage transition participants to conceptualize the transition mainly as a joint undertaking of the incoming administration and the career officials who will still be there after twelve p.m. on January 20. Of course, political appointees have a role to play; especially with regard to national security and foreign affairs, contact and cooperation between outgoing political leadership and the President-elect’s team is critical. But for the broad range of issues, political appointees should stay mostly out of the way.

349. *Id.*

350. Such defenses include PAUL VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT (2017); JOHN J. DI IULIO JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT (2014).

351. See generally JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 29-110 (1989) (providing a sweeping overview of influences and constraints on “operators,” i.e. front-line agency staff).

Second, the PTA could be amended to further specify the duties, and to underscore the independence from political appointees, of each agency transition director. It might also require the designation of multiple career officials in each agency, drawn from agency subcomponents, to manage transitions, rather than just a single agency transition lead. In addition, the statute could be amended to not just provide for the possibility of detailing agency officials to the transition, but to affirmatively *require* each agency to detail one or more career officials to the transition. Conceivably, the transition should be able to select detailees without having to get permission from the agency head, as is now the case.³⁵² The goal here would be to enable full and frank engagement between career staff and the transition team, and to do so away from the figurative and sometimes actual watchful eye of political appointees.

Third, the PTA should explicitly impose on political leadership what we have argued is already implicit in both the PTA and the Constitution: a duty to cooperate with transitions. This formalization could be paired with (non-criminal) sanctions for failure to cooperate, including the possibility of loss of certain post-employment perks many ex-officials enjoy, including post-employment security clearances and sometimes access to office space.³⁵³

Fourth, oversight of transitions could be strengthened, by involving Inspectors General inside agencies or congressional committees or both. This could take the form of requiring reports on transition progress beyond what the PTA already requires, and perhaps mechanisms for whistleblowing complaints specific to the transition.

Finally, a more far-reaching reform would be to recalibrate the balance of political and career officials inside agencies. The United States stands alone among peer nations in the sheer number of political appointees who sit atop each agency of the federal government.³⁵⁴

352. See PTA § 3(a)(2), 3 U.S.C. § 102 note; Ctr. for Presidential Transition, P'SHIP FOR PUB. SERV, *supra* note 64, at 9. In the case of a congressional staffer detailed to the transition, requiring approval of the relevant Member of Congress, as the PTA requires, is appropriate. First, the staffs are much smaller, so the consequences of the detail will usually be greater. Second, because the transition will only want a detailee from a friendly, co-partisan office, a lack of cooperation by the supervisor is unlikely.

353. On occasion, this occurs in ad hoc ways; the idea here would be to formalize it. Barbara Starr & Caroline Kennedy, *Biden Transition Team Denies Outgoing Acting Defense Secretary Transitional Office Space*, CNN (Jan. 20, 2021), <https://www.cnn.com/2021/01/19/politics/biden-transition-acting-defense-secretary-office-space/index.html> [<https://perma.cc/6QXT-L7XW>].

354. Fontana, *supra* note 39, at 396–97; David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1123–25 (2008).

Proposals to reduce the number of political appointees, and the number of presidential appointees in particular, are longstanding.³⁵⁵ They seem to be gathering momentum in recent years, particularly in light of the increasing difficulty Presidents have had in getting nominees confirmed.³⁵⁶ Such a shift would have two significant benefits with regard to presidential transitions. First, fewer political appointees and more career officials means less mischief and a smoother transition. Second, a major portion of what transitions do is identify and vet potential appointees. In a world with fewer appointees, the burdens on the transition itself would be reduced. These incidental benefits are not in themselves a powerful reason to reduce the number of political appointees; that would be the tail wagging the dog. Nonetheless, these benefits merit attention in the more general debate about whether there are too many political appointees.

In arguing for further empowering career officials during transition, we do not mean to suggest that career officials should be able to ignore political appointees above them in the organizational chart; the point is that the organizational chart becomes more complex during a transition. Immediately following an election, particularly if results are in dispute, the incumbent President and political leadership may be justified in declining to cooperate with or slow-walking transition efforts, and in directing career officials to do the same. But as the transition wears on—and in particular after the apparent successful candidate has been “ascertained”—the authority of outgoing political leadership erodes vis-à-vis career officials on matters of transition, and the authority of incoming political leadership increases correspondingly. Post-ascertainment, if the incumbent is *not* the ascertained winner, the incoming team has a higher claim of authority than the outgoing team—at least when it comes to the transition itself. That is, if incoming and outgoing officials issue conflicting directives on facilitating transition, both the general legal framework of the PTA and broader political accountability considerations favor the incoming administration.

355. See, e.g., Robert Maranto, *Why the President Should Ignore Calls to Reduce the Number of Political Appointees*, HERITAGE FOUND. (Feb. 27, 2001), <https://www.heritage.org/government-regulation/report/why-the-president-should-ignore-calls-reduce-the-number-political> [<https://perma.cc/R4HR-Q4BK>] (describing, though dismissing as ill-founded, the “intense pressure” on the President “from critics of the appointment process”).

356. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 212 (2008) (“The most obvious solution to politicization’s adverse effects on agency performance is to cut the number of appointees.”); Metzger & Strauss, *supra* note 39, manuscript at 1 (addressing the “recent American experience” of the Trump-Biden transition).

Of course, for better or worse, the President continues to possess the governing powers of the Presidency until the end of the term. Only the President—not the President-elect—can deploy troops, issue pardons, and negotiate treaties. But when it comes to administering *the transition*, powers are best conceived of as overlapping and shared, with allocation shifting over the course of the transition until, during the final stages, they are largely possessed by the President-elect and the incoming team.³⁵⁷

Some have argued that for the outgoing President to wield power for so long after a repudiation at the polls is a fundamental flaw in our system.³⁵⁸ Depending on the circumstances, the underlying justifications for “presidential administration,”³⁵⁹ for example, are at least weaker and could be nonexistent after a new President has been selected. But the Constitution inescapably leaves the outgoing President in place until noon on January 20. Our point is narrower. To be effective—to “hit the ground running”—the President-*elect*, not the President, must be more and more in charge of all aspects of the transition operation as that date approaches. Presidential administration implies transition administration.

One key takeaway from the 2020–21 transition is that the system worked reasonably well—indeed *remarkably* well, given the public stance of the outgoing President. The agency officials responsible for carrying out the transition managed to discharge their basic obligations to provide the transition with access and information, and they did so in a way that might not have occurred had political appointees been running the show. At least so far as appears, the transition was

357. This conception might be seen to conflict with the Article II’s vesting of executive authority in “a” President. See U.S. CONST. art. II, § 1. For two reasons, there is no conflict. First, as discussed above, the transition operation is not the executive branch; it is a liminal, quasi-governmental entity. See *supra* note 299. Even if one accepts a unitarian account, the President is not the chief executive of the transition any more than he is CEO of Amtrak. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring) (pointing out that the Constitution makes the President “Commander in Chief of the Army and Navy,” not “Commander in Chief of the country”). Second, as Jed Shugerman has recently shown, the Article II Vesting Clause does not give the President *exclusive* executive power; that power can be shared without doing violence to the constitutional arrangement. See Jed Handelsman Shugerman, “Vesting”: Text, Context, and Separation-of-Powers Problems, 74 STAN. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3793213>.

358. See Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENT. 183, 184–85 (1995) (“[T]here is something profoundly troubling . . . in allowing repudiated Presidents to continue to exercise the prerogatives of what is usually called the ‘most powerful political office in the world.’”).

359. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001) (describing and defending a model of presidential control over much of the work of the administrative state).

executed largely on the terms we have described here. And it also appears that the reason the transition was even plausible was that, once it got underway because of the GSA “ascertainment,” career staffers carried the load.

This dodged bullet is not a reason to be sanguine, however. A complex set of political circumstances—including impeachment, talk of invoking the Twenty-Fifth Amendment, a backlash to the January 6 assault on the Capitol, and the consistent rejection by courts and officials of claims of election fraud—surely helped rein in possible excesses. It is impossible to say how close to collapse the transition mechanisms came. The shortcomings of this transition and the possibility of another transition like it—perhaps with outgoing political leadership even more unwilling to facilitate transition—underscore the need to reconsider certain aspects of transitions, in particular how they begin and how they proceed once underway. Accordingly, in the next Part we consider possible reforms to the PTA’s current mechanism for triggering the post-election transition.

VI. TRIGGERING THE TRANSITION—HEREIN OF “ASCERTAINMENT”

One issue that was front and center in 2020–21 is distinct and important enough to warrant its own section. But the lesson is the same: keep politics out of the process as much as possible.

A. THE ASCERTAINMENT TRIGGER

As detailed above, the PTA provides office space, funding, and security briefings to both major party candidates prior to the election. After the election, the winner is provided significantly increased support—financial, technical, IT—as well as access to national security information, statutorily required agency briefing materials, and agency personnel. The additional resources flow to the President-elect and the Vice President elect.³⁶⁰ The PTA defines those terms:

The terms ‘President-elect’ and ‘Vice-President-elect’ as used in this Act shall mean such persons as are the apparent successful candidates for the office of President and Vice President, respectively, as ascertained by the Administrator [of the General Services Administration] following the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2.³⁶¹

Thus, as many people learned in 2020, the Administrator of the GSA must “ascertain” who the “apparent successful candidates” are to trigger full post-election transition support.

360. PTA § 3(a), 3 U.S.C. § 102 note.

361. PTA § 3(c).

Only twice since enactment of the PTA has the GSA not made that determination promptly after the election. The first time was in 2000, when the GSA Administrator did not formally ascertain the apparent successful candidates until December 14, after the Supreme Court decided *Bush v. Gore*.³⁶² The second was in 2020, when Administrator Emily Murphy waited 20 days to release post-election resources to the Biden-Harris transition team.³⁶³ She did so in a letter that began “Dear Mr. Biden,” studiously avoided referring to him as “President-elect,” and did not ever explicitly state that she had ascertained that he was the “apparent successful candidate.”³⁶⁴

In our view, Murphy’s delay violated the PTA. The Act anticipates a possible delay in light of uncertainty about the outcome, specifically providing that a candidate who is provided office space and other support is entitled to continued use thereof “until the date on which the Administrator is able to determine the apparent successful candidates for the office of President and Vice President.”³⁶⁵ So there could be a delay before the Administrator is “able” to ascertain the apparent winner. The election of 2000 was such a situation;³⁶⁶ 2020 was not.

When it finally came, GSA Administrator Murphy’s letter explained that she was making the ascertainment “because of recent developments involving legal challenges and certifications of election results.”³⁶⁷ The reference to “legal challenges” suggests that she could not make an ascertainment earlier because of pending litigation in a number of states. But it cannot be that the mere existence of litigation prevents ascertainment. As Zywicki writes: “Simply by keeping litigation ongoing, a sore loser candidate or party could dramatically undermine the transition efforts of the winning candidate by indefinitely postponing the declaration of a President-elect under the Act.”³⁶⁸ In any event, within days of the election, as a legal and factual matter it

362. 531 U.S. 98 (2000). The delay is described, and criticized, in Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U. L. REV. 1573.

363. See Letter from Emily W. Murphy, Adm’r, U.S. Gen. Servs. Admin., to Joseph R. Biden, Jr. (Nov. 23, 2020), https://www.gsa.gov/cdnstatic/2020-11-23_Hon_Murphy_to_Hon_Biden.pdf [<https://perma.cc/5DQC-QZSA>]; Walter M. Shaub Jr., *The Presidential Transition Meets Murphy’s Law*, N.Y. REV. BOOKS (Nov. 13, 2020), <https://www.nybooks.com/daily/2020/11/13/the-presidential-transition-meets-murphys-law> [<https://perma.cc/2HZZ-NCUT>].

364. Letter from Emily W. Murphy to Joseph R. Biden, Jr., *supra* note 363.

365. PTA § 3(h)(2)(D).

366. Todd Zywicki has argued compellingly that though initially there was no apparent winner, the then-GSA Administrator violated the statute in refusing to release funds even after states had certified a majority of electoral college votes for George W. Bush. Zywicki, *supra* note 362.

367. Letter from Emily W. Murphy to Joseph R. Biden, Jr., *supra* note 363, at 2.

368. Zywicki, *supra* note 362, at 1616.

was quite clear that the challenges to Biden's victories were going nowhere.

As for the certified results, when Murphy made her ascertainment, Biden's *certified* electoral college total was still less than 270. However, the certified votes plus the uncontested, non-swing states in the Biden column did total over 270.³⁶⁹ Perhaps this was Murphy's theory. But if that is the case, certification is not the key thing. The outcome of this election was identical in the electoral college and otherwise more lopsided than Trump's victory in 2016, when the GSA ascertained a victor the day after the election.

Though not catastrophic under all the circumstances, the almost three-week delay was unfortunate, likely unlawful, and points out a weakness in the existing regime.³⁷⁰ That weakness is the possible politicization of what is in theory a purely factual determination.

Administrator Murphy's letter stated that "I was never directly or indirectly pressured by any Executive Branch official . . . I did not receive any direction to delay my determination."³⁷¹ Of course, desires can be communicated even without explicit "pressure" or "direction." Given Trump's refusal to concede and baseless insistence that he had actually won, combined with his well-known tendency to make his desires clear without voicing them,³⁷² it is hard to take Murphy's claim at face value, particularly in light of presidential tweets that at least cast doubt on Murphy's representation.³⁷³

369. Of the swing states, Georgia certified on November 20 and Michigan and Pennsylvania on November 23, leaving just Nevada, Arizona, and Wisconsin, which lacked sufficient votes to make Trump the winner even if they did cast their votes for him. See Maggie Astor, Keith Collins & Amy Schoenfeld Walker, *Biden Secures Enough Electors to Be President*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/interactive/2020/11/20/us/politics/2020-election-certification-tracker.html> [<https://perma.cc/AU8S-MYHM>] (summarizing certification dates of key states).

370. Ryan Goodman & Kate Shaw, *The GSA's Delay in Recognizing the Biden Transition Team and the National Security Implications*, JUST SEC. (Nov. 10, 2020), <https://www.justsecurity.org/73317/the-gsas-delay-in-recognizing-the-biden-transition-team-and-the-national-security-implications> [<https://perma.cc/4WPL-QTDT>].

371. Letter from Emily W. Murphy to Joseph R. Biden, Jr., *supra* note 363, at 1.

372. See, e.g., *Hearing with Michael Cohen Before H. Comm. on Oversight and Reform*, 116th Cong. 10 (2019) (opening statement of Michael Cohen, Former Attorney to Donald Trump) ("Mr. Trump did not directly tell me to lie to Congress. That's not how he operates. . . . In his way, he was telling me to lie.").

373. For example, on November 15, Trump tweeted—out of the blue—"Great job Emily!" retweeting a ten-day-old tweet from Murphy herself that encouraged disabled veterans to apply for federal contracts. See Donald Trump (@realdonaldtrump), TWITTER (Nov. 15, 2020), *archived*, Brandon Brown, TRUMP TWITTER ARCHIVE V2, <https://www.thetrumparchive.com/?searchbox=%22https%3A%2F%2F>

B. RULES OR STANDARDS?

The existing statute employs a standard, not a rule. The law-applier has a certain amount of discretion. Having seen that discretion abused, it is tempting to turn to rules to cabin it. Murphy herself lamented that “the statute provides no procedures or standards for this process” and “strongly urge[d]” Congress to amend it.³⁷⁴ She is not alone in calling for a clearer, more rule-like test.³⁷⁵ Congress (or conceivably the GSA through rulemaking) could develop a set of very specific criteria for when there is an “apparent successful candidate,” such as initial vote count differences of *X* thousand, calls by at least *Y* networks, at least *Z* percent of precincts reporting, or 270 electoral votes in the initial tally in states where automatic recounts are not triggered.

We believe, however, that the existing language is adequate. First, it is not entirely open-ended. To the contrary, it gives the decider meaningful guidance and constraint. Importantly, the trigger is shy of certainty. Funds go to the *apparent*—not the actual or known—successful candidate. In addition, the statute goes out of its way to specify

2FkQbKViF7Il%22 [https://perma.cc/A43Q-DFBE]. The *Washington Post* also quoted one unnamed agency insider as saying that Trump “does not want a transition. He’s made that very clear, and we are following orders.” Lisa Rein, Jonathan O’Connell, Carol D. Leonnig & Josh Dawsey, *As Democrats Fume, the Trump Appointee Who Can Start the Biden Transition Is in No Hurry*, WASH. POST (Nov. 20, 2020), https://www.washingtonpost.com/politics/murphy-trump-biden-transition-/2020/11/20/93c42044-29d2-11eb-92b7-6ef17b3fe3b4_story.html [https://perma.cc/SK6C-4TG7]. Trump also tweeted on November 23, suggesting he had authorized or directed Murphy’s letter. See Donald Trump (@realdonaldtrump), TWITTER (Nov. 23, 2020), archived, Brandan Brown, TRUMP TWITTER ARCHIVE V2, https://www.thetrumparchive.com/?searchbox=%22I+believe+that+we+will+prevail%22 [https://perma.cc/P3Y4-4225] (“I believe we will prevail! Nevertheless, in the best interest of our country, I am recommending that Emily and her team do what needs to be done with regard to initial protocols . . .”).

374. Letter from Emily W. Murphy to Joseph R. Biden, Jr., *supra* note 363, at 1.

375. See, e.g., Beth W. Newburger, *Emily Murphy Was Right Not to Recognize Biden’s Win Until Now*, WASH. POST (Nov. 24, 2020), https://www.washingtonpost.com/outlook/2020/11/24/emily-murphy-gsa-transition-biden [https://perma.cc/X66H-3TF5] (“The problem remains obvious. Neither the law nor the subsequent amendments stipulate the ground rules for ascertaining the winner.”); Kimberly Wehle, *4 Ways to Prevent a Future Insurrection*, ATLANTIC (Jan. 13, 2021), https://www.theatlantic.com/ideas/archive/2021/01/how-remove-danger-period-american-law/617651 [https://perma.cc/G6WY-QZPV] (“Congress needs to take that nominal power away from an unelected bureaucrat, and instead impose neutral, self-executing terms for unlocking transition dollars and access to information crucial to the transition effort.”); DAVID M. WALKER, U.S. GEN. ACCT. OFF., GAO-01-229T, PRESIDENTIAL TRANSITION: CHALLENGES AND OPPORTUNITIES (2000) (pre-submitted congressional testimony of the Comptroller General) (“The Administrator should have clearly defined, consistently applied, well-documented, and transparent criteria for making this determination.”).

that the determination is to be made on the basis of the vote on election day. It plainly does not require the Administrator to wait for state certifications or the casting of electoral votes; indeed, it implicitly prohibits doing so. There is by definition an apparent winner if states with 270 electors certify their votes for a particular candidate.³⁷⁶ But that is the absolute latest that there could be, not the moment there finally is, an apparent winner. “Apparent” is not an empty term. The very fact that we and so many others feel confident in saying that Administrator Murphy violated the Act indicates that it already contains an administrable and constraining standard.³⁷⁷

The best argument for rules is that they would provide, on the one hand, protection for an Administrator who wants to ascertain but feels pressure not to, and, on the other, protection against an Administrator who does not want to ascertain but should. Those are consummations devoutly to be wished (though to be fully effective the latter would require judicial enforcement, which would be time-consuming and uncertain).

However, we are not confident that exactly the right rules can be devised. The drafters would surely focus on past scenarios, which may or may not recur, and fail to anticipate future ones. There could be an apparent successful candidate who fails to meet the specific criteria adopted; there may be a situation where the criteria point to success but there is every reason to doubt the outcome. Unquantifiable uncertainties abound. For example, the possibility of initial results being set aside by courts has to be relevant; but the mere existence of litigation cannot be enough to delay ascertainment. Inescapably, some judgment call about the extent and likelihood of success of litigation is required. How would that be captured through precise rules?

376. Zywicki, *supra* note 362.

377. If an ascertainment decision (or non-decision) were challenged in court, the Administrator might argue that the decision is unreviewable because it is “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), such that courts have “no law to apply.” *Webster v. Doe*, 486 U.S. 592, 599 (1988) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). But the statutory language is miles short of the sort of *carte blanche* that makes a decision unreviewable under § 701(a)(2). Suppose the PTA provided that the GSA Administrator “may, in his discretion, [authorize transition funding to] any [presidential candidate] whenever he shall deem such [funding] necessary or advisable in the interests of the United States”—which is the language of the statute in *Webster*, *mutatis mutandis*. See 486 U.S. at 594. That would indeed be standardless and support an argument for nonreviewability. But of course, the PTA provision does not remotely resemble such an open-ended grant of discretionary authority.

C. “THE APPARENT SUCCESSFUL CANDIDATE”?

Several commenters, including David Marchick and Lawson Fite, have argued that the existing standard is too high.³⁷⁸ In our view, the problem in 2020 was not that the standard was too demanding but that it was ignored. It is true that were the standard lower it would be even harder for a dissembling GSA Administrator to claim with a straight face that it had not been met. But any standard *could* be ignored. So a lower standard would not be responsive to the 2020 problem. In addition, a lower standard creates its own set of problems by increasing the chance of providing full transition support to the eventual *losing* candidate.

D. WHO DECIDES?

Instead of attempting to constrain the discretion of the decisionmaker, we would place the ascertainment decision with someone less susceptible to pressure or likely to be influenced by her own political or partisan commitments.

The GSA Administrator is one of the few key players under the PTA who is not a career employee. She is a political appointee, appointed by the President with the advice and consent of the Senate, serving at the President’s pleasure. Indeed, the GSA’s organic act includes an unusual sentence emphasizing presidential authority: “The Administrator shall perform functions subject to the direction and control of the President.”³⁷⁹ We bracket whether this sentence has any actual legal effect; some scholars would argue that it merely restates implied constitutional or statutory principles that apply to all presidential appointees. But it does at least remind us that the GSA Administrator is not a free agent. Furthermore, the GSA Administrator has absolutely no other responsibility that calls for the same sort of judgment as ascertainment of the apparent winner of the presidential election.³⁸⁰

378. See, e.g., Lawson Fite, *The GSA Delayed Biden’s Transition. Future Presidents-Elect Could Sue to Speed Things Up.*, LAWFARE (Nov. 30, 2020), <https://www.lawfareblog.com/gsa-delayed-bidens-transition-future-presidents-elect-could-sue-speed-things> [<https://perma.cc/9CJG-83QJ>] (proposing lowering the statutory standard to “substantially likely to be the apparent successful candidate”); Transition Lab: A Podcast from the Ctr. for Presidential Transition, *Yamiche Alcindor and David Marchick on a Transition Like No Other*, P’SHP FOR PUB. SERV., at 32:44 (Jan. 26, 2021), <https://presidentialtransition.org/transition-lab> (last visited Nov. 2, 2021) (suggesting Congress should consider a lower standard for ascertainment).

379. 40 U.S.C. § 302(a).

380. As Administrator Murphy put it, somewhat plaintively, in her letter to Biden,

The obvious implication of what we have written above is that this task should fall to a career employee, perhaps the Federal Transition Coordinator. The Federal Transition Coordinator is a senior career appointee in the GSA designated by the Administrator to run the GSA transition operation, coordinate transition planning across agencies, ensure that agencies comply with their own obligations, and serve as a liaison to the major candidates.³⁸¹ Having the Federal Transition Coordinator make the ascertainment could turn down the heat by making it clear that the decision is ministerial, narrow, and objective.³⁸² However, one lesson, and one consequence, of the delay in 2020 is that the ascertainment determination is loaded and high visibility. That means it needs to be, and in practice will be, made by someone higher up on the organizational chart. In addition, the decision may represent an exercise of such “significant authority” that the person making it is necessarily an officer of the United States and therefore must be appointed pursuant to the Constitution’s Appointments Clause.³⁸³

In terms of general subject matter, the Federal Election Commission (FEC) comes to mind. Ascertainment is all about an election, after all; shouldn’t it be placed with the Federal Election Commission? In fact, there could be no place worse. Because of its highly politicized nature, even number of commissioners, and resultant tendency to deadlock,³⁸⁴ the FEC as a body would be just the wrong entity to make

hers is “an agency charged with improving federal procurement and property management.” Letter from Emily W. Murphy to Joseph R. Biden, Jr., *supra* note 363, at 1; *see also* Zywicki, *supra* note 362, at 1616–17.

381. PTA § 4(c), 3 U.S.C. § 102 note.

382. Placing this important responsibility in the hands of a career official might also play some role in beginning the process of “rebuilding the civil service that . . . has just weathered four years of blistering attacks from the Oval Office . . .” Jon D. Michaels & Blake Emerson, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISCOURSE 418, 432 (2021). *See generally* *Hearing on Revitalizing the Federal Workforce Before the Subcomm. on Gov’t Operations, H. Comm. on Oversight and Reform*, 117th Cong. (2021) (statement of Anne J. O’Connell, Stanford Law School) (detailing the impact of the Trump Administration on the federal workforce).

383. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2052–54 (2018). Ascertainment is a consequential and final decision; the issue for Appointments Clause purposes would seem to turn on the extent to which it is discretionary.

384. The FEC’s legendary ineffectiveness and dysfunction are perhaps best captured by former chair Anne Ravel. Asked whether she would say “the FEC is more or less useless than men’s nipples,” she responded: “I would say that the FEC and men’s nipples are probably comparable.” Caitlin Cruz, *FEC Chair To ‘Daily Show’: Agency Is ‘Enormously Dysfunctional,’* TALKING POINTS MEMO (Nov. 13, 2015), <https://talkingpointsmemo.com/livewire/daily-show-federal-election-commission-chair-enormously-dysfunctional-male-nipples> (last visited Nov. 2, 2021) (linking to video

this determination. More promising would be the Election Assistance Commission (EAC), which labors in a relevant vineyard and has not been as paralyzed by partisan disagreement as the FEC. However, the EAC too has an even number of members; there is a realistic danger that if it was given this power in any case where it mattered it would just become the FEC.³⁸⁵

What is needed is an agency head or comparable entity that has gravitas and authority, commands general respect, is relatively non-partisan, would not be easily influenced by either side, and has some capacity to evaluate the substantialness of any pending legal challenges. Todd Zywicki has suggested the Attorney General,³⁸⁶ who certainly possesses the requisite gravitas but lacks the necessary political independence. A more promising candidate would be the Comptroller General. The Comptroller General is “uniquely independent,”³⁸⁷ serving a fifteen-year term³⁸⁸ and is removable only for cause by Congress by joint resolution (i.e., with the President’s signature or over their veto).³⁸⁹ The Comptroller General reviews and evaluates governmental operations, makes assessments, and has an institutionalist perspective. The Government Accountability Office already plays a modest role in supporting the transition team.³⁹⁰ Ascertainment would undeniably be outside the Comptroller General’s usual duties, but not wildly so, and much less than it is for the GSA Administrator.

There is one problem: *Bowsher v. Synar*.³⁹¹ *Bowsher* held that the Comptroller General was an agent of Congress and, as a result, could

clip of interview); see also Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1477–79 (2014) (discussing FEC gridlock); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1893 (1999) (“[T]he FEC at present does not adequately enforce the law, does not adequately deter potential malfeasants, and requires fundamental restructuring.”).

385. Although neither the FEC nor the EAC itself is likely the right place to vest this responsibility, there may be an argument for giving the chair of one or both bodies some role, as discussed below.

386. Zywicki, *supra* note 362, at 1638–39.

387. Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1389 (1988); see also FREDERICK C. MOSHER, *A TALE OF TWO AGENCIES* 158 (1984) (“[A]ll of the Comptrollers General have treasured and defended the independence of their office, not alone from the President but also from Congress itself.”).

388. 31 U.S.C. § 703(b).

389. *Id.* § 703(e)(1)(B). The Comptroller General may also be removed by impeachment. *Id.* § 703(e)(1)(A).

390. The PTA authorizes GAO staff to hold briefings and workshops for prospective presidential appointees. PTA § 3(A)(8)(a)(ii)(III), 3 U.S.C. § 102 note.

391. 478 U.S. 714 (1986).

not be given executive duties. Though much criticized, the decision remains good law. And the power to identify the winner of a presidential election, and thereby release federal funds, seems likely to qualify as “executive” rather than “legislative” under *Bowsher*; and for that reason the Comptroller General, as an agent of Congress, likely cannot make it.³⁹² It *might* be possible to divide the authority—that is, to charge the Comptroller General with ascertaining the apparent winner, and then give to others in government, perhaps a combination of the GSA Administrator, the Director of the Office of Government Ethics, and the Federal Transition Coordinator, the power to implement that determination by releasing funds and other transition resources. But any legal uncertainty here would be problematic. The last thing one would want is a successful constitutional challenge, or even a delay to allow for a challenge, to the Comptroller General’s ascertainment during the transition period.

Another strong contender is the Director of the Office of Government Ethics (OGE). Established by the 1978 Ethics in Government Act,³⁹³ OGE runs the executive branch ethics program, focused in particular on preventing financial conflicts of interest. It provides interpretations of the ethics statutes, writes regulations, provides training for executive branch ethics officials, administers Integrity, the executive branch financial disclosure system used by high-level officials, monitors compliance with ethics requirements, and makes ethics information available to the public.³⁹⁴ It already plays a central role in presidential transitions. The Director is a member of the White House Transition Coordinating Council,³⁹⁵ and a senior career official from OGE sits on the Agency Transition Directors Council.³⁹⁶ OGE prepares a Presidential Transition Guide and works extensively with actual or potential nominees well before a nomination is made public to prepare financial disclosures and identify potential conflicts. Thus, well before the election, OGE is working with both candidates’ transition teams. Because of its function and traditions, OGE enjoys a reputation for integrity, straight-shooting, and non-partisanship.

392. On the other hand, Congress is charged, through both the Twelfth Amendment and the Electoral Count Act, with counting electoral votes and, based on those votes, determining the person “having the greatest number of votes” who “shall be the President.” U.S. CONST. amend. XII; 3 U.S.C. § 15.

393. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 401, 92 Stat. 1824, 1862 (codified as amended at 5 U.S.C. app. § 401).

394. *What We Do*, U.S. OFF. OF GOV’T ETHICS, https://www.oge.gov/web/oge.nsf/about_what-we-do [<https://perma.cc/RB96-F3JN>].

395. PTA § 4(d)(3)(A).

396. PTA § 4(e)(3)(C).

There are several possible drawbacks to placing ascertainment authority with OGE. First, the Director of OGE does not have the independence that is desirable in this setting and that the Comptroller General enjoys. The Director does serve a five-year term,³⁹⁷ but the general understanding is that a statutory term of years is not an implicit grant of for-cause protection, and that the Director of OGE is removable at will. This means that the President could fire the Director for making an ascertainment and, knowing that, the Director might hesitate. However, an after-the-fact termination would not affect the validity of the Director's decision, and the political price for firing the Director for making an ascertainment would be potentially enormous. Finally, as a practical matter, the Director is more independent, and more used to giving bad news, than is the GSA Administrator.³⁹⁸ As is clear from our discussion of the FEC, for-cause protection is relevant but certainly not sufficient, and we think not necessary, to ensure sufficient freedom from political pressure.

There might also be some question whether this new role would interfere with OGE's other functions, including complicating OGE's working relationships with both campaigns. Here, too, we do not see any real danger. Indeed, a cynic would point out that giving OGE the ascertainment role would only make the campaigns more friendly and cooperative. But the more important point is that currying favor will do the campaigns no good; the decision is to be made by someone with integrity on the basis of facts. That is the kind of thing OGE is good at.

Finally, we might worry that giving this power to the Director of OGE could politicize the ethics office and thereby harm the ethics program across the federal government. We can't rule out that possibility; the position contains no statutory qualifications, so the only real checks on presidential appointments are the Senate and public opinion. But those checks are not meaningless; the small possibility that, perhaps years later, ascertainment might be controversial is an unlikely basis for skewing the whole OGE selection process. Our hunch is that a President malevolent enough to attempt to stack the decks in anticipation of an ascertainment decision could already be naming a

397. 5 U.S.C. app. § 401(b).

398. In 2008, political scientist and bureaucracy expert David Lewis attempted to categorize the ideological leanings of particular federal agencies. Based on expert survey responses, Lewis identified each agency as "liberal," "moderate," and/or "conservative." OGE was categorized as "moderate," as was the GSA. DAVID LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 115–16 (2008); *see also* Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 348 (2011) (using additional survey data to estimate agency ideology and identifying the GSA as one of the more conservative agencies).

political hack as ethics director—even without this additional authority.

A still lower-profile but promising possibility is the Chair of CIGIE, the Council of the Inspectors General on Integrity and Efficiency. Created by the 2008 amendments to the Inspector General Act of 1978,³⁹⁹ CIGIE is an independent executive-branch entity designed to address issues of integrity, economy, and effectiveness inside the federal government.⁴⁰⁰ Its membership consists of all Inspectors General (IGs) in the federal government, both those appointed by the President and those appointed by agency heads, as well as several other federal officials.⁴⁰¹ The chair of CIGIE is selected by the council members to serve for a two-year term.⁴⁰²

Although IGs, like the OGE director, lack “for-cause” removal protections, they do enjoy some statutory guarantees of independence. By statute all IGs must be selected without regard to political affiliation, and based on their “integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”⁴⁰³ By law they report both to the executive and legislative branches. And although IGs may be removed or transferred by the President (or, for those appointed by agency heads, by the relevant appointing official), the removing official must first provide Congress with a communication in writing providing the reasons for the action, and cannot actually effect the removal for thirty days after that.⁴⁰⁴ For all of these reasons, IGs occupy a relatively unique status in the federal government, and the individual who at any given time has been selected *by* the IGs to chair CIGIE likely possess the qualities of integrity and independence that are important to making the ascertainment decision free from political considerations.⁴⁰⁵

399. Inspector General Reform Act of 2008, Pub. L. No. 110-409, § 7, 122 Stat. 4302, 4306–13 (codified as amended at 5 U.S.C. App. 3 § 11); *see also* Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. App. 3 §§ 1–13).

400. 5 U.S.C. App. 3 § 11.

401. *Id.* § 11(b)(1).

402. *Id.* § 11(b)(2)(B).

403. *Id.* §§ 3(a), 8G(c). *See generally* *The Inspectors General, COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY* (July 14, 2014), https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf [<https://perma.cc/E2CX-YSDA>].

404. 5 U.S.C. App. 3 §§ 3(b), 8G(e).

405. *See generally* CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL (2020).

One additional possibility is a multi-member body, drawn from the positions we have identified here, to make the ascertainment decision. A three-member panel, consisting of some combination of the head of OGE, CIGIE, the FEC, the EAC, and perhaps the GAO, might well be the ideal body to make this determination.

E. “UNASCERTAINMENT” AND REASON-GIVING

Two other amendments would help mitigate the threat of politicization. These could be modest refinements to the current regime or an overlay to our proposal.

First, the Act should be amended to explicitly provide for the reversal of an ascertainment of the apparent successful candidate and the withdrawal of transition support.⁴⁰⁶ In part, this reflects an abundance of lawyerly caution; if initial returns prove incorrect, it is critical that there be no question about the actual apparent successful candidate’s entitlement to full funding and other support, regardless of what had already flowed to the initial apparent successful candidate.⁴⁰⁷ However, it is highly unlikely that this will ever happen, and the real value of such an explicit provision lies elsewhere. One of the reasons that in 2020 the Administrator was evidently so resistant to making an ascertainment was that ascertainment *feels like* a determination of the outcome of the election. The process would work better if ascertainment was viewed as a mechanical and interim determination. Something like Secret Service protection, which is also provided to the apparent winner and generates no controversy at all.⁴⁰⁸ A statutory provision making clear that what is done can be undone would be one element of casting a different light on ascertainment.

The final amendment would be to impose a deadline by which the ascertaining official must either make an ascertainment or give a

406. Todd Zywicki made this suggestion two decades ago. *See Zywicki, supra* note 362, at 1638.

407. In this unlikely scenario, the candidate first, and mistakenly, identified as the apparent victor should not be required to refund federal funds already spent. The recipient was legally entitled to those funds and did nothing to obtain them improperly. The situation is no different than with funds provided to the team of the losing candidate before the election.

408. 18 U.S.C. § 3056(a)(1). Note, however, that the Secret Service also protects “major presidential and vice-presidential candidates” and their spouses. *Id.* at § 3056(a)(7). So protecting the President-elect is a continuation of what has been occurring; the potentially controversial move would be to *stop* protecting the apparent loser. In 2000, the Secret Service continued to protect both candidates (one of whom was the Vice President of the United States) until the election was settled (and, given the government position of the loser, beyond); in 2020 it never had to decide at what point to stop protecting the apparent losing candidate because that person was the President of the United States.

statement of reasons for not doing so.⁴⁰⁹ Reason-giving is a (and, some would say, the) fundamental principle of American administrative law.⁴¹⁰ In this setting, the mere act of a public explanation, and public scrutiny of that explanation, might be enough to limit or eliminate entirely purely political delay or political decision-making. It would also facilitate an action for judicial review of agency action “unlawfully withheld or unreasonably delayed,”⁴¹¹ giving courts a discrete decision to review and an explanation to assess. We think such a suit would be extraordinarily unlikely, but a meaningful threat of it occurring might prevent delay of the sort we saw in 2020.

CONCLUSION

In the wake of America’s fifty-ninth presidential inauguration, there is reason for serious concern about the health of our electoral system and our democracy. As this Article has argued, presidential transitions reflect deep values and commitments, expressed in both law and convention, that make the peaceful and effective transfer of power possible—but do not do enough to guarantee it. These shortcomings are particularly concerning in this moment of profound polarization and in the wake of a President’s effort to challenge the very foundations of our constitutional democracy.

Diagnosing and curing what ails the body politic is a much larger project than we have tackled in this Article. But the vulnerabilities in transitions, as opposed to those in our democracy writ large, are comparatively straightforward. They are also fixable. The body of law and practice that already imposes on government officials, in particular career officials, direct obligations to the incoming administration—obligations to facilitate the transition—simply needs to be strengthened, formalized, and in a few key places modified. These improvements would both increase the likelihood of smooth transfers of power in the future, and at least contribute to the project of repairing our democracy.

409. *Cf.* 41 C.F.R. § 105-8.154 (authorizing the GSA to determine that accessibility measures under the Rehabilitation Act need not be undertaken because they would impose undue burdens on an agency but requiring any such determination to “be accompanied by a written statement of . . . reasons”).

410. *See generally* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018).

411. 5 U.S.C. § 706(1).