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# QUICK OFF THE MARK? IN FAVOR OF EMPOWERING THE PRESIDENT-ELECT

*Nina A. Mendelson*[*]

## INTRODUCTION

The United States's presidential transition period is too long. Between November 7, 2008, and January 20, 2009, the media quickly identified a "'leadership vacuum.'"[1] In contrast to those of President-elect Obama, President Bush's approval ratings were at historic lows.[2] One reporter commented in late November, "The markets, at least, seem to be listening to one [P]resident—and he's not the one in the Oval Office,"[3] and another noted that "everyone . . . ignores the actions of the lame duck."[4]

Meanwhile, President-elect Obama was faced with numerous calls for immediate action on the nation's pressing economic and national security concerns. A December cover of *Time* magazine blared, "Why Obama's Presidency Has Already Begun . . .,"[5] and Congressman Barney Frank commented, "'[Obama] says we only have one president at a time. . . . I'm afraid that overstates the number of presidents we have. He's got to remedy that situation.'"[6]

Despite repeatedly stating that America has "'only one [P]resident at a time,'"[7] his care in asserting no formal power, and his avoidance of foreign affairs issues,[8] Obama prior to inauguration acted in many ways as if he

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[*] Professor of Law, University of Michigan Law School. Thanks to Chris Kriva for very helpful research assistance and to Jack Beermann, Daniel Halberstam, and Riyaz Kanji for useful discussions.

[1] Jeff Mason, *Mr. Co-President? Obama Upstages Bush on Economy*, REUTERS, Nov. 28, 2008, *available at* http://in.reuters.com/article/idINIndia-36698520081125 (quoting Stephen Wayne, a professor of government at Georgetown University) (link).

[2] WashingtonPost.com, Washington Post-ABC News Poll of Jan. 13–16, 2009, http://www.washingtonpost.com/wp-srv/politics/documents/postpoll_011709.html (last visited Mar. 22, 2009) (link).

[3] *See* Lisa Lerer, *Obama Takes Reins on Econ Crisis*, POLITICO, Nov. 26, 2008, http://www.politico.com/news/stories/1108/16023.html (link).

[4] Norman J. Ornstein, *Mr. Bush's Gentlemanly Goodbye*, N.Y. TIMES, Jan. 20, 2009, at A33 (link).

[5] Massimo Calabresi & Justin Fox, *Jump-Starting the Obama Presidency*, TIME, Dec. 8, 2008, at 28 & cover (link to cover).

[6] Jim Kuhnhenn, *Democrats Want a More Assertive Obama*, ASSOCIATED PRESS, Dec. 4, 2008, *available at* http://www.breitbart.com/article.php?id=D94S8I600&show_article=1 (link).

[7] *Id.*

[8] For example, Obama offered no comment or threat of sanctions or other actions following the early January attacks by Israel in the Gaza Strip. Helene Cooper, *Mideast Awaits Signs of Obama's Stance*

were President. On economic matters, he made announcements regarding his own massive economic stimulus plan,[9] held bipartisan meetings with members of Congress, and called for congressional action on economic stimulus measures.[10] He described the type of climate change legislation he would endorse upon taking office.[11] Obama also encouraged President Bush to offer financial assistance to the automobile industry, and it is possible that his statements may have influenced Bush to actually do so[12]—just as with his urgings regarding bailout funds to the financial industry.[13] In response to questions about his "much higher profile," Obama publicly commented in November on the importance of the American people knowing that "'their new [P]resident has a plan and is going to act swiftly and boldly' . . . ."[14] In short, Obama's preinaugural statements appear to have influenced both government decisionmakers and the general public.

