



SYMPOSIUM ESSAY

Ascertaining the President-Elect Under the Presidential Transition Act

Michael T. Morley*

Abstract. The Presidential Transition Act (PTA) requires the Administrator of the General Services Administration (GSA) to facilitate the transition to an incoming administration following a presidential election. The GSA must provide a President-elect with office space, telecommunications services, and millions of dollars for transition staff, consultants, and travel. Other agencies must conduct background checks on a President-elect's intended nominees for national security positions as expeditiously as possible.

The PTA does not provide any guidance for the GSA Administrator, however, in determining whether a presidential candidate qualifies as a President-elect. The statute defines the term "President-elect" as "the apparent successful candidate[] for the office of President . . . as ascertained by the Administrator." But the statute provides no standards for an Administrator to apply in ascertaining an election's results or determining whether a candidate is apparently successful. In most years, the Administrator's decision is straightforward because the losing major-party candidate concedes on, or shortly after, election night. The presidential elections of 2000 and 2020, in contrast, involved lengthy post-election controversies. In both cases, the Administrator delayed ascertaining a President-elect for several weeks. Disputes arose over the standards the Administrator was employing in ascertaining—or declining to ascertain—the election's apparent results, and whether the Administrator was being improperly motivated by partisan considerations.

This Article provides a framework for Administrators to apply, and Congress to consider codifying, when ascertaining the results of presidential elections under the PTA. It further suggests that Congress should amend the PTA to avoid unnecessarily delays in presidential transitions by requiring the GSA and other agencies to provide the full extent of transition-related services to all major presidential candidates if an election's results cannot be ascertained within three days of Election Day. Finally, since the Administrator lacks constitutional authority to definitively determine a presidential election's result, Congress should reduce the potential perceived significance of the Administrator's ascertainment decision by changing the term "President-elect" as used in the PTA and related federal statutes to a less politically charged term, such as "federal designee."

* Sheila M. McDevitt Professor of Law, Florida State University College of Law. I am grateful for the invaluable research assistance of Kat Klepfer of the FSU College of Law Research Center, as well as the feedback I received at the Stanford Law School symposium on Safeguarding the Right to Vote.

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Introduction

The 2020 presidential election was held on November 4, but the federal government did not begin facilitating the transition to the administration of President-elect Joseph Biden until nearly three weeks later, on November 23. That day, the Administrator of the General Services Administration (GSA) Emily Murphy issued a letter officially making “post-election resources and services available” to Biden¹ pursuant to the Presidential Transition Act of 1963 (PTA).² The GSA had delayed even longer in recognizing an apparent winner and commencing the official transition process following the 2000 election³ that culminated in *Bush v. Gore*.⁴

Congress adopted the PTA to subsidize and facilitate the process of transitioning between presidential administrations following an election.⁵ There is a period of approximately two-and-a-half months between Election Day in early November⁶ and Inauguration Day on January 20 of the following year.⁷ By the end of that brief period, a President-elect must learn about the range of foreign and domestic threats facing the nation and the posture of the Armed Forces; familiarize himself with major agency activities; identify appointees for political positions throughout the administration; and craft Executive Orders to issue upon assuming office, as well as longer-term proposals for legislation and regulations.⁸ In short, the President must put “thousands of people, policies and procedures into place for successful governance.”⁹

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1. Letter from Emily W. Murphy, Administrator, Gen. Servs. Admin., to President-Elect Joseph R. Biden, Jr. 1 (Nov. 23, 2020), <https://perma.cc/Q5BM-MT75>.
 2. Presidential Transition Act of 1963, Pub. L. No. 88-277, § 3(a), (c), 78 Stat. 153, 154 (1964) (codified at 3 U.S.C. § 102 note).
 3. See *infra* note 99 and accompanying text.
 4. 531 U.S. 98 (2000) (per curiam).
 5. See H.R. REP. NO. 88-301, at 3 (1963); S. REP. NO. 88-448, at 1 (1963).
 6. See 3 U.S.C. § 1.
 7. See U.S. CONST. amend. XX, § 1.
 8. For a description of the President’s most important priorities during the transition process, see BRADLEY H. PATTERSON, JR., THE STRUCTURE AND ORGANIZATION OF THE WHITE HOUSE STAFF: OPTIONS AND CHOICES FOR THE NEW PRESIDENT (Nov. 1, 2000), reprinted in *Transitioning to a New Administration: Can the Next President Be Ready? Hearing Before the Subcomm. on Gov’t Mgmt., Info. & Tech. of the H. Comm. on Gov’t Reform*, 106th Cong. 38 (2000) [hereinafter *Presidential Transition Hearing*]; *Presidential Transition Hearing*, *supra*, at 57-58 (statement of former New Hampshire Governor John H. Sununu) (explaining the problems with delays in commencing the transition).
 9. *Presidential Transition Hearing*, *supra* note 8, at 10, 12 (statement of Rep. Judy Biggert, Vice Chairman, H. Subcomm. on Gov’t Mgmt., Info. & Tech.).

