

A Recommendation for Presidential Transition Transparency

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By Heath Brown

Perhaps no aspect of the presidency is as misunderstood and underappreciated as the passage of power between presidents – the presidential transition. Lost in the commotion of the campaign, policy and personnel planning happens discreetly *before* and after Election Day. Candidates have traditionally figured out much about whom they would appoint to their cabinet, how they might re-organize the White House, and what policies they would promote long before they have earned a single vote.

It had been tradition to keep this transition planning – **the pre-election transition planning phase** that occurs before Election Day – entirely secret out of fears of the opposing party, or the press, accusing the candidate of being presumptuous and “measuring the drapes of the White House” before the election. For this reason, candidates have kept pre-election transition planning safe under lock-and-key, permitting only select and loyal insiders to participate in the planning, and some have established the transition team as a private 501(c)(4) nonprofit. George W. Bush initially trusted a high school friend (Clay Johnson) and Barack Obama a former Senate staffer (Christopher Lu). As a result, hundreds of important decisions about the future administration are made with very limited public input or even awareness. Those with long-standing relationships, built on support for the candidate in the past – sometimes including financial backing – may have free rein to recommend candidates for key administrative posts, suggest which policies the new president might favor, and ways to re-organize the federal government. Those without access – the vast majority of citizens and organized interests – have few opportunities to make such important recommendations. Thus a great irony: while the country’s most democratic ritual is at play, the direction of the country may have already been set in stone to some degree, long before a single vote has been cast.

Recent Changes

U.S. policy has recently been adjusted to make some efforts to encourage better planning in the pre-election phase. A 2004 law – the Intelligence Reform and Terrorism Prevention Act – allowed key advisers to be screened by the FBI in order to obtain a security clearance before the election, so that they can begin receiving classified information.¹ In 2010, Congress amended the 1963 Presidential Transition Act with the Pre-Election Presidential Transition Act of 2010 to authorize additional pre-election federal funding to help the two major party nominees cover expenses such as office space, furniture, and computers needed for planning for the transition.²

These are all positive signs for the safety and security of the country, and overhaul an unnecessarily haphazard process. More pre-election planning is good for the quality of government and promotes a process where candidates can learn from the successful practices of previous transition planners with fewer worries about damning stories in the press.

Figure A: Three Phases of the Presidential Transition

Pre-Election “Transition Planning” Phases

- May/June of Election Year to Party Convention
- Party Convention to Election Day (federal funds become available to official candidates)

Post-Election “Transition” Phase

- Election Day to Inauguration Day

Post-inauguration “Handover” Phase

- Inauguration Day to End of First 180 Days in Office

Need for Greater Transparency

Despite these advances in transition planning, few efforts have been made to increase the openness of pre-election transition planning, promote transparency, and assure that planning adheres to basic democratic principles. We still know little about the people with whom the major candidates are meeting, who has been given access to advise the transition team, and who is paying the bills. These concerns are heightened in 2016, given recent changes in campaign finance law and the explosion of money in politics. In this election, several super PACs have amassed huge amounts of money; probably more than they can spend on political advertisements. Are these super PACs spending at all on transition planning? Who is funding these groups and are they involved in advising the transition teams? There is no way to know. And there are dozens of 501(c)(4) social welfare nonprofits – dark money groups – with sufficient funding to support transition planning.

Pre-election transition planning falls outside most campaign finance regulations administered by the Federal Election Commission (FEC), though donations to a transition team affiliated with a candidate must be disclosed to the GSA and are capped at \$5,000 from any contributor.³ Because transition planning is done before the inauguration and operated by private nonprofit organizations, few transparency laws bind the involved non-federal employees and organizational entities. For example, transparency, sunshine, and record-keeping laws – such as the Presidential Records Act of 1978 (PRA),⁴ which codified the types of records of a sitting president that would be publicly archived, and the Freedom of Information Act (FOIA),⁵ which grants access to the public to documents from federal agencies – only loosely apply to the transition period. Documents prepared by transition teams of not yet inaugurated presidents are not required to be maintained for future archiving at a presidential library or at another location for the losing candidate. And even the briefing reports prepared for the transition team by federal agencies are hard to access, since in the past, presidents have interpreted FOIA as not germane to the transition period.

In 2008, however, President-elect Obama’s transition team announced that any transition document that was “in possession of a federal agency” could be subject to FOIA.⁶ Nevertheless, the *Washington Times* reported in 2010 on its efforts to collect such documents and found “decidedly

mixed views even inside the federal government on whether to make information public and, if so, how much and when.”⁷ Some agencies provided the newspaper with a set of reports that had been shared with the Obama transition team in 2008-09, others provided very little, and few seemed certain about what was required.

To be sure, there are important reasons why certain aspects of transition planning should take place in private. For example, classified information received from the outgoing administration clearly must be kept non-public. Discussions of the merits of specific candidates for posts in a future administration likely should remain confidential. And, deliberations on the precise wording or political strategy of future policy proposals also need not be shared widely. These details and others can reasonably be kept confidential at the discretion of the candidate and the transition planning team.