Most writing about presidential transitions—including some of my own—has focused on the problems associated with the outgoing President's actions, rather than on those of the incoming President-elect. These writings reflect the numerous and varied issues surrounding a presidential departure. Weaknesses in the outgoing President's political power may imimpede his or her ability to take strong action when needed, regardless of whether such action is intended to address domestic economic issues or foreign policy matters.[15] Meanwhile, actions that are taken, such as "midnight rulemaking," hiring into the civil service (especially from the ranks of political appointees), and many other decisions, may be seen as overreaching and illegitimate.[16] They may have broad impacts, may be difficult to reverse later, and may be taken notwithstanding the views of the new Presi-

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*on Gaza*, NYTIMES.COM, Jan. 15, 2009, http://www.nytimes.com/2009/01/16/us/politics/15web-cooper.html (link).

[9] *See, e.g.*, *Obama Vows Strong New Financial Regulations*, REUTERS, Dec. 7, 2008, *available at* http://www.reuters.com/article/topNews/idUSN0545867820081207?feedType=RSS&feedName=topNews (link).

[10] *See* Peter Baker, *On Eve of History, Obama Follows Low-Key Path*, N.Y. TIMES, Jan. 20, 2009, at A1 (link); Brian Knowlton, *Obama Presses for Action on the Economy*, NYTIMES.COM, Jan. 8, 2009, http://www.nytimes.com/2009/01/09/us/politics/09transition.html (link).

[11] Calabresi & Fox, *supra* note 5, at 28.

[12] For a general description of the auto industry bailout, see David E. Sanger et al., *Bush Aids Detroit, but Hard Choices Wait for Obama*, N.Y. TIMES, Dec. 20, 2008, at A1 (link).

[13] Posting of David M. Herszenhorn to the N.Y. Times The Caucus Blog, Obama to Visit the Hill to Ask Democrats to Approve Bailout, http://thecaucus.blogs.nytimes.com/2009/01/12/obama-to-visit-the-hill-to-ask-democrats-to-approve-bailout/ (Jan. 12, 2009, 18:47 EST) (link).

[14] Brian Knowlton, *Obama Vows to Cut Budget Waste*, NYTIMES.COM, Nov. 25, 2008, http://www.nytimes.com/2008/11/26/us/politics/25cnd-transition.html (link).

[15] *See* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1265 (2006).

[16] *See* Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352 (2009) (link).

dent-elect and the electorate. In my analysis of such actions, I have referred to them collectively as "agency burrowing."[17]

Bush's widely criticized transition activities have included the sale of oil and gas leases on land neighboring national parks, limitations on protections for endangered species associated with approval of federal projects, and rules permitting "factory farms" to self-regulate their polluted runoff to waterways.[18] Indeed, in 2006, when Republicans lost the House and Senate at the midterm congressional elections, President Bush's press secretary announced that the President told his staff, "[P]ut on your track shoes because we're sprinting to the finish."[19] Incoming Presidents, including Presidents Clinton, Bush, and Obama, have reacted to such actions of the outgoing President by holding up pending agency actions.[20] In fact, Congressman Jerrold Nadler has recently introduced a bill that would bar any rule issued within ninety days of inauguration from taking effect until ninety days after inauguration.[21]

We should now go beyond exploring the legitimacy of "agency burrowing" and examine the mirror-image issue (and a possible response to burrowing): Should a President-elect be empowered to exercise greater authority prior to inauguration?[22] This Essay briefly explores two related points. First, policy and legitimacy considerations weigh heavily in favor of increasing a President-elect's power during the transition period. Second, in the absence of a constitutional amendment advancing the date of inauguration, statutory amendments increasing a President-elect's power would be a helpful and feasible way to involve the President-elect in governance during the transition period.

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[17] *See, e.g.*, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

[18] *See* Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, N.Y. TIMES, Jan. 12, 2009, at A10 (link); Felicity Barringer, *U.S. to Open Public Land Near Parks for Drilling*, NYTIMES.COM, Nov. 7, 2008, http://www.nytimes.com/2008/11/08/us/08lease.html (link); Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402) (link).

[19] *See* Press Release, White House Office of Communications, Press Gaggle by Tony Snow, Nov. 6, 2006, *available at* 2006 WL 3191168, *and at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061106.html (link).

[20] *See* Memorandum from Leon Panetta for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291, 58 Fed. Reg. 6074 (Jan. 25, 1993); Memorandum from Andrew H. Card, Jr. for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (link); Memorandum from Rahm Emanuel for the Heads of Executive Departments and Agencies (Jan. 20, 2009), *available at* http://www.thefederalregister.com/d.p/2009-01-26-E9-1639 (link).

[21] *See* Midnight Rule Act, H.R. 34, 111th Cong. (introduced Jan. 6, 2009) (link).

[22] *Cf.* Beermann & Marshall, *supra* note 15, at 1254 ("During transitions . . . there is no relationship between power, accountability, and electoral support that normally hallmarks the democratic process.").

## I. THE ARGUMENT FOR INCREASED PRESIDENT-ELECT POWER

The arguments from policy and democratic legitimacy to increase the President-elect's power are strong. The President-elect has just won a national election; his claim to democratic legitimacy may be stronger than at *any* later point in the four-year presidential term. Empowering the President-elect is likely to increase the government's responsiveness to the electorate. Increasing the power of the President-elect could also limit the ability of the outgoing President to implement his political agenda in disregard of electoral preferences.[23] It might even reduce cynicism among voters by reducing the extent to which "politics as usual" constricts the expression of their electoral views.[24] And, as the most recent transition period has suggested, the leaders of America's counterparts abroad are also generally anxious to begin conversations with the incoming President.

In opposition to the arguments for increased power for the President-elect, it might be argued that voters choose a President to take office on the constitutionally-specified date of January 20, not before. Thus, the sitting President "enjoys an electoral mandate for the full four-year period."[25] Surely, only the cave-dwelling American voter would not know that the date of inauguration is January 20. That does not mean, however, that voters *prefer* that a new President take office no earlier than January 20. A voter is asked to select only a new President, not the date on which the outgoing President will have to depart.

It is likewise irrelevant that earlier presidential candidates were elected to four-year terms beginning on January 20. Defending that position implies that nearly any prize flowing from electoral victory is democratically legitimate so long as every electing majority gets the same reward. But this view cannot be correct. For example, we would surely look askance at a year-long delay between election and inauguration, even if the same condition applied to every other electing majority.[26] As it stands, America's three-month presidential transition period is comparatively long.[27] In France, the "presidential transition in 1981 from Giscard d'Estaing to Mitte-

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[23] Beermann and Marshall also have suggested that constitutional principles might constrain an outgoing president to ensure an orderly transition that is largely helpful to the President-elect. *Id.* at 1256 (citing the Term, Take Care, and Oath clauses of the Constitution).

[24] Mendelson, *supra* note 17, at 564–65.

[25] Beermann & Marshall, *supra* note 15, at 1285. Beermann and Marshall accordingly argue that "midnight regulation" is "not constitutionally problematic." *Id.* at 1288.

[26] I discussed this argument in Mendelson, *supra* note 17, at 565 n.34.

[27] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 100 (2006) (observing that every country to have written a constitution since World War II has chosen a shorter transition period than the United States); Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 329 (2001) (noting that post-election governmental transitions elsewhere are generally shorter than in the United States).

rand took eleven days."[28] As I have argued elsewhere, this argument, based on an equal reward to each electing majority, "fails to attach significant expressive value to an infrequent, concerted electoral action."[29] Only pragmatic concerns might push in the other direction; a sound reason for a presidential transition period is that it enables the President-elect to assemble enough staff to begin operating the government.[30]

Despite the weight of the policy arguments, the Constitution's text precludes a President-elect from unilaterally ejecting the sitting President. Article II, Section 1 vests executive power in "*a* President."[31] Further, by specifying a date and time at which one President's term ends and the successor's begins, the Twentieth Amendment clearly contemplates that two Presidents will not serve simultaneously.[32] Moreover, the Framers may have wished to avoid an executive branch that would be governed by committee.[33] Thus, President-elect Obama could not have appeared at the White House on November 8 seeking to eject President Bush, appoint judges, or veto a bill.

The most straightforward way to shorten the transition period without raising legitimacy concerns would be to amend the Constitution so that Inauguration Day takes place on December 1, or even November 20, as at least one proposed constitutional amendment has provided.[34] It is fair to say, however, that new constitutional amendments face substantial procedural and political obstacles.[35] It accordingly is worth exploring other opportunities to formalize a greater role for the President-elect, particularly with respect to significant administrative agency actions.

## II. THREE POSSIBILITIES FOR INCREASING THE PRESIDENT-ELECT'S POWER DURING THE TRANSITION PERIOD

The Twentieth Amendment is likely the most significant (though not the only) obstacle to a proposal that would significantly empower the President-elect. As I discuss further below, however, there are reasonably strong arguments that the Amendment's language does not preclude a *moderate* proposal. Such a proposal could easily be consistent with the Amendment's

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[28] ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 323 (Mariner Books 1999).

[29] Mendelson, *supra* note 17, at 565 n.34.

[30] *See, e.g.*, Beermann & Marshall, *supra* note 15, at 1268.

[31] U.S. CONST. art. II, § 1 (emphasis added) (link).

[32] *See* U.S. CONST. amend. XX, § 1 (link).

[33] *See* David M. Driesen, *Toward a Duty-Based Theory of Executive Power* 8 (Feb. 9, 2009) (unpublished manuscript, on file with SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339892) (link).

[34] *See* 131 Cong. Rec. 11886 (1985) (statement of Sen. Mathias).

[35] *E.g.*, Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 111–13 (1993) (noting that constitutional amendments are even rarer than one might expect given the "significant obstacles placed in the way of those seeking constitutional change").

underlying purposes.[36] This Essay is meant to initiate a discussion about empowering the President-elect by considering three simple possibilities: voluntary collaboration, required concurrence in presidential decisions, and required concurrence in administrative agency decisions. This hardly exhausts the range of options, but it does represent a good starting point for future proposals.

### *A. Voluntary Collaboration*

The easiest case: the sitting President chooses to open the door to the President-elect. Suppose President Bush, for example, had invited President-elect Obama to consult on important policy matters and had refrained from making any significant policy decisions without first obtaining Obama's agreement. Because a President can obtain counsel from outside advisers (including private citizens), this method would surely be constitu-constitutionally permissible.[37]

### *B. Required Participation at the Presidential Level*

At the other end of the continuum, Congress is probably precluded from requiring a sitting President to obtain consent from a President-elect before he acts. For example, Congress presumably could not condition a purely presidential decision, such as the issuance of an Executive Order, on concurrence from the President-elect. The problem here is not empowering the President-elect, but instead requiring a sitting President to obtain consent from anyone at all. Such a proposal would trench significantly on the President's autonomy, and, in the words of the Supreme Court, would create the "risk of control [or] interference . . . by other branches" in the President's "assigned sphere of responsibility."[38] Congress would have to

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[36] *See infra* Part III.

[37] An issue might remain regarding whether advisory committee requirements would apply to such consultation; if so, they might deter full and frank discussion between the President and President-elect. Congress has imposed disclosure and public meeting requirements under the Federal Advisory Committee Act of 1972, 5 U.S.C. app. §§ 1–16 (2006) ("FACA"). Such obligations might, however, infringe upon the President's ability to carry out his constitutional functions—including his duty to make recommendations to Congress—and courts have accordingly construed the statute narrowly to avoid the constitutional question. Michael J. Mongan, Note, *Fixing FACA: The Case for Exempting Presidential Advisory Committees from Judicial Review Under the Federal Advisory Committee Act*, 58 STAN. L. REV. 895, 906, 909 (2005). That issue is beyond the scope of this article, but it is fair to say that the arguments against required disclosure of this sort of consultation, either because it would not be covered by FACA or because it would infringe on the president's constitutional prerogatives, are likely to be very strong. *See id.* at 906–07; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 473 (1997) (stating that consultation with a single individual is not consultation with a "group" and thus is not covered by FACA). *See also* Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 904–05 (D.C. Cir. 1993) (holding that FACA did not cover a health care task force that included the first lady because she received appropriated funds and was authorized to perform the duties of the office).

[38] Nixon v. Fitzgerald, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring).

show an "overriding need to promote objectives within [its] constitutional authority" to justify such a disruption.[39]

Given the outcome of the recent election and the prospect of midnight rulemaking and similar actions, advocates of such a proposal could argue that it is justified by the need to have an executive branch that is appropriately responsive to voters. The burden of having to show that an objective is "overriding," however, would be difficult to overcome given the level of interference with the President's direct responsibilities. Similarly, presidential disclosure requirements might face separation of powers challenges or be defeated by assertions of executive privilege.[40] In addition, such a proposal might face Twentieth Amendment objections, which are discussed in greater detail below.

### *C. President-Elect Concurrence in Significant Agency Decisions*

Requiring the participation of the President-elect in significant agency decisions is the most promising proposal for empowering the President-elect. As agencies are entrusted by statute with a wide range of important government decisions, this proposal could have significant effects. At the same time, the case for the legality of such a proposal is likely to be stronger than a proposal requiring the sitting President to obtain concurrence from the President-elect for individual actions. For example, suppose that Congress barred any executive branch agency from promulgating a significant final rule during the presidential transition period unless the agency obtained the concurrence of the President-elect or her designate. Similar provisions could be imposed for the approval of any significant lease, grant, or contract. For the sake of discussion, I do not envision a system in which designates of the President-elect *write* rules, or propose grant, loan, or lease terms. The agency would still do that, subject to the supervision of the sitting President. Concurrence of the President-elect or her designate would simply be a precondition to the agency finalizing its decision.

By increasing the participation of the President-elect's team during the transition period, such a proposal could make the executive branch more democratically responsive and accountable to the electorate. It would also limit the prospect of "midnight rulemaking" that is contrary to the preferences of the incoming President and the voters. Ideally, it would increase the extent to which executive power is exercised in a democratically legitimate way. The only practical downside of the proposal is that it would require the President-elect and his transition staff to learn about policy issues more quickly so that a concurrence decision for a particular rule or decision could be prompt.

The focus of the concurrence proposal is domestic policy. Foreign policy may be trickier. An outgoing President can do serious harm to foreign

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[39] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

[40] *See supra* note 37.

policy, harm that may be very difficult for the new President to undo. This is especially so because "[a]brupt changes in foreign policy can do great damage to the country's ability to advance its interests internationally."[41] Meanwhile, other countries look to the President-elect nearly immediately for leadership. And there is no accountability for the lame-duck actions of the outgoing President, as the electorate has already thrown its weight behind a new commander-in-chief. Consequently, the need to constrain an outgoing President from doing damage in the foreign policy arena may be substantial.

Unfortunately, the legal obstacles to formally empowering a President-elect in this area are likewise substantial. As a matter of constitutional law and tradition, the President is the "representative of the United States with respect to external affairs."[42] Despite the damage that a lame-duck President could do, a transition period system that generates any ambiguity about who is the head of state could create even greater difficulties for conducting international affairs. As Professors Beermann and Marshall have stated, "[d]ealings with foreign nations are not possible without a single authoritative voice."[43] Beyond these pragmatic difficulties, a regime in which the outgoing President must obtain the President-elect's concurrence on foreign policy matters is unlikely to pass muster under the Court's current separation of powers doctrine. Even apart from Twentieth Amendment issues, courts are likely to find impermissible interference with the President's unique authority over foreign affairs.[44]

As a consequence, we might have to settle for something less than President-elect concurrence in the foreign policy arena. Congress might require that the President consult with the President-elect on foreign policy matters. Presidents have made some effort to engage in such consultation already, and perhaps they should see themselves as duty-bound to do so.[45] Nancy Amoury Combs has suggested that outgoing Presidents have gener-

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[41] Beermann & Marshall, *supra* note 15, at 1281.

[42] Goldwater v. Carter, 617 F.2d 697, 705 (D.C. Cir. 1979) (en banc) (per curiam), *vacated on other grounds by* 444 U.S. 996 (1979) (per curiam) (link). *See* American Ins. Ass'n v. Garamendi, 539 U.S. 396, 414–15 (2003) (link); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (link); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (stating that "the President alone has the power to speak or listen as a representative of the nation" in the "vast external realm") (link).

[43] Beermann & Marshall, *supra* note 15, at 1281.

[44] *See, e.g.*, ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1099 (9th Cir. 2005) (concluding that requiring the President to "undertake . . . cleanups on foreign soil absent some agreement with the foreign government . . . would impermissibly encroach on the Executive's foreign affairs authority") (link); Earth Island Inst. v. Christopher, 6 F.3d 648, 653 (9th Cir. 1993) (holding that a statute requiring the Secretary of State to initiate negotiations with foreign nations "impinges upon power exclusively granted to the Executive Branch under the Constitution") (link).

[45] *See* Beermann & Marshall, *supra* note 15, at 1282.

ally avoided "controversial international issues" or have consulted with their successors regarding the proper "course to pursue."[46]

## III. LEGAL OBJECTIONS TO A PRESIDENT-ELECT CONCURRENCE REQUIREMENT FOR AGENCY ACTIONS

In the domestic arena, the legal case for giving the President-elect a more formal role in agency decisions is fairly strong. A concurrence requirement for significant agency actions would interfere far less with authority allocated to the President than would requiring concurrence for presidential decisions. Congress is clearly able to limit an agency's activity, including by limiting the scope of a statutory program or imposing procedural requirements; Congress thus could impose a concurrence requirement. The biggest constitutional difficulty an agency-concurrence proposal would face stems from the Twentieth Amendment. This section outlines that issue and then briefly surveys other possible constitutional objections.

### *A. The Twentieth Amendment*

The language of the Twentieth Amendment provides that "[t]he terms of the President and the Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin."[47] Adding a President-elect concurrence requirement would augment the President-elect's power and reduce that of the President. By giving her such additional power, the argument might be made that the President-elect's term has effectively started earlier than January 20.

On the other hand, there may be strong functionalist, purpose-based rejoinders. For example, one could argue that because the sitting President and the executive agencies would retain all power to initiate and design the structure of agency policies, the President-elect's term has not meaningfully begun. The sitting President would likewise retain sole power to interact with the other branches; only the President can veto legislation or appoint individuals to the federal bench. Rather than representing an earlier start to the presidential term, the concurrence function of the President-elect or her designates might be seen as one of many preconditions to agency action. The concurrence requirement likely would make a significant difference only to controversial policy decisions. Moreover, compared with, say, proposals to halt transition-period rulemaking activity altogether, this plan would facilitate a smoother presidential transition. Immediately after the election, the President-elect would be motivated to serve the public interest and she, unlike the outgoing President, would remain electorally accountable for decisions taken during the transition period.

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[46] Combs, *supra* note 27, at 305.

[47] U.S. CONST. amend. XX, § 1.

Moreover, the agency-concurrence plan should be seen as consistent with the Amendment's spirit. The purpose of the Twentieth Amendment was not to give the lame-duck President an entitlement to some specified time in office. Instead, it was meant to *shorten* the transition period between election and inauguration. As John Copeland Nagle has so effectively described in his essay on the Twentieth Amendment and lame-duck Congresses, the Amendment's purpose was not to limit, but to increase, the responsiveness of government to the people's will as expressed through the election.[48] By eliminating the lame-duck Congress[49] and shortening both the presidential and legislative transition periods, it was to make "the voice of the people in an election . . . supreme."[50] The sponsor of a subsequent proposed constitutional amendment to inaugurate the President and Vice President on November 20 emphasized the need to have "[t]he people's decision . . . implemented as soon as possible."[51] A concurrence requirement for significant agency decisions would clearly be consistent with that purpose.

Although the Twentieth Amendment, on its face, does provide a transition period of significant length, only a limited inference about the Amendment's purpose should be drawn from the date its drafters chose. Implicit in the Amendment is an attempt to balance democratic goals, such as having the country's leadership positions held by election winners as soon as possible, against pragmatic considerations, such as the need for an orderly transition and time for the President-elect to arrive with her household in Washington. Modernized transportation methods have shortened the time needed for the latter. Other practical obstacles to an immediate transition may still remain; electoral campaigns require considerable personal and financial resources, and the need for such resources competes with the need for pre-election transition planning. Moreover, the Electoral College must finish casting its votes following the November election, al-

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[48] *See* John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 480 (1997).

[49] Prior to the Twentieth Amendment, owing to idiosyncrasies in scheduling congressional sessions, thirteen months (or longer) might elapse between the date members of Congress were elected and the date they took office. During this time, a short session of the lame-duck Congress was usually called. *Id.* at 484–85.

[50] *Id.* at 480. Despite Beermann's and Marshall's suggestion that the Twentieth Amendment was not clearly aimed at lame-duck presidential activity because inauguration of the new president is not set until seventeen days after the new Congress arrives, the reason for this delay was not to preserve a lame-duck presidency, but to avoid having a lame-duck House of Representatives be the institution set to resolve a presidential election if no candidate received a majority in the Electoral College. *See* U.S. CONST. amend. XII (link).

[51] *See* 131 CONG. REC. 11886 (1985) (statement of Sen. Mathias). The Twentieth Amendment had to be an amendment to the Constitution only because it (briefly) had the effect of shortening congressional and presidential terms from their constitutionally prescribed lengths. *See* S. REP. NO. 72-26, at 5–6 (1932).

though its schedule could be shortened by statute if needed.[52] But apart from these practical issues, it is unclear whether any valid reasons remain for leaving power in the hands of departing incumbents. None of these practical considerations weighs against imposing a President-elect concurrence requirement upon agency officials.

### *B. The Appointments Clause and Other Concerns*

The delegation of concurrence authority to an elected individual not already holding his or her executive position raises additional legal questions. Delegations of regulatory power to *private* individuals have sometimes been successfully challenged on due process grounds—in part because of concerns that the private party may be motivated by selfish interests that could be adverse to those of the regulated party and in part because of concerns that the private party may be able to readily exercise power in an arbitrary fashion. For example, in the New Deal case *Carter v. Carter Coal Co.*, the Supreme Court invalidated on due process grounds a regulatory scheme that institutionalized the decisions of two-thirds of a district's coal producers in the form of rules binding on the other third.[53] In the present instance, however, no similar criticism can be leveled against the President-elect, who has every incentive to pursue the public interest. Although he has not yet formally assumed his position, the President-elect is in a situation far closer to that of a public official than to that of a private individual because of the means of his selection and his ultimate electoral accountability. Consequently, giving the President-elect concurrence authority seems less likely to offend the Due Process Clause than do other schemes in which Congress has delegated significant authority outside the executive branch.

The Appointments Clause, which provides the proper means of appointing government "Officers,"[54] may also present no obstacle. Courts have so far declined to hold that simply taking action relating to the government makes an individual a federal officer for purposes of the Appointments Clause.[55] Requiring that an agency obtain the concurrence of the

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[52] By congressional statute, the Electoral College currently meets the first Monday after the second Wednesday in December. 3 U.S.C. § 7 (2006) (link).

[53] 298 U.S. 238, 311 (1936) (link); *see* Eubank v. City of Richmond, 226 U.S. 137, 144 (1912) (link).

[54] U.S. CONST. art. II, § 2, cl. 2 (link).

[55] *See, e.g.*, Auffmordt v. Hedden, 137 U.S. 310, 326–27 (1890) (link) (holding that a merchant appraiser who could issue binding valuations of dutiable goods was not an "officer"); *cf.* Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam) (quoting United States v. Germaine, 99 U.S. 508, 510 (1879)) ("We think that the term 'Officers of the United States' . . . defined to include 'all persons who can be said to hold an office under the government' . . . is a term intended to have substantive meaning.") (link). In *Printz v. United States*, 521 U.S. 898 (1997) (link), the Court struck down the Brady Handgun Violence Prevention Act on the grounds that it commandeered state officials. Justice Scalia, writing for the majority, stated in dicta that all executive branch functions were to be performed by officers selected by the President (or by inferior officers, appointed as the Constitution provides) so as to ensure "meaningful Presidential control." *Id.* at 922. Commentators and later courts have distinguished this lan-

President-elect prior to making a significant decision would not thereby give the President-elect an "office" or make that individual an "officer." The President-elect would not "exercise significant discretion"[56] or have the "power to bind the government."[57] The argument would be that the President-elect's concurrence is a simple precondition to federal agency action, much like other preconditions Congress has imposed.

For example, courts have upheld provisions of the Indian Gaming Regulatory Act that require state gubernatorial concurrence as a condition of federal authorization to Native American tribes who want to operate casinos.[58] Despite the concurrence precondition, the courts viewed the authority to implement the Act, including the ability to initiate an action and to define its scope, as residing with a duly-appointed federal official. In the transition case described here, plausible arguments also could be made that the President-elect's functions would not make him an officer in the constitutional sense. Agency officials would continue to possess the authority to define the outlines of a rule, for example, and to finally decide whether to issue that binding rule once all preconditions had been satisfied. Requiring concurrence from the President-elect is thus not part of the core authority to implement the statute. Instead, concurrence simply represents an additional condition on the exercise of executive authority.

For the same reason, such a scheme also is not likely to raise significant separation of powers concerns. Despite the concurrence requirement, agency officials would still possess the core authority, under the relevant statutes, to carry out the laws.[59] Moreover, there is no issue of congressional aggrandizement because Congress would obtain no new authority or influence by imposing a statutory concurrence requirement.[60]

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guage, however, because the act at issue in *Printz* relied primarily on *state* officials for implementation. *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 367 F.3d 650, 658 (7th Cir. 2004) (link) (concluding that a state gubernatorial concurrence requirement was not "execution" within the meaning of *Printz*); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 375–86 (1998) (arguing that the *Printz* dictum is inconsistent with well-established doctrine and practice).

[56] Freytag v. Commissioner, 501 U.S. 868, 882 (1991) (link).

[57] Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. Off. Legal Counsel 202, 202–03 (1983).

[58] *See Lac Courte Oreilles*, 367 F.3d 650; Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688 (9th Cir. 1997) (link).

[59] Nor does this create a novel issue with the language in Article II, Section 1 vesting the executive power in the President. Congress has already vested significant authority in the heads of agencies, and even with a concurrence requirement, the core executive authority for implementing those statutes would remain with the agencies.

[60] Similarly, there would appear to be little argument that Congress would be improperly delegating its own authority. *See, e.g.*, Currin v. Wallace, 306 U.S. 1 (1939) (link).

## CONCLUSION

In short, a requirement that an agency obtain the concurrence of the President-elect or her designate for a significant transition period action may well be feasible, and it would surely increase the electoral accountability of the executive branch. Future work might include assessing options with greater involvement by the President-elect in setting the domestic agenda or making foreign policy decisions. At a minimum, further discussion on empowering the President-elect is worthwhile. It may be that changes to the law—short of a constitutional amendment—would significantly increase the extent to which the executive branch is accountable to the electorate after one of the electorate's rare concerted expressions.