To help achieve these goals, the PTA directs the GSA Administrator to make available to the “President-elect” and “Vice-President elect” office space, telecommunications services, printing services, and millions of dollars for transition staff, consultants, and travel expenses.¹⁰ Federal agency heads,¹¹ members of Congress, and congressional committees¹² may detail federal employees to assist the President-elect’s transition team. Additionally, the President-elect is entitled to receive “a detailed classified, compartmented summary” of “specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force.”¹³ He or she may also submit nominations for “high level national security positions” for background investigations “as soon as possible” after Election Day,¹⁴ which the responsible agencies must complete “as expeditiously as possible.”¹⁵

The PTA defines “President-elect” and “Vice-President-elect” as “the apparent successful candidates for the office of President and Vice-President, respectively, as ascertained by the Administrator following the general elections held to determine the electors of President and Vice President.”¹⁶ The statute does not provide any further guidance for the Administrator to apply in “ascertain[ing]” the “apparent successful candidates” of a presidential election.¹⁷ Neither the statute nor federal regulations expressly provides any criteria to guide the Administrator’s decision, which is not subject to judicial review. The GSA Administrator’s refusal to ascertain a winner in the weeks following the 2000 and 2020 elections delayed the transitions to the incoming administrations, placing them at a substantial disadvantage throughout the first several months of their terms.¹⁸

10. Presidential Transition Act of 1963, Pub. L. No. 88-277, § 3(a), 78 Stat. 153, 154-55 (1964) (codified at 3 U.S.C. § 102 note).

11. *Id.* § 3(a)(2), 78 Stat. at 154.

12. Presidential Transition Enhancement Act of 2019, Pub. L. No. 116-121, 134 Stat. 138 (2020) (codified as amended at 3 U.S.C. §§ 1 note, 102 note).

13. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601(a)(1), 118 Stat. 3638, 3857 (2004) (codified at 3 U.S.C. § 102 note).

14. *Id.* § 7601(a)(3), 118 Stat. at 3857.

15. *Id.*

16. Presidential Transition Act of 1963 § 3(c), 78 Stat. at 155.

17. *Id.* at § 3(a), (c), 78 Stat. at 154-55.

18. See *Presidential Transition Hearing*, *supra* note 8, at 21, 65 (statement of former New Hampshire Governor John H. Sununu) (explaining that, because the transition period is the only time the President can focus on preparation rather than “fulfilling responsibilities of office,” a one-month delay in starting a transition can cause delays of up to a year in “getting things really started”).

Delaying ascertainment of the President-elect hinders transition efforts, undermining an incoming administration's ability to get up to speed, make necessary appointments, and be able to start administering the government effectively. Premature ascertainment, in contrast, can unfairly affect both public perceptions and practical realities amid a legitimately disputed election. Having a candidate officially designated the "President-elect"—even if only for purposes of the PTA—with the media constantly referring to them as such, may affect the willingness of election administrators, courts, or other officials to grant post-election relief, particularly in close cases.

There is scant academic literature concerning the Administrator's authority to "ascertain[]" the results of a presidential election. Most of the leading articles on the PTA focus on the conduct of the transition itself, rather than the antecedent decision to ascertain the President-elect.¹⁹ A few pieces allude to the GSA's decision to delay declaring a winner in the 2000²⁰ or 2020²¹ elections, but do not discuss how the decision should have been reached. Todd Zywicki has written the most comprehensive analysis of the issue.²² He argued that the Administrator must "ascertain" a candidate as the President-elect when, based on states' certifications of their election results, the candidate has won a majority of pledged electoral votes.²³ Zywicki also recommended amending the PTA to shift responsibility for ascertaining the winners of presidential elections to an independent commission, with judicial review of the commission's decisions.²⁴ He further suggested amending the PTA to either clarify the definition of "ascertainment" or allow the Administrator to release funding and provide transition assistance to both candidates in the event of a contested election.²⁵

This Article provides an alternate ascertainment framework for the GSA to apply and Congress to consider incorporating into the PTA that is consistent with the statute's text, structure, purpose, and legislative history, as

19. See Joshua P. Zoffer, *The Law of Presidential Transitions*, 129 YALE L.J. 2500, 2505 n.19 (2020); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1256 (2006).

20. See, e.g., Ari B. Rubin, Note, *Grounding the Lame Duck: The President, the Final Three Months, and Emergency Powers*, 109 GEO. L.J. 907, 912 (2021).

21. See, e.g., John Taschner, *Recapturing Democracy: COVID-19 and the 2020 Presidential Election*, 48 HASTINGS CONST. L.Q. 461, 482 (2021).

22. Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. REV. 1573, 1578; see also HENRY B. HOGUE, CONG. RSCH. SERV., R46602, PRESIDENTIAL TRANSITIONS ACT: PROVISIONS AND FUNDING 9 (2020); STEPHANIE SMITH, CONG. RSCH. SERV., RL30736, PRESIDENTIAL TRANSITIONS 20 (2008).

23. Zywicki, *supra* note 22, at 1602.

24. *Id.* at 1639.

25. *Id.* at 1638.

well as underlying policy considerations. Part I begins by discussing different possible approaches to ascertainment based on the PTA's legislative history. Working backwards from Inauguration Day, Part II discusses various points in the process at which the Administrator may ascertain the President-elect following a contested presidential election. This Part goes on to explore potential statutory amendments. Part III briefly concludes.

Most of the time, ascertainment under the PTA is a purely ministerial, uncontroversial decision. In bitterly disputed presidential elections, however, it becomes important to understand the circumstances under which the Administrator should recognize a President-elect and allow the transition process to a new administration to officially commence.

I. Ascertainment and the PTA's Legislative History

Congress adopted the PTA to “promote the orderly transfer of the executive power” by ensuring that incoming administrations have enough time to identify appointees, get up to speed on national security threats, and otherwise learn about the state of affairs at the agencies they are about to take over.²⁶ Congress also sought to limit a President-elect's reliance on private funds to subsidize the transition process.²⁷ The PTA's definition of “President-elect” as the “apparent successful candidate,”²⁸ especially considered in light of these purposes, demonstrates that the Administrator may recognize a President-elect even before the result is made official through Congress's count of electoral votes.²⁹

On the other hand, Congress recognized the “psychological and other advantages” associated with being designated the President-elect by the Executive Branch and having a full-fledged, officially sanctioned transition effort underway.³⁰ As a candidate's transition efforts progress and garner publicity, an Administrator's ascertainment can take on a political and public reality of its own, making a court at least somewhat reluctant to dislodge it.

The PTA's legislative history is consistent with at least four possible ways in which the Administrator could approach the issue of ascertainment. First, during congressional debates over the statute, some members suggested that

26. Presidential Transition Act of 1963, Pub. L. No. 88-277, § 2, 78 Stat. 153, 153 (1964) (codified at 3 U.S.C. § 102 note).

27. See 109 CONG. REC. 13,345 (1963) (statement of Rep. George Brown); *id.* at 13,346 (statement of Rep. Benjamin Rosenthal).

28. Presidential Transition Act of 1963, § 3(c), 78 Stat. at 155.

29. 109 CONG. REC. 13,345 (1963) (statement of Rep. George Brown); see also *id.* at 13,348 (statement of Rep. Harold Gross).

30. *Id.* at 13,345, 13,348 (statement of Rep. Harold Gross).

ascertainment would occur only when the ultimate winner of a presidential election was “perfectly clear to everybody concerned.”³¹ This interpretation treats ascertainment as akin to judicial notice, which is permissible when a fact is “not subject to reasonable dispute” because it is “generally known within the trial court’s territorial jurisdiction.”³² Under this interpretation, the Administrator would generally be unable to ascertain a result until either the losing major-party candidate conceded, or all recounts, contests, and candidate-initiated litigation were over. This standard could lead to substantial delays in commencing a transition, and yet still may be overly optimistic in the current environment. As late as 2012, many Democrats continued to believe that President Bush stole the 2004 election (in which Bush won the national popular vote),³³ while an even greater number of Republicans insist that Donald Trump was the legitimate winner of the 2020 election.³⁴ Even after litigation and other post-election proceedings terminate, the modern public still may not recognize a winning candidate due to misinformation, motivated reasoning, partisan bias, conspiracy theories, and reinforcement from social media and cable news commentators.

Second, the Act may be read as empowering the Administrator to assess the likely outcomes of post-election proceedings such as canvasses, recounts, election contests, and other post-election litigation to ascertain the winner. While his comments are far from clear, it appears that Representative Jasper may have contemplated such an approach. He urged that the Administrator would “make the determination” to ascertain the apparent winner in “the event of a close election, where the results would not be known until later.”³⁵ The

31. *Promoting the Orderly Transfer of the Executive Power in Connection with the Expiration of the Term of Office of a President and the Inauguration of a New President: Hearing on H.R. 12479 Before the Subcomm. on Exec. & Legis. Reorganization, of the H. Comm. on Gov’t Operations*, 87th Cong. 1, 17 (1962) [hereinafter *Orderly Transfer Hearing*] (statement of former Deputy Director of the Bureau of Budget—the preceding agency to the Office of Mgmt. and Budget—Elmer Staats,); see also 109 CONG. REC. 13,345 (1963) (statement of Rep. George Brown) (stating that ascertainment was appropriate where “all the American people knew [who] had been elected” and no one “would dare to say that somebody else was elected President”).

32. FED. R. EVID. 201(b)(1).

33. See Dan Cassino, *Many Republicans Believe the Election Was Fixed. But That’s What Losing Partisans Often Think.*, WASH. POST (Dec. 4, 2020), <https://perma.cc/L8EX-CFJP>; see also Joanna Weiss, *What Happened to the Democrats who Never Accepted Bush’s Election*, POLITICO MAG. (Dec. 19, 2020, 7:00 AM EST), <https://perma.cc/G7XW-2JDG>.

34. Lane Cuthbert & Alexander Theodoridis, *Do Republicans Really Believe that Trump Won the 2020 Election? Our Research Suggests That They Do.*, WASH. POST (Jan. 7, 2022, 7:00 AM EST), <https://perma.cc/9CP2-V3F2>.

35. *Orderly Transfer Hearing*, *supra* note 31, at 16 (statement of former Management Analyst of the Bureau of Budget—the preceding agency to the Office of Mgmt. and Budget—Herbert Jasper).

Administrator lacks expertise in election law, however. And it would be unseemly for the Administrator to predict the outcomes of proceedings before state entities or federal courts. Moreover, the PTA does not provide a mechanism through which candidates may attempt to persuade the Administrator of the merits of their claims. This approach also seems to create an unnecessarily high risk of potential error. As proceedings progress and rulings are made, the identity of the apparent winner could shift, leading to repeated changes in the identity of the President-elect ascertained by the Administrator. This potential interpretation not only finds little support in the legislative history, but would yield serious practical difficulties.

Third, rather than establishing a single, fixed, objective standard for “ascertainment,” the PTA may grant discretion to each Administrator to determine for him- or herself when an election’s results are sufficiently certain to identify an apparent winner.³⁶ As Representative Fascell stated at several points, when the Administrator has any “doubt” or “question in his mind” as to the “apparently successful candidate,” he or she should not ascertain a winner.³⁷

Treating the PTA as failing to establish any substantive standard for ascertainment and leaving it solely to the Administrator to decide when a winner is “apparent” would exacerbate unpredictability and facilitate both *ad hoc* partisan decisionmaking by Administrators and political influence by the White House.³⁸ It may also encourage candidates to attempt “shadow litigation” before the Administrator, submitting arguments and analysis as to why they are likely to prevail in proceedings pending before other tribunals. The Administrator should generally refrain from attempting to speculate about the likely outcomes of proceedings before other entities. In any event, even if the PTA does not itself establish a single, fixed standard, but rather leaves the Administrator a degree of discretion to determine when an election’s results are sufficiently certain to warrant “ascertainment,” the question then arises as to how the Administrator should exercise such discretion.

36. See 109 CONG. REC. 13,345 (1963) (statement of Rep. George Brown) (stating that the PTA requires the Administrator to “determine[] in his own judgment . . . that there has been a President elected”).

37. *Id.* at 13,349 (statement of Rep. Dante Fascell); see also *id.* at 13,348 (statement of Rep. Dante Fascell that “[t]here is nothing in the act that requires the Administrator to make a decision which in his own judgment he could not make”).

38. The Clinton White House reportedly “stepped in to oversee and supervise” the GSA Administrator during the dispute over the results of the 2000 election. Zwycki, *supra* note 22, at 1600; see also Bob Davis, *New President-Elect’s Transition Team May Find GSA Director Holds the Keys*, WALL ST. J (Nov. 20, 2000, 12:01 AM ET), <https://perma.cc/K4SU-FE4K> (to locate, select “View the live page”) (discussing a directive from White House Cabinet Secretary Thurgood Marshall, Jr., instructing the GSA to notify the White House Chief of Staff “before making a decision on the transition”).

Fourth, Zywicki argues that the PTA’s legislative history establishes that the Administrator must certify a candidate as the apparent President-elect once that candidate obtains a majority of pledged, certified electors, regardless of whether those results remain subject to recounts, contests, or federal court challenges.³⁹ Zywicki is correct that several members recognized that the Administrator should *not* ascertain an election’s results if he or she is unable to determine which presidential candidate will receive a majority of electoral votes,⁴⁰ as when voters choose electors who are unpledged to a particular candidate.⁴¹ But the legislative history is less clear that the Administrator necessarily must treat state certification as dispositive.

Despite its seeming finality, “certification” is not actually the final step in many states’ post-election processes. To the contrary, many states do not even allow recounts⁴² or election contests⁴³ to occur until after the election’s results have been certified. At the very least, the Administrator should wait until a state’s official statutory processes are over before accepting its results as final. More broadly, particularly in recent years, the possibility of candidates pursuing state or federal litigation to challenge presidential election results has become sufficiently ubiquitous that recