

# PRESIDENTIAL TRANSITIONS

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Presidential transition periods are times of uncertainty and contradiction. The outgoing President retains all the formal legal powers of the presidency yet his last electoral success is four years removed and his political capital is at low ebb.<sup>1</sup> The incoming President, in contrast, enjoys an electoral mandate and enormous political influence but has no formal control over the reigns of government.<sup>2</sup> During transitions, in short, there is no relationship between power, accountability, and electoral support that is the normal hallmark of the democratic process.<sup>3</sup>

Presumably, of course, not all is askew. Both presidents, having achieved the highest level of public service, should be expected to act in the best long-term interests of the United States. And both may be motivated by the image of two prominent leaders burying their differences and acting together in the common good. But beyond this level of generality, the transition agendas of the two presidents are unlikely to be aligned. For example, even if both presidents are from the same political party, their goals in the

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<sup>1</sup> LAURIN L. HENRY, *PRESIDENTIAL TRANSITIONS* 3 (1960). Indeed, if the incumbent has been defeated in the election, his power is not only at low ebb but his agenda effectively repudiated.

<sup>2</sup> Meanwhile, members of the outgoing Administration tend to view their successors as naïve upstarts while their successors view their predecessors as trapped in failed policies. CARL M. BAUER, *PRESIDENTIAL TRANSITIONS: EISENHOWER THROUGH REAGAN* 15 (1986).

<sup>3</sup> Indeed, in circumstances where the transition occurs after the incumbent has been defeated the relationship between power and democratic support is fully reversed. See Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 *CONST. COMMENT.* 183, 184-185 (1995).

transition period may be widely disparate. The outgoing President will be concerned with preserving his legacy.<sup>4</sup> The incoming President, on the other hand, will be focused on beginning her own initiatives and on establishing a record in the first one hundred days that can set the stage for success throughout the next four years.<sup>5</sup> The dominant agenda for the outgoing President, in short, is shoring up the past; the agenda for the incoming President is embarking on the future.

When the two presidents are from opposing parties, the conflicts during the transition period, certainly, will be even more acute. The outgoing President will want to protect his policies or accomplishments from being reversed or undermined and he may also affirmatively want to create obstacles to prevent his successor from too quickly achieving political and policy success. The incoming President, in turn, may desire to expeditiously reverse the policies of the previous President and may additionally choose to tarnish the record of her predecessor in order to weaken any remaining support for his programs.

Throughout history presidential transitions have followed no consistent pattern. Some presidents have worked closely with their predecessors or successors. Some have been markedly less cooperative – for partisan reasons or otherwise. Generally, however, the courses of presidential decision-making respecting transitions have been ad hoc rather than guided by legal or constitutional principle.

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<sup>4</sup> BRAUER, *supra* note 2, at 97-98.

<sup>5</sup> The first hundred days represents a special opportunity for the President and his new team to seize momentum; during this time, they have an almost unparalleled opportunity to achieve early program results. This time represents an interval when the President's critics are not likely to publicly criticize him, while his allies organize around him with their support. Martha Kumar, *Opportunities and Hazards*, The White House 2001 Project, Sept. 1, 1998, available at <http://whitehouse2001.org>.

The question then arises as to whether there are constitutional constraints that govern presidents with respect to transition or whether presidential action in this area is wholly discretionary. Does the outgoing President have a duty to facilitate the transition to a new Administration (and, if so, how far does this obligation extend)? Or should the outgoing President continue to exercise power until his last day in office as if there had been no election – that is, in undivided pursuit of his own agenda? Similarly, does the incoming President have residual duties after transition to the old Administration once she takes office or is she free to wholly ignore the action of the old Administration once she takes office?<sup>6</sup>

This article is about the constitutional principles that guide the conduct of outgoing and incoming Presidents during presidential transitions. Part I provides the necessary background. It reviews the procedures for selecting and inaugurating the President and introduces the types of issues that arise concerning presidential transition. Part II discusses the legal issues. It first examines whether the Constitution imposes legal duties on outgoing and incoming presidents with respect to transition. Concluding that it does, this section then attempts to discern the nature of those obligations. Part III offers a brief conclusion.

## **I. Background --**

### **A. Constitutional Transition**

The Constitution says little about presidential transitions. Article II sets the term for office at four years.<sup>7</sup> Article II<sup>8</sup> and Amendment XII<sup>9</sup> set forth how Presidents are to

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<sup>6</sup> In this article, we will refer to any obligations the incoming President has to the outgoing as transition obligations, although, as a technical matter, the transition is over once the new President takes office.

<sup>7</sup> U.S. CONST. art. II, § 1.

<sup>8</sup> U.S. CONST. art. II.

be elected. Amendment XX<sup>10</sup> specifies January 20 as the date for inauguration of the victor, at which time an incumbent who has not been reelected leaves office.

Amendment XXII provides that no President may be elected for more than two terms.

Amendment XV provides for presidential succession in circumstances when the President leaves office, by death or otherwise, prior to the expiration of his term. No provision, however, discusses how the transfer of power is to be achieved.

Presidential transition periods, however, are obviously anticipated by the constitutional structure. The constitutional system for electing and installing the President ensure that the President will serve for a substantial period of time either knowing or facing a strong possibility that his period in office as President will be ending at a specific time in the near future.<sup>11</sup> Presidential elections are conducted every four years regardless of circumstance. There is no provision in the U.S. Constitution for early elections and none for elections to be delayed. The legislature or some other body such as the cabinet cannot force early elections to replace an unpopular President. Even if the Presidency is vacated during a term due to resignation, death or impeachment and conviction, or if the President becomes unable to serve for health or other reasons, the election schedule remains unchanged. At that point, another designated officer, usually the Vice-President, serves out the remainder of the former President's term or, in the case of an incapacitated President, until the President is able to resume the duties of the presidency.<sup>12</sup> In addition, the President may be elected only twice and may serve, under

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<sup>9</sup> U.S. CONST. amend. XII.

<sup>10</sup> U.S. CONST. amend. XX. § 1.

<sup>11</sup> Although the formal transition period exists only from the election to the inauguration of the new President, similar issues of the proper use of power arise in circumstances when the President knows he is leaving office even before the actual election, as in the case of the President nearing the end of the second term or an incumbent believing he is likely to be defeated.

<sup>12</sup> U.S. CONST. amend. XXV.

normal circumstances, a maximum of two full terms.<sup>13</sup> Further, the President is chosen via a three-step process that, under current procedures,<sup>14</sup> takes two full months to complete, and the chosen President is not inaugurated until two weeks after that process is completed, about two and one-half months after the election.<sup>15</sup>

The mechanics of the transition have evolved over time, including significant changes to its constitutionally-mandated structure. The Constitution originally provided for a presidential election in November and inauguration of the new President in March, at the same time as the transition between two Congresses. When a new President was elected, this meant that an outgoing President would remain in office for four months after the successor had been chosen. During this four month period, the President would be a lame duck, but would still have a great deal of government business to handle as President. The length of this period caused significant problems when a lame duck President lacked sufficient power to deal with a crisis.<sup>16</sup> This problem, together with

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<sup>13</sup> The President may be elected only once if he or she has served more than two years of a term for which someone else was elected. It is possible that someone could serve more than ten years as President by being elected Vice-President or being appointed as Vice-President and then succeeding the President. Needless to say, however, such a scenario, although theoretically possible, is actually unlikely. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565 (1999).

<sup>14</sup> The requirement that presidential elections are set on the first Tuesday after the first Monday in November is statutory. See 3 U.S.C.A. § 1 (1985) (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”). Presumably, then, the transition period could be shortened, as Sandy Levinson notes, to a much shorter time period if Congress chose instead to set a January election date. See Levinson, *supra* note \_\_\_, at 184.

<sup>15</sup> The three steps in the electoral process are as follows: First, in early November of an election year, the voters cast their votes, which legally results in the choice of electors who actually elect the President. Second, in early to mid-December, the electors meet in each state and vote for President and Vice-President, and transmit their votes to Washington, D.C. Third, at 1pm on January 6 of the year following the election, the electoral votes are counted in a joint session of Congress which is presided over by the President of the Senate, aka the incumbent Vice-President of the United States. Two weeks later, on January 20, the newly-elected President and Vice-President are inaugurated for a four year term in office. Of course, the presidential election process is preceded by a lengthy primary election process.

<sup>16</sup> President Wilson, expecting to lose the 1916 election, lamented the role that he, as lame duck, would play in foreign affairs: “Four months would lapse before [the President-elect] could take charge of the affairs of the government, and during those four months I would be without such moral backing from the

improvements in travel and communications that reduced the time necessary for a new President and Congress to prepare to take office, led to constitutional reforms under which the new President is inaugurated on January 20 and the new Congress begins two and one-half weeks earlier, on January 3.<sup>17</sup>

Another major constitutional change affecting presidential transition was the ratification in 1951 of the Twenty-Second Amendment imposing the two-term limit on presidential service. The length of the President's term, including whether there should be term limits, was hotly debated during the Constitutional Convention, with the ultimate decision being a four year term. No limit on the number of times a President could be reelected was specified.<sup>18</sup> As Bruce Peabody and Scott Gant have explained, the issue of term limits was tied by the Framers to the issue of presidential selection.<sup>19</sup> If the power to select the President was given to Congress, then the consensus was that a term limit would be necessary to prevent congressional domination of the government. Congress would dominate under such a structure because the President would cater to Congress's wishes in order to continue in office. If, on the other hand, the power to select the

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nation as would be necessary to steady and control our relations with other governments. I would be known to be the rejected, not the accredited, spokesman of the country; and yet the accredited spokesman would be without legal authority to speak for the nation. The direction of the foreign policy of the government would in effect have been taken out of my hands and yet its new definition would be impossible until [the inauguration]." Nancy Amoury Combs, *Carter, Reagan, and Khomeni: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303 (2001).

<sup>17</sup> U.S. Const. amend. XX.

<sup>18</sup> Although the Framers resolved the issue in favor of unlimited presidential service, a tradition limiting Presidents to two terms in office arose early. According to the folklore, Washington believed in a two term limit to prevent anyone from becoming "President for life" akin to a king; however, in his farewell address he mentioned only personal reasons for stepping aside. WIKIPEDIA, TWENTY-SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION, *available at* [http://en.wikipedia.org/wiki/Twenty-second\\_Amendment\\_to\\_the\\_United\\_States\\_Constitution](http://en.wikipedia.org/wiki/Twenty-second_Amendment_to_the_United_States_Constitution). However, based on Washington's example, and the views of Thomas Jefferson and Jefferson's immediate successors, an informal limit of two terms was observed by every President until 1940 when Franklin Roosevelt ran for and was elected to a third term. *See* Peabody & Gant, *supra* note 13, at 578-79 (discussing Jefferson's views on presidential term limits); WIKIPEDIA, *supra* (noting that Jefferson and Presidents James Madison and James Monroe adhered to the two term tradition).

<sup>19</sup> Peabody & Grant, *supra* note 13.

President was in some other body, such as the states or the people, then no term limit would be necessary because reelection would not threaten the separation of powers. The need for reelection was thought to insure that the President would act in the public interest, and there was no perceived reason to prevent the people from reelecting a successful, popular President.

The issue of presidential term limits arose periodically in Congress, beginning in 1803 with the rejection by Congress of a proposal to limit Presidents to three terms, only two of which could be successive.<sup>20</sup> Fears of an entrenched President inspired periodic calls for term limits, with rumblings over the issue arising most strongly when a strong second-term President raised concerns that the President might seek a third term. After Roosevelt won reelection for a third time (and a fourth term) in 1944, the movement picked up steam, and after his death in 1945, a 1947 congressional coalition between Republicans and Southern Democrats passed the proposed amendment by a sufficient margin to send it to the states for ratification.<sup>21</sup> Southern and Republican dominated state legislatures ratified the Twenty -second Amendment in short order, and by 1951 the amendment had been ratified by the required two-thirds of the states.<sup>22</sup>

In any event, the passage of the Twenty-second Amendment assures that presidential transitions will occur regularly. There will be a new President at least every

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 599.

<sup>22</sup> See U.S. CONST. amend. XXII; see generally Peabody & Grant, *supra* note 13. It is understandable that Members of Congress would support a term limit on the President because the limit would tend to weaken the President and thus tend to increase the power of Congress. Southern Democrats might have supported the term limit based on the notion that a weaker President would mean a weaker federal government, which they would prefer. The fact that Republicans favored term limits more than Democrats generally may have been merely the historical accident that the first President to have violated the tradition was a Democrat. It may have been shortsighted on the part of Republicans since the next three Presidents to be elected a second time were Republicans, although only two of the three, Dwight Eisenhower and Ronald Reagan, served two complete terms. It is pure speculation to contemplate Democrats' reaction had Eisenhower or Reagan sought a third term had the Twenty-second Amendment not been in effect.

eight years, except in the rare instance in which a President dies in office or resigns in the first half of a term and is replaced by the Vice-President who is then elected twice. In such a case, presidential transition occurs after ten years. In practice, new Presidents are inaugurated more often than every eight years on average, and often the new President is of a different political party than the President he replaces. Presidential transitions, thus, are an important, common, and inevitable element of the constitutional and governmental structure of the United States.

### **B. Presidential Transition in Practice**

The lack of provisions regarding presidential transition has left it to Presidents and their successors to develop practices to facilitate orderly and effective transition. This process has evolved over time. Over the years, as society and government have become more complex, planning for presidential transition has become more involved, and now begins significantly before the election.<sup>23</sup> Outgoing administrations have also aided in the handover of power by providing reports on their activities and other assistance in the transition.

Transition between presidencies involves more than handing over the keys to the White House and taking an oath of office. Significant preparation is required along at least three fronts. First, preparations must be made to make all of the appointments within government that change with the administration. The most important appointments involve the cabinet, the President's Chief of Staff and other high level close

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<sup>23</sup> Most presidential campaigns, for example, have persons in the organization whose responsibility is focused solely on transition issues. After the election, under the Presidential Transition Act of 1963, the president-elect is entitled to government support for the planning process, including office space and government funds. Presidential Transition Act of 1963, Pub.L. 88-277, Mar. 7, 1964, 78 Stat. 153. Under the 2000 amendments to the Act, the new Administration will also receive assistance in processing the background checks of political appointees. Presidential Transition Act of 2000, Pub. L. No. 106-293, 114 Stat. 1035 (amending Presidential Transition Act of 1963, 3 U.S.C. § 120 (1963)).

advisors, but there are also numerous lower level appointments that are made at the time of transition. This work includes identifying nominees, checking their backgrounds and doing the necessary legwork to secure Senate confirmation when required. Second, incoming officials must prepare themselves to take office by receiving information and policy briefings. Third, the President-elect must be prepared for office with briefings on the issues likely to require presidential attention. Finally, on what may be viewed as a fourth front, the President and his advisors must devise a political strategy to bring the goals on which they campaigned to fruition.<sup>24</sup>

The President-elect needs the cooperation of the incumbent President on at least the second and third fronts. Historically, outgoing officials have held meetings with their successors and some have remained in office for a time after the new President was inaugurated to help with the transition. Presidential candidates have received national security briefings to prepare them in case they are elected. Outgoing Presidents have met with or offered to meet with their successors, and, in a symbol of continuity, have taken part in the inauguration ceremony.<sup>25</sup>

As the complexity of the government has increased, the transition has become more and more difficult to manage. Historically, campaign funds and private donations had been used to cover transition related expenses such as office space, clerical help and travel expenses. Congress relieved the parties of that burden with the Presidential Transition Act of 1963.<sup>26</sup> Under this Act, Congress provides funds for the President-elect

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<sup>24</sup> Martha Joynt Kumar & George C. Edwards, III, *Meeting the Freight Train Head On: Planning for the Transition to Power*, The White House 2001 Project, Aug. 18, 2000, available at <http://whitehouse2001.org> (after interviewing 69 White House staff members, the authors discuss in detail the steps required for a smooth presidential transition).

<sup>25</sup> On the other hand, President John Adams was criticized for sneaking out of Washington early in the morning of the inauguration of his successor Thomas Jefferson. Biography at page 565-66.

<sup>26</sup> Pub.L. 88-277, Mar. 7, 1964, 78 Stat. 153.

to establish a transition team and to bring potential appointees to Washington for interviews and general vetting. Funding under the Act has increased from approximately \$375,000 for Richard M. Nixon in 1968-69<sup>27</sup> to \$5.27 million for George W. Bush in 2000-2001.<sup>28</sup> This funding allows the President-elect to make substantial preparations before taking office, largely in terms of identifying and attracting potential appointees. In addition, the Act was amended in 2000<sup>29</sup> in order to streamline the appointments process during transition.<sup>30</sup>

The period of time between the election and the inauguration, now six weeks shorter than originally provided for but still relatively long, creates some special problems for the transition. Although the President remains in office until his successor is inaugurated, the President's political power is vastly diminished, especially if the incumbent has lost an election. An outgoing President may lack the political power to take strong action even if all would agree that such action would be in the national interest. In some such situations an outgoing President may seek commitments or assurances of continuity from his successor so he can effectively pursue a policy in the waning days of his administration. For a variety of reasons, an incoming President may be reluctant to make commitments before coming into office. For one, making an agreement with an outgoing President may make the incoming President appear weak just

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<sup>27</sup> BRAUER, *supra* note \_\_\_\_.

<sup>28</sup> Media Advisory: Presidential Transition Fact Sheet, U.S. General Services Administration, (Nov. 17, 2000) available at [http://www.gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=8199&channelId=-13259&P=XAE&contentId=9025&contentType=GSA\\_BASIC](http://www.gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=8199&channelId=-13259&P=XAE&contentId=9025&contentType=GSA_BASIC).

<sup>29</sup> Presidential Transition Act of 2000, Pub. L. No. 106-293, 114 Stat. 1035 (amending Presidential Transition Act of 1963, 3 U.S.C. § 120 (1963)).

<sup>30</sup> Michael Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001).

at the moment that the new President's power should be at its zenith.<sup>31</sup> Additionally, an agreement may strengthen the outgoing President or the outgoing President's party in anticipation of the next congressional or presidential election. Also, the incoming President may be afraid that he will regret a commitment made without the full information and opportunities for consultation available only upon taking office. Thus, even in a crisis in which immediate and decisive presidential action would be in the national interest, it is unlikely that an incoming President would make an agreement on a course of action with the outgoing President.

The certainty of the deadline and the lengthy period between the election and the inauguration of the new President provide conditions for a great deal of late-term activity by an outgoing administration.<sup>32</sup> Late-term actions by the outgoing administration can at times be beneficial for a new administration if they ease the transition or take care of a messy problem before a new administration takes office. In fact, there is evidence that one form of cooperation between administrations has been for an outgoing administration to veto legislation in order to allow the new administration to set a different agenda with Congress.<sup>33</sup> There are stories, recounted in Laurin Henry's study of the transitions of the

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<sup>31</sup> One example is Jefferson, who did not want to make any commitments during the long process leading to his election. Adams bio page 562-63. Another example is Wilson who did not want to make any commitments regarding the crisis in Mexico, and Roosevelt who would not make any commitments regarding the economy although Hoover tried and tried. HENRY *supra* note \_\_, at 292-302.

<sup>32</sup> If regulatory activity is measured by Federal Register pages as a rough proxy, then such activity has surged in the last quarter of the presidential term in every presidency since at least 1948. According to a recent survey, the turnover of a whole administration is, on average, associated with a twenty-nine percent jump in this measure of regulatory activity during the post-election period. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563 (2003).

<sup>33</sup> This occurrence was more likely before the transition between Congresses and the inauguration were moved to January. Under prior practice, a lame duck session of Congress began in December of the election year after a new Congress had already been elected. That Congress would send bills, often including a budget, to the lame duck President right up to inauguration day. The outgoing President would be signing and vetoing bills on inauguration day with his successor in the room, and would often seek his successor's advice on whether to sign or veto. Under current practice it is unlikely, but not unheard of, that

early twentieth century, of Presidents and Presidents-elect sitting together in the White House on inauguration morning while the incumbent President finished up last minute business including signing and vetoing legislation, sometimes consulting the President-elect on her preferences.<sup>34</sup>

At other times, last minute action by the outgoing administration can be a serious problem for a new administration. One classic example of this, of course, is President Adams last minute appointment of judges before the beginning of the Jefferson presidency.<sup>35</sup> More recently, outgoing Administrations have engaged in significant regulatory action late in the term and one of us, in an earlier article, has described the types of midnight regulations that tend to be taken late in an administration's term, and the motives for those actions.<sup>36</sup> Some late-term actions are simply the result of the human tendency to work to deadline, while others are designed, at least in part, to sabotage or embarrass the new administration. In recent decades, in particular, there has been a pattern to presidential transition when the incoming President is of a different political party from the outgoing President. The output of the outgoing administration, including presidential and agency action of various types, tends to increase substantially, especially when the outgoing administration is of the Democratic Party and the incoming

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the new Congress, installed on January 3, would have already sent any bills to the President by the inauguration day of January 20.

<sup>34</sup> See HENRY *supra* note 1, at 70, 197.

<sup>35</sup> Charles F. Hobson, *John Marshall, The Mandamus Case, and the Judiciary Crisis, 1801-1803*, 72 GEO. WASH. L. REV. 289, 921 (2003). (“During the final weeks of his administration, Adams and the Senate were busily employed in nominating and confirming sixteen circuit judges and forty-two justices of the peace for the District of Columbia--the so-called “midnight appointments,” to which the circuit judges were to have life terms and the justices of the peace terms of five years. Republicans, not without reason, denounced this eleventh-hour creation of a host of new offices as a brazen attempt by the defeated party to perpetuate its control of government through the judiciary. ‘There the remains of federalism are to be preserved & fed from the treasury,’ Jefferson bitterly commented in reference to the new circuit judges, ‘and from that battery all the works of republicanism are to be beaten down & erased. By a fraudulent use of the constitution which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.’”)

<sup>36</sup> See Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U.L. REV. 947 (2003).

President is a Republican.<sup>37</sup> In response, incoming Presidents have found it necessary to react by reexamining the late-term regulatory output of the prior administration, sometimes during a freeze issued by the new administration on the implementation of rules issued at the very end of the prior President's term.<sup>38</sup>

The historical record, in short, is mixed. At times, outgoing administrations are particularly helpful in facilitating transition.<sup>39</sup> At times, they place obstacles in front of their successors. At times, they may be helpful in some aspects of transition and obstructionist in others.

### **C. The Increasing Stakes and Internal Conflicts in Presidential Transition**

The lack of a consistent pattern in presidential transitions should not be surprising. As already noted, both incoming and outgoing presidents face competing pressures during the transition period. On the one hand, there is the motivation to cooperate as fully as possible with the other Administration. On the other, there are the demands not to sacrifice one's own political agenda and/or unduly promote a competing political program. These differing approaches may be termed, at the risk of

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<sup>37</sup> The increase in administrative output and other aspects of presidential transitions are described in detail in Beermann, *supra* note 36. See also Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* 3 n.6 (Mar. 8, 2001) (unpublished manuscript on file with the authors), available at <http://www.mercatus.org/pdf/materials/459.pdf>.

<sup>38</sup> President Clinton, in the last days of his presidency, personally took a number of actions. Upon coming into office, President George W. Bush responded to this late-term activity by having his Chief of Staff issue a memorandum directing agencies to delay the effective dates of recently published rules, not to issue any new regulations, and to withdraw finalized but not yet published regulations from the Federal Register. Beermann, *supra* note 36, at 949.

<sup>39</sup> Another relatively minor aspect of the transition is that outgoing Presidents and their spouses, which until now have always been "first ladies" have traditionally helped the incoming President with the domestic aspects of becoming Presidents. Incoming first ladies have been invited into the White House to survey the premises and meet the domestic staff. Outgoing Presidents have made room for the incoming first family's belongings to be moved into the White House in advance of the inauguration. Some of these domestic arrangements are related to the performance of the President, as the White House is the site of numerous official functions, and the transition can be helped by a smooth handover of the domestic details of the presidency.

oversimplification, the “good government” and the “good politics” models in presidential transition. What is interesting is that the urgencies underlying both of these competing forces have dramatically increased in recent decades.

For a number of reasons there is now a greater need than any time in our Nation’s history for incoming and outgoing Administrations to work cooperatively during transition periods. To begin with, government is more complex and an incoming Administration faces an inestimable learning curve in assuming office and digesting the mounds of information necessary to be able to understand the powers at its disposal and govern effectively. Accordingly, to state the obvious, a new Administration can not learn all it needs to know in its first day of office.<sup>40</sup> The new Administration must engage in substantial preparation before assuming office and in so doing will be highly dependant on the old Administration to prioritize the information to be learned and to direct members of the new Administration to appropriate sources.

Second, as societal problems also become more complex there is a corresponding need for the governing Administration to have access to the material, ideas, and data to address important issues. Again, in order to effectively govern the new Administration must have access to such materials before its first days in office.

Third, enhanced cooperation and communication between the two administrations is demanded by national security and foreign policy concerns. As the world becomes more dangerous and the risks of harm more immediate, the need for effective and

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<sup>40</sup> “The early months are so important,” observed David Gergen, a senior official in four White Houses. “Because that’s when you have the most authority, but that’s also when you have the least capacity for making the right decisions.” Martha Kumar, *Opportunities and Hazards*, Sept. 1, 1998, available at <http://whitehouse2001.org> (Interview with David Gergen, June 24, 1997, Washington, D.C.).

seamless transitions becomes correspondingly greater.<sup>41</sup> Thus, in this area particularly, the need for outgoing and incoming presidents to work together is no longer an option but is an unavoidable demand of the contemporary world. The need for presidential transitions to proceed in accord with the good government model is therefore manifest.

But social and government complexity and national security and foreign policy dangers are not all that has been changing. National politics as well has undergone transformation. We have entered, in the words of one writer, the era of the permanent campaign in which all government action is undertaken with an eye to its electoral effect.<sup>42</sup> Accordingly, presidential power is exercised not only in the service of government but also in the service of the next legislative battle or the next election. For the outgoing president or incoming president to choose not to work with the other (particularly when they are from different political parties) might then be seen as politically necessary. After all, neither side wants to help political opponents further their political agenda. Moreover, even if motivated by good government concerns, neither side wants to risk that what the other will learn in the transition process will be used to tarnish or damage their own political aims or reputation. Good deeds in Washington seldom go unpunished. The “good politics” motivation in presidential transition, in short, is also in ascendance.

It might be tempting to suggest that during transition both incoming and outgoing presidents should adopt the good government as opposed to the good politics mode of action. But there is no clear line between the good government and good politics models.

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<sup>41</sup> See, Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U.L. REV. 1573 (2001) (noting the dangers when transitions do not proceed smoothly).

<sup>42</sup> SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN* (1982); *see also* NORMAN J. ORNSTEIN, *THE PERMANENT CAMPAIGN AND ITS FUTURE* (2000).

In the era of the permanent campaign, the act of governing cannot be separated from the act of campaigning. Indeed, most actors we suspect, would perceive themselves as pursuing both. If the outgoing administration believes, for example, that the announced goal of the incoming administration to reform social security or health care is a fool's enterprise that would cause long-term damage to the Nation, then he might legitimately believe that anything he can (and should) do all that is in his power to frustrate that effort. To her, throwing obstacles before the new Administration is good government and good politics. The question is whether there are constitutional obligations that should govern his judgment and it is to this issue we now turn.

## **II. The Constitutional Obligations of Presidential Transition**

There are no cases addressing the Presidential duties and obligations with respect to transition and even if a dispute developed it is likely that a court would find it non-justiciable.<sup>43</sup> Moreover, it might also be argued that any transition obligations are at best products of comity and historical practice rather than true legal duties. After all, presidential transitions have taken place from the beginning without legal rules being articulated and with both incoming and outgoing presidents apparently assuming they

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<sup>43</sup> To begin, the transition period is so short that the issue might be moot by the time it is ready for legal resolution. Courts, moreover, have also been reluctant to review actions committed to Executive Branch discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (stating that an agency's decision whether or not to enforce is generally not reviewable). The fact that an issue may be non-justiciable, of course, does not mean that it does not give rise to a determinable constitutional question. It only means that the courts are not the arbiters of the constitutional issue. Moreover, as Dawn Johnsen notes, "[t]hat a President may have the raw power to disregard constitutionally objectionable laws without risk of an adverse judicial response does not, of course, resolve whether the presidential action was proper. The President's obligation faithfully to execute the law is not contingent on the availability of judicial review as a check on presidential excess. Indeed, the President should act with particular care when a controversial assertion of authority may be non-justiciable." Dawn E. Johnsen, *The Constitution Under Clinton: A Critical Assessment: Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 25-26 (2000).

could do as they wished.<sup>44</sup> Finally, it might be contended, in any event, that the President's discretion as to how (and whether) to execute her powers is so broad that no meaningful constraints can be discerned with respect to how the President must act with respect to transition.

That said, the position that the constitution imposes duties on presidents with respect to transitions is substantial. Indeed arguments supporting the proposition that the President has constitutional duties and obligations with respect to transition can be derived from constitutional text, the President's foreign affairs powers, and general principles of representative government. We shall discuss each in turn.

### **A. Constitutional Text**

Three textual provisions arguably impose transition duties on the outgoing President – the Term Clause, the Take Care Clause, and the Oath Clause. As will be discussed, the obligations imposed by the Term and Oath Clause, although critically important, are relatively limited. The President's Take Care Clause responsibilities, on the other hand, are potentially broader but less clearly defined.

#### **1. The Term Clause**

The best argument that the Constitution imposes at least some minimal obligations on a president with respect to transitions stems from the Term Clause.<sup>45</sup> The Term Clause sets the presidential term at four years (unless the President is re-elected). It therefore demands that the president vacate the office at the end of that period<sup>46</sup> and, as

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<sup>44</sup> This is not to say that the transition behavior of individual actors has not been seriously criticized. John Adams, himself, for example, was seriously criticized for leaving Washington, D.C. before his successor, Thomas Jefferson, was inaugurated.

<sup>45</sup> U.S. Const Art. II, § 1.

<sup>46</sup> The obligation to leave office could be seen both as coming from Article II, section 1 limiting the presidential term to four years and the Take Care Clause, Article II, section 3, which would impose upon the president the duty to assure that the four year term was complied with.

such, stands for the proposition that not all of the President's behavior during transition is fully discretionary. He is bounded by at least one concrete constraint.<sup>47</sup>

The obligation of the outgoing President is to vacate the office and relinquish all official powers at the end of the term may seem so obvious that it is not worth stating, but history and current events are full of examples of rulers who have illegitimately held on to power after their terms were supposed to have ended. Moreover, even though the history of peaceful transitions in the United States suggests that no President would likely attempt holdover only in order to retain power for himself, there are circumstances in which a President might be tempted to hold on to power on an interim basis because of a national crisis or other such event. Consider, for example, the situation facing the outgoing President if the incoming President and Vice President are killed prior to assuming office, or, if for one reason or another, the election results are not finalized and remain in dispute after Inauguration Day. In both circumstances, legitimate concerns of government stability might lead a President (perhaps with both strong popular and Congressional support) to guide the country through the period of uncertainty.<sup>48</sup> Even so, however, we suggest that, in any case, the President must leave office.<sup>49</sup> The Term

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<sup>47</sup> To be sure, not even this argument is fail safe. It might be contended that the duty to vacate the office arises after the President is no longer President and therefore does not interfere with absolute presidential discretion.

<sup>48</sup> President Roosevelt, for example, relied on the concern for government stability when he decided to run for a third term.

<sup>49</sup> The question arises whether Franklin Roosevelt violated his duty to leave office when he stood for reelection a second time, contrary to the longstanding tradition that the President should serve two terms only. On the one hand, the tradition against seeking a third term had been established since Washington and had become deeply rooted in the constitutional culture. Thus, by ignoring this deeply-rooted tradition Roosevelt arguably violated his legal obligations. *Consider* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (discussing the role of "constitutional culture" in interpreting takings cases.) On the other hand, pro-term limits forces were never able to muster enough support to pass a constitutional amendment until after Roosevelt's second re-election, thus indicating the "tradition" may not have evolved into set requirement. The better argument, then, is that even if Roosevelt acted in contradiction to non-legal norms, he had no legal duty to refrain from running for a third term.

Clause language is not only unconditional but the policies underlying that provision are equally uncompromising. Transition in time of crisis and uncertainty may be risky, but the risk of abuse of power by an incumbent government is, in the long run, even greater.

Second and relatedly, the Term Clause (in possible conjunction with the Take Care Clause)<sup>50</sup> demands that the President must do all that is possible to assure that elections take place. Obviously, as recent history suggests, one could imagine a strong argument for postponing a national election in a time of crisis and in fact this past fall there were published reports that the Administration was considering its available options in case terrorism threatened the viability or safety of the November elections.<sup>51</sup> In our view, unless it is physically impossible to conduct the election, it would be inconsistent with our traditions and history, in which elections have been held during the gravest of crises, for a President to continue in office beyond the constitutionally mandated term. The incumbent President has a duty to do everything possible to insure that an election is conducted, and the presidential term completed, according to its constitutionally and statutorily mandated schedule.

At the same time, it is difficult to read the Term Clause provision as setting any more than such basic duties on the President. It implies nothing, for example, about assuring that the President's successor is adequately prepared to take office and provides no direction about whether the President is free to pursue his own political agenda during the transition period or whether she must be more solicitous of the his successor's agenda.

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<sup>50</sup> See notes 52 – 64, *infra* and accompanying text.

<sup>51</sup> Ritt Goldstein, *Politics: Spector of a Terror-Postponed Election Haunts Campaign*, INTER PRESS SERV., Aug. 19, 2004 (stating that “a recently unearthed government memorandum prepared for the U.S. Congress purportedly addresses the power of the administration to postpone elections); *Can Terrorists Postpone Election?*, USA TODAY (Mag.), Sept. 1, 2004, at 9.

## 2. The Take Care Clause

The Take Care Clause, Article II, Section 3, provides that the President “shall take care that the laws be faithfully executed.” The language is notable. In contrast to, say, Article I, Section 8 which provides that Congress “shall have power” to engage in certain actions, the Take Care Clause explicitly imposes a duty on the President. The Congress that chooses not to legislate does not violate its constitutional obligations; Congress may choose to exercise power or not, as it sees fit. The Take Care Clause, on the other hand, provides the President with no such option; she *shall* take care that the laws are faithfully executed.

Not surprisingly then, the Take Care Clause has been construed by courts and commentators as imposing affirmative obligations on the President. These include requiring her to expend appropriated funds,<sup>52</sup> enforce statutes,<sup>53</sup> and implement Supreme Court decisions.<sup>54</sup> To be sure, not all of this is uncontroversial and none of it is absolute. The extent that the Take Care Clause imposes enforceable duties on the President, for example, has been hotly debated.<sup>55</sup> And there is substantial agreement that whatever the obligations the Take Care Clause imposes, the President has significant discretion as to how to carry them out.

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<sup>52</sup> *Train v. New York*, 429 U.S. 35 (1975); *Kendall v. United States ex rel Stokes*, 37 U.S. (12 Pet.) 524 (1838).

<sup>53</sup> *Ameron, Inc. v. United States Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986).

<sup>54</sup> See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (memorandum from Attorney General Benjamin R. Civiletti); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting an argument that the President's Take Care duty did not permit the use of troops to enforce *Brown v. Board of Education* because, so the argument went, only statutes were included in the term “laws” in the faithful-execution clause).

<sup>55</sup> The literature on presidential refusal to enforce statutes that are potentially constitutionally objectionable is particularly rich. Johnsen, *supra* note 43; Struass, *supra* note 62; Arthur S. Miller, The President and Faithful Execution of the Laws, 40 Vand. L. Rev. 389 (1987).

The question is how does this understanding apply to presidential transitions? In some instances, the application of the Take Care provision may be clear. A President, for example, who refuses to take any actions to assure that necessary pre-transition activities occur according to constitutional mandate, such as elections, may violate his Take Care obligations<sup>56</sup> and/or he may also do so if he refuses to allow appropriated funds to go to the incoming Administration's transition team as provided by statute.<sup>57</sup>

But whether this responsibility goes beyond enforcing any specific constitutional provisions<sup>58</sup> presents a more difficult question. In order to address this point, consider the following example. Assume that the outgoing President refuses to provide, and prohibits all members of his Administration from providing, any and all advice and assistance with respect to transition.<sup>59</sup> This means, for example, that he refuses to allow the new President access to critical information on national security and foreign policy, that he refuses to allow members of his Administration to brief incoming personnel on any issues whatsoever, and that he does not even allow representatives of the new Administration access to the White House in order to prepare for even the most basic elements of transition – the allocation of office space and the set up of a basic communications infrastructure. Undoubtedly, if the President were to take such an action it could seriously impair the ability of the new Administration to begin its term

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<sup>56</sup> See notes \_\_--\_\_ supra and accompanying text.

<sup>57</sup> Cf. Todd J. Zywicki, *The Law of Presidential Transition and the 2000 Election*, 2001 B.Y.U. L. REV. 1573, 1575 (2001).

<sup>58</sup> It is not controversial that the mandate of the Take Care Clause that the President execute the laws also means that he must appropriately execute the Constitution. The term “laws” in the Take Care Clause “necessarily includes the Constitution.” Strauss, *supra* note 62, at 108.

<sup>59</sup> We will assume, however, in order to avoid any statutory non-enforcement issues that the President does not prohibit the General Service Administration from funding the incoming transition team or from preparing the necessary material under the Presidential Transition Act of 2000, Pub. L. No. 106-293, 114 Stat. 1035.

effectively. It might also threaten the foreign policy and national security interests of the United States.

The argument that the outgoing President's refusal to assist transition violates the President's duties under the Take Care Clause is relatively straight forward. If the President has not provided his successor with the means to execute the laws, he has not taken care that the laws will be faithfully exercised.

Nevertheless, the contention that failing to assist one's successor violates the Take Care Clause must meet a number of initial objections. The first is temporal. How can one President be held responsible for failing to take care that the laws are faithfully exercised during a time period when he is no longer in office?

The second is more structural. Unlike the cases that address failure to spend appropriated funds or enforce specific laws, the failure to assist in transition does not raise separation of powers concerns. The claim that the President is acting unconstitutionally when she refuses to spend funds for example is buttressed in large part by the argument that her proper recourse is to veto the bill authorizing the expenditure.<sup>60</sup> Refusing to spend funds is therefore an end-run around the veto requirement. No such problem arises so long as the President simply refuses to assist with transition. She is not, by that action, undercutting the authority of another branch of government.

The third is historical. The argument that the President does not violate the Constitution when he refuses to take a set of action may also be supported by constitutional history. The framers explicitly considered and rejected a provision that

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<sup>60</sup> LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 3d ed. at 732.

would make the President impeachable for maladministration.<sup>61</sup> This history might be read as supporting the proposition that maladministration alone, of which failure to assist with transition is surely a part, does not rise to the level of unconstitutionality.

None of these arguments, however, are persuasive. First, the answer to the temporal argument that the outgoing President has no obligations to assure that the laws are faithfully executed during the next President's term may be found in the nature of the Take Care Clause itself. The language of the Clause is supervisory. The Clause does not demand that the President enforce the laws herself.<sup>62</sup> Rather it requires that she take measures to assure that the laws are effectively enforced. A new Administration that assumes office without the benefits of briefing or other critical transition assistance will be unable, at least for some time period, to be able to appropriately perform its enforcement duties because it will lack the requisite knowledge to make informed choices. The outgoing President, who, by refusing transition assistance, causes the new Administration's disability, therefore has not taken care that the laws will be faithfully executed.

The second, structural argument, in turn, is incomplete. The constitutionality of Presidential action need not be determined by whether it intrudes on another branch's prerogatives. A President who takes office without taking the oath of office, for example, has explicitly violated a constitutional command even if his action does not threaten separation of powers.

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<sup>61</sup> Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1309 (1996).

<sup>62</sup> See Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 108 (2000).

Finally, the historical maladministration argument is also not persuasive. First, deliberately failing to facilitate transition can be characterized as more than maladministration but rather a willful abdication of duty. Second, merely because a presidential action is not properly grounds for impeachment does not mean it is lawful. As Peter Strauss has argued, impeachability and unconstitutionality are not equivalents.<sup>63</sup>

The Take Care Clause, then, fairly read, imposes the obligation on the outgoing President to assist in preparing his successor for office. As we see it then, an outgoing President who orders his Administration not to help the incoming President would be acting unconstitutionally.

We do not read the Take Care Clause, however, as requiring the outgoing President to facilitate the ability of the incoming President to effectuate changes in current policy. This conclusion also derives from constitutional text. The constitutional provision speaks only of the responsibility to faithfully execute the laws – not to work to change the laws that already exist. We therefore believe that the better reading of the Take Care Clause is that it requires the outgoing President to prepare the new President to be able to immediately execute the law upon taking office, but it does not require the outgoing President to do anything to facilitate the new President’s tenure beyond that obligation.

Similarly we do not read the Take Care Clause as requiring an outgoing President, even a defeated incumbent, to abandon his own agenda during the transition period. This would mean, for example, that an outgoing President is free to issue regulations or executive orders issued late in the term even if he knows they will be undone by the incoming President and even if his purpose in so doing may be to cause the incoming

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<sup>63</sup> Strauss, *supra* note 62.

President to expend political capital to reverse the actions.<sup>64</sup> The Take Care Clause does not impose upon the outgoing President the duty to assist the incoming President in taking a firm political hold of the presidency.

### 3. The Oath Clause

The final textual basis from which to infer transition duties derives from the Oath Clause. The Oath Clause requires that before entering office a President will “solemnly swear (or affirm) that [she] will faithfully execute the Office of President of the United States, and will to the best of [her] Ability, preserve, protect and defend the Constitution of the United States.”<sup>65</sup>

That the Oath Clause imposes important duties on the President is not controversial.<sup>66</sup> As one commentator suggests, the duty of the President to preserve, protect, and defend the Constitution of the United States may, in fact, be the President’s “first duty.”<sup>67</sup> Indeed the importance of the President’s duty to “preserve, protect and defend,” has been seen as so central to his role that the language has been interpreted as a source of presidential power as well as obligation.<sup>68</sup> Coined the President’s “protective”

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<sup>64</sup> Undoing the work of a lame-duck President is a long-standing tradition for incoming Presidents. For example, President Grover Cleveland had made forest protection one of the key aims of his administration; however, the issue was sufficiently controversial that he waited until he was a lame-duck to set aside the reserves. In February of 1897, Cleveland, then a lame-duck, set aside twenty-one million acres of timber land as forest reserves to preserve it from logging. Encouraged by incensed constituents, the House of Representatives tried to impeach Cleveland for two days, and when that effort failed, the Senate attached to the Sundry Civil Bill a rider annulling Cleveland’s reservations. Cleveland issued a pocket veto and left office. Incoming President McKinley then convened a special session of Congress to discuss the reservations, and it enacted the Organic Administration Act of 1897, which suspended the reservations and limited the purposes for which national forests could be reserved. Coombs, *supra* note 16, at 332.

<sup>65</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>66</sup> See Saikrishna Prakash, *The Changing Law of War: Do We Need a New Legal Regime After September 11?: The Constitution as a Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

<sup>67</sup> Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1263 (2004).

<sup>68</sup> *In re Neagle*, 135 U.S. 1 (1890). *see also* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y. Gen. at 82 (stating that the duty to “preserve, protect and defend” the Constitution “implies the power to perform what he is required in so solemn a manner to undertake”).

power, the duty has been interpreted as investing the President with broad and expansive authority to take actions necessary to protect the property and personnel of the United States from attack or other dangers.<sup>69</sup> In any event, few would argue that if the President did not act to protect the nation from danger, he would be in violation of this obligation.

That the President's protective duties should also govern his actions with respect to transition is also readily apparent. First, the language itself that the President must "preserve" as well as protect and defend the Constitution explicitly directs that the President take actions with an eye to the future. His responsibilities are not limited to his own term of office. Second, and more to the point, failure to alert and cooperate with the incoming President with respect to imminent dangers facing the nation directly exposes the country to substantial risk. The new Administration cannot be expected to sift through complex information, much of it classified and much of it conflicting, regarding potential dangers to the United States only upon taking office and still be able to craft effective responses. Reliance on the advice and direction of the previous Administration is absolutely necessary to protect the United States. An outgoing President's refusal to provide that information and warn his successor as to potential dangers contradicts this protective duties. Accordingly, the outgoing President's decisions whether or not to brief his successor on domestic or international threats to national security are not optional. "To preserve, protect, and defend" means cooperating to the fullest degree to protect the United States against impending danger.

At the same time, the duties imposed by this provision, although critically important to the national interest, are limited in substantive scope. Refusal to allow the

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<sup>69</sup> *In re Neagle*, 135 U.S. 1 (1890); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 14-15 (1993).

new Administration access to government briefings on most domestic matters, for example, while harming the ability of the new President to make informed choices, would not likely threaten the Republic's survival. The "preserve, protect, and defend" language, in short, imposes special duties in transition only with respect to matters of national security.

A transition duty broader than one pursuant to the President's protective obligations might be inferred by the oath's requirement that the President "faithfully execute the Office of the President." Consider again the hypothetical of a President ordering his Administration not to work with representatives of the incoming presidency. Whether such action would violate the oath to faithfully execute the office depends on whether "executing" an office includes preparing that office for transition. Although our answer is certainly debatable, (executing an office may or not necessarily mean preparing that office for transition) we believe that it does. The fact that the Oath Clause references a duty to the office itself suggests that the incumbent's responsibilities extend beyond only his own tenure and, in our view, the most obvious direction for that responsibility to be exercised is towards the next President. We do not contend, however, that the outgoing President's duties under the Oath Clause respecting transition go beyond that found in the Take Care Clause. There is nothing in the Oath Clause language that suggests that the outgoing President must abandon his own agenda at the end of his term or that he must facilitate the new agenda of his successor.

## **B. Foreign Affairs**

The president's implied and express powers to conduct foreign affairs<sup>70</sup> also give rise to presidential obligations during transition. The President's foreign affairs powers have expanded dramatically in recent decades;<sup>71</sup> and his responsibilities stemming from this power can not be overstated.<sup>72</sup> As one Court proclaimed, "[t]he President is the constitutional representative of the United States with respect to foreign affairs."<sup>73</sup>

The primacy of the Presidency in foreign affairs raises special concerns in the conduct of presidential transitions. Once an election occurs, other nations begin to look to the President-elect rather than the incumbent President for leadership, which makes it very difficult for the United States to conduct foreign policy during the period between the election and inauguration day.<sup>74</sup> Thus, as Nancy Coombs reports, "lame-duck Presidents usually steer clear of significant or controversial international issues; or, at the least, they seek their successors' concurrence or commitment as to the course to pursue."

Midnight regulation in foreign relations can be much more damaging to the interests of the United States and the principles of presidential succession than similar conduct in the domestic sphere. As a general matter, the ability of the United States to engage in foreign relations depends to a great extent on its reliability as an international partner. Abrupt changes in foreign policy can do great damage to the country's ability to advance its interests internationally. Because of this, once an outgoing administration

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<sup>70</sup> The Constitution explicitly gives the President the power to make treaties as well as appoint and receive ambassadors. U.S. CONST. art. II, §§ 2-3. Other foreign affairs powers, such as the ability to recognize governments or enter into executive agreements are not explicit in the text.

<sup>71</sup> The expansion in presidential power in foreign affairs has not gone unchallenged. Numerous commentators have pointed out the dangers of vesting so much concentrated power in one person. Martin Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996). For the view that the President's powers in this area have always been expansive, see H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. Wash. L. Rev. 527, 554-55 (1999).

<sup>72</sup> Powell, *supra* note 71 (discussing the primacy of presidential power in foreign affairs).

<sup>73</sup> *Goldwater v. Carter*, 617 F.2d. 697 (D.C.Cir. 1979) (en banc) vacated 444 U.S. 996 (1979).

<sup>74</sup> Coombs, *supra* note 16, at 305.

makes a commitment, it may be very difficult for the incoming administration to reverse course.<sup>75</sup>

In our view, these special factors in the foreign relations context give rise to a duty on the part of an outgoing administration not to take any unavoidable significant foreign policy initiatives during the lame-duck period and perhaps during the lead up to the election.<sup>76</sup> Significant foreign policy steps should be left to the new administration, and the outgoing administration should not make any commitments or take any actions that would prejudice the ability of the incoming administration to engage in foreign policy in accordance with its electoral mandate. When there are pressing issues, the incumbent administration should, as has been done in the past, consult with its successors on the proper course of action. Not only does such consultation enhance the legitimacy of the administration's action, it strengthens the ability of the United States to conduct foreign relations during this period, since foreign nations are already looking to the incoming administration.

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<sup>75</sup> An incoming administration inclined to repudiate late-term commitments made by its predecessor may find that international law places an additional obstacle in the way of its foreign policy goals. As Nancy Coombs explains:

A certain tension exists between democracy and international law regardless of whether the administration binding the state is a lame duck. Democracy requires deference to the right of the majority to change its mind, whereas international law, in its effort to attain the stability necessary to ensure the peace and security of states, requires states to honor their commitments until the other party or parties to the agreement consents to a change.

Coombs, *supra* note 16. While we view the issue more in terms of presidential succession than purely democracy, the problem is the same—international law may stand in the way of policy changes that would normally occur in light of the outcome of the presidential election.

<sup>76</sup> These factors also, it should be obvious, require the outgoing President to assure that the new Administration is fully briefed on foreign affairs matters. As with the national security matters discussed above, the incoming Administration's will need to have as full an understanding as possible prior to assuming office in order to be able to appropriately act in this area. Moreover, the fact that much of the information relevant to foreign affairs decision making will not be public creates a greater necessity that the outgoing Administration takes steps to assure that the new Administration is fully informed on the day it takes office.

At the same time, the incoming Administration also has a duty not to abruptly abandon the foreign policy positions of its predecessor. The need for continuity in policy goes in both directions and the successor Administration also needs to be solicitous of previous Administration's policies in order to promote the larger foreign policy objectives.

None of this means that it is impossible for the United States to change courses in foreign policy. History is full of examples of changes in foreign policy. A new President, a President facing changed circumstances or even a President whose views have changed, violates no principle if he changes directions in foreign policy. In fact, the main reason that outgoing Presidents should not take significant foreign policy actions is to allow the new President to forge a new direction in foreign relations. However, the national interests and the interests of the presidency demand that the President be sensitive to the damage that can be done by abrupt changes in foreign policy if the changes are made in a manner that makes the United States appear to be an unreliable partner in foreign relations.

In sum, because of the concerns regarding presidential transition and foreign affairs, different transition obligations arise than is the case with domestic matters. Foreign policy requires continuity to be effective. Unlike most domestic issues the President cannot dramatically change course in foreign affairs without harming our international standing. Thus, in order to promote an effective foreign policy a president must work within the framework established by his predecessor and create a framework that allows his successor to succeed. In this area, the incoming and outgoing presidents

cannot ignore the other's political agendas. Both have a duty to affirmatively work with each other's policies.

### C. Democratic Theory

The final arguable constraint on the outgoing President's actions during transition concerns his obligations under democratic theory.<sup>77</sup> As mentioned in the introduction, presidential transitions are awkward times in our democracy because power remains in the hands of an individual who is at least four years removed from his most recent electoral success and, in the case of a defeated incumbent, has actually been repudiated in the most recent election. Meanwhile, the person who has just earned an electoral mandate is on the sidelines without the power to start the agenda that she was elected to pursue.

In these circumstances, the outgoing lame duck president who acts in disregard of the electoral results by either taking measures to inhibit the new president's ability to fulfill her electoral duties or continues to advance an agenda that has been defeated at the polls can be seen as acting contrary to the popular will and therefore in violation of democratic principles.<sup>78</sup> Indeed, the fact that a lame-duck Congress continued to pursue

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<sup>77</sup> Whether the nature of democratic theory, independent of constitutional text, may legitimately form a basis of constitutional interpretation while theoretically debatable has nevertheless become an established tradition in constitutional law. For example, notions of federalism have long guided constitutional interpretation although federalism is nowhere mentioned in the constitution. *See e.g.* *Younger v. Harris*, 401 U.S. 37 (1971). Claims that the constitution should be interpreted by resort to extra-textual principle have come from a variety of sources and from a variety of angles. Recently, Justice Breyer, for example, has argued that promoting the democratic process should guide constitutional interpretation. *See* Stephen Breyer, *Our Madisonian Constitution*, 77 N.Y.U. L. REV. 245 (2002). Michael Paulsen, on the other hand, has claimed that presidential power should be judged in relation to a principle of constitutional necessity. *See* Paulsen, *supra* note 66.

<sup>78</sup> Proponents of the Twentieth Amendment made this argument to champion their cause. *See, e.g.*, 75 Cong. Rec. 3864 (1932) (statement of Rep. Stafford) ("The voice of the people in the election of their representatives is the supreme law of the land."); 74 Cong. Rec. 5880 (1931) (statement of Rep. Glover) ("We are a Nation that says the people ought to rule ...."); *id.* at 5898 (statement of Rep. McCormack of Mass.) ("In a representative government it is essential that the will of the voters immediately go into effect and operation.").

a course of action that had been rejected at the polls was the major precipitating event behind the passage of the Twentieth Amendment.<sup>79</sup>

The most serious weakness in contending that legal obligations of transition can be generated from democratic theory is that it may prove too much. Taken at its most extreme, it would require that the lame duck administration actually start the new administration's agenda or, at least, that it ceases to take any action that could be seen as contrary to the new administration's policies. But placing the outgoing president in what is in effect an secondary position with respect to the incoming president creates its own set of problems. As a theoretical matter it subordinates the existing President to little more than an agent of his successor. Second, it creates the practical problems of forcing persons potentially opposed to a particular agenda to begin the process of effectuating its implementation. That is not a map for success.

Moreover, the democratic theory argument actually cuts both ways. The outgoing president, it must be remembered, was elected to a four year term ending on January 20. His term does not end at the moment election results are finalized. He enjoys an electoral mandate for the full four year period. Moreover, the Twentieth Amendment, although apparently intended to prohibit lame duck legislation by Congress,<sup>80</sup> does not so clearly govern lame duck activity by the outgoing President. After all, the Amendment provides that Congressional terms shall begin on January 3 while Inauguration Day for the

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<sup>79</sup> The impetus for the Twentieth Amendment may be directly traced to President Warren Harding's support for ship subsidies in 1922. The issue of ship subsidies had been central to the 1922 congressional campaigns, and the voters had defeated most members of Congress who supported the subsidy legislation. President Harding, still desirous of enacting the legislation, called a special lame-duck session of Congress to consider the matter. This action so inflamed certain Senators that they drafted what later became the Twentieth Amendment of the Constitution. Coombs, *supra* note 16, at 332; *see also* John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470 (1997).

<sup>80</sup> *See* Nagle, *supra* note 79, at 486.

President is set for January 20.<sup>81</sup> The possibility that a lame duck President will be acting with a newly elected legislature is therefore highly probable. We therefore reject the argument that the democratic theory principle (outside the realm of foreign policy as discussed above)<sup>82</sup> formally constrains the action of the outgoing president.<sup>83</sup>

## CONCLUSION

The case that presidential transitions impose constitutional obligations on both incoming and outgoing administrations is substantial. Textual foundation for this position exists in the Term, Take Care and Oath Clauses. Further support for this conclusion derives from the President's broad foreign affairs and protective powers. We therefore reject the position that the "rules" governing presidential transitions are only matters of comity without legal force. Any legal principles to be derived, however, will necessarily be quite general given the fact that the President is vested with substantial discretion with respect as to how his obligations are to be fulfilled. Some general principles, however, may be discerned.

First, from the Term Clause,<sup>84</sup> it may be established that the outgoing President should not act in any manner that threatens peaceful presidential transition and must affirmatively take all possible steps to assure that an orderly transition takes place.

Second, the Take Care Clause<sup>85</sup> requires that the outgoing President provide sufficient assistance to the new Administration so that the latter is able and prepared to execute its powers from the first day in office. Third, the Oath Clause and the president's protective

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<sup>81</sup> U. S. CONST. amend. XX, § I.

<sup>82</sup> See notes 74--76 *supra* and accompanying text

<sup>83</sup> We do not, however, find the democratic theory argument wholly irrelevant to our transition discussion. Rather, we believe it buttresses the arguments made from other sources. After all, one of the policy reasons supporting the position that the Take Care Clause, for example, imposes transition obligations on the President is that such action is supported by presidential deference to the popular will.

<sup>84</sup> U.S. CONST. art. II, § 1.

<sup>85</sup> U.S. CONST. art. II, § 3.

powers require the outgoing President to do all that she can to alert the new President to any threats to the Nation's security and must work with the new Administration to the fullest extent possible to prevent any harm to the nation from being realized. Fourth, the President's foreign affairs powers demand that both the outgoing and incoming Presidents act in foreign policy matters in a manner that advances the ability of the United States to effectively conduct foreign affairs. This means that the outgoing President must be aware and solicitous of the likely directions that the new President may take on foreign affairs issues and not work in a manner that may undermine the ability of the new President to achieve those goals. It also means that the incoming President does not have a free hand to reject the policies of his predecessor.

At the same time, the outgoing President is under no obligation beyond those just described to implement the new President's political agenda or to end implementing her own. This is so, moreover, even if the new President may be forced by the outgoing President's actions to expend political capital to undo the previous Administration's work. The Constitution does not demand that the outgoing President pave the political road for his successor.