Nevertheless, total secrecy is hardly justified, especially as it relates to the process used by the transition team. Many of the same principles in effect once a candidate is elected president are at play prior to the election. The public maintains an interest in knowing who is influencing the transition team, as well as how they are influencing it. This information could help voters determine whether or not to support a candidate.

Any future presidential nominee should insist that transparency and ethics standards infuse their pre-election transition planning. In particular, each major candidate should consider answering these five questions in adopting a pre-election transition policy.

Question 1: Who is focused on transition planning?

George W. Bush tasked Clay Johnson to do pre-election transition personnel work in 1999, and Barack Obama tasked his Senate advisers, Peter Rouse and Christopher Lu, with early transition planning at the start of the primaries in early 2008.⁸ But these roles often are not publicly known.

For instance, the press became aware in September 2008 that Sen. John McCain had named William Timmons⁹, a former White House official and longtime lobbyist, as a leader of a group involved in running his transition. We now know that Timmons and others had been involved in transition planning for McCain since April. Personnel planning had begun as early as June, with Russell Gerson¹⁰, founder of the investment firm the Gerson Group and a McCain campaign bundler, working with 29 volunteers to compile the names of potential cabinet nominees and to create a personnel database.

Romney chose former Utah Governor and Secretary of Health and Human Services Michael Leavitt to oversee his pre-election transition planning as early as April, though the Romney Readiness Project was not publicly announced until the end of May 2012.

Recommendation 1: With the final party primary slated for June 7th, the leading candidates should announce who has been – or will be – doing pre-election transition planning by at least the following week.

**Question 2: Have those tasked with focusing on transition planning signed an ethics pledge?
Who has been given a waiver from the pledge?**

Simply knowing who is planning the transition is a first step to greater public understanding. It is also important that we understand the terms under which these individuals are working. It is widely understood what public employees are permitted to do, but those serving during the pre-election transition are often acting as volunteers or working, as 501(c)(4) nonprofit employees, outside the parameters of public employment. It has become commonplace for those serving in the post-election transition to sign an ethics pledge promising not to plan in policy areas in which they have a financial interest. In the post-election phase of 2008, Obama required all transition team members to sign a statement that prohibited them from lobbying, soliciting money, or receiving gifts during the transition period, as well as agreeing to a 12-month ban after the transition ended on lobbying a federal agency which they had overseen during the transition period.

Tevi Troy, who worked on the Romney pre-election transition team (called R2P), observed first-hand that considerable planning had occurred by the time of the 2012 election but several important issues were never fully addressed. He writes: “certain key R2P personnel questions – such as lobbyist participation, compensation for staff, full-time versus part-time status, and ethics requirements – were not sorted out until too late in the process.”¹¹ Failing to adopt these ethical principles during the pre-election period will likely lead to a half-hearted or rushed effort to implement them during the post-election transition period.

Special attention should be paid to the role of lobbyists – both actively registered and former. There is no reason why all lobbyists should be prohibited from having a role to play on pre-election transition planning: they often possess expert knowledge and may have served on a transition team in the past. But the role lobbyists play should be clearly explained. In particular, the pre-election transition team should decide whether lobbyists will be permitted to help plan for the transition of agencies which they have lobbied in the past or will likely lobby in the future.

Recommendation 2: The leading candidates should identify and disclose to the public the ethical principles and policies that they are likely to promote once in office and apply each to the greatest extent possible before the election during the pre-election transition period.

Question 3: Who is funding the team?

In the past, candidates either did little pre-election transition planning or relied on a skeletal staff of volunteers prior to the election. Pre-election transition planning was usually paid for through private funding, and not much of it. John McCain’s transition team had a budget of about \$30,000, while Barack Obama’s transition budget was \$400,000 – all paid for through private contributions.¹² As the awareness of the importance of pre-election transition planning has grown, more resources have been needed. Most recently, in 2010 Congress authorized federal funding for pre-election transition planning prior to Election Day. After the party nominating conventions, each campaign is eligible to receive some federal support – Romney’s team was authorized to spend \$6.6

million, but only spent \$1.4 million – to support transition planning. Romney raised an additional \$1.4 million from private sources for pre-election transition planning in 2012, and anticipated raising an additional \$3.8 million. Congress set aside significantly more in public funding for pre-election transition planning in 2016. In his 2017 budget proposal, the Obama requested \$9.5 million for post-election transition activities.

Moving forward, candidates should be much more forthright about who is funding their pre-election transition planning, especially in the period before federal funds commence and disclosure is required by law. This will permit greater scrutiny of potential influence by the media.

Recommendation 3: As soon as pre-election transition planning begins, candidates should disclose who has provided funding and/or the campaign’s plan to fund pre-election transition planning.

Question 4: With whom is the team meeting?

Much of the pre-election transition planning period involves collecting information, and much of that information comes from experts, both in and out of government. In 1980, President-elect Reagan’s transition team was famously influenced by the Heritage Foundation and 20 years later President-elect Obama’s team relied on reports prepared by the Center for American Progress. Think tanks, as well as interest groups, research organizations, and corporations have information to share and are often quite interested in sharing. In the past, much of this sharing has happened in secrecy.

In 2008, Obama’s pre-election transition team was much more open about this information collection than previous president-elects had been. It broke into policy-specific groups and held meetings with policy organizations and interest groups. These meetings allowed for expertise to be shared from the policy community to the transition team. Once elected, President-elect Obama adopted a “Seat at the Table” policy that required any individuals or organizations wishing to meet with his post-election transition team to post their letter of advice to a public website. After the inauguration, President Obama adopted a voluntary disclosure policy on access to the White House. Meetings with those outside of government would be published on the White House website, and this policy has been maintained for the last eight years.¹³

With this precedent established, the same practices should be adopted during the pre-election transition period in 2016. Candidates seeking to surpass Obama’s commitment to transparency, should begin by adopting a policy of disclosing transition-related meetings during the campaign. This is become even more important after the *Citizens United* decision and the recent emergence of largely unaccountable dark money nonprofits.

Recommendation 4: As soon as pre-election transition planning begins, each candidate should post information on a public website about all meetings held with individuals and organizations outside the campaign or transition team, including date, location, and a list of attendees. This website should be maintained after the election for the winning candidate during the post-election transition phase.

Question 5: What records is the transition team going to keep?

Federal law mandates rigorous record-keeping for the president and White House staff after the inauguration. Those records form the basis of what the public knows about the inner-workings of the presidency and contribute to an uninterrupted institutional history that promotes good governance. Few of these record-keeping regulations apply by law to the transition period, but most could be implemented by a forthright candidate. Future presidents-elect should require their transition teams to maintain copies of key documents, correspondence, and other material in order to archive and share them with the public. This would extend the institutional history of the presidency to cover the months leading up to the official transfer of power. This would also prepare key officials on the transition – many of whom will go on to positions in the White House – for the type of record-keeping that will soon be required of them.

To be sure, all of these complete records need not be shared publicly in real-time. Material from the transition period might be held for a period of time, as is the tradition with other documents from the presidency. Care can be given to redacting sensitive and classified information, as is the case with other documents. Sound procedures can surely be developed to ensure the security of sensitive information while at the same time adhering to the equally important principle of open government.

Recommendation 5: Each candidate should develop a plan during the pre-election transition to archive key documents from the pre- and post-transition period for future use and announce when those documents will be made public.

Conclusion

These recommendations will not restrict who the transition team can consult with or how much information it can collect. It also will not mean a transition team has to discuss who it is vetting for appointment. These recommendations simply promote a similar level of voluntary transparency before the election as we require by law after the election.

Notes

¹ Public Law 108-458, “Intelligence Reform and Terrorism Prevention Act of 2004” General Services Administration: <http://www.gsa.gov/portal/content/178103>.

² Public Law 111-283, “Pre-Election Presidential Transition Act of 2010” General Services Administration: : <http://www.gsa.gov/portal/content/178099>.

³ Public Law 111-283, “Pre-Election Presidential Transition Act of 2010” General Services Administration: : <http://www.gsa.gov/portal/content/178099>.

⁴ “Presidential Records Act of 1978” National Archives: <http://www.archives.gov/presidential-libraries/laws/1978-act.html>.

⁵ “Freedom of Information Act” National Archives: <https://www.archives.gov/foia/>.

⁶ Center for Presidential Transition, “Presidential Transition Guide” Partnership for Public Service: https://www.govexec.com/media/gbc/docs/pdfs_edit/011916cc1.pdf.

- ⁷ Jim McElhatton, "Obama's 'open government' hides transition data" *Washington Times*, 5/6/2010: <http://www.washingtontimes.com/news/2010/may/06/open-government-often-closes-doors/?page=all>
- ⁸ Shirley Ann Warshaw, *Guide to the White House Staff* (Washington, DC: CQ Press, 2013).
- ⁹ Michael Scherer, "McCain taps lobbyist for Transition" *Time*, 9/12/2008: <http://content.time.com/time/nation/article/0,8599,1840722,00.html>.
- ¹⁰ Ashley Parker "Campaigning aside, team plans a Romney presidency" *New York Times*, 8/16/2012: <http://www.nytimes.com/2012/08/17/us/politics/mitt-romneys-transition-team-is-hard-at-work.html>.
- ¹¹ Tevi Troy, "Measuring the Drapes" *National Affairs*, 3/25/2013: https://hudson.org/content/researchattachments/attachment/1098/nationalaffairs_tevitroy032513.pdf.
- ¹² "Ready to Govern: Improving the Presidential Transition" Partnership for Public Service, January, 2012: <https://ourpublicservice.org/publications/download.php?id=118>.
- ¹³ Voluntary disclosure website, White House: <https://www.whitehouse.gov/VoluntaryDisclosure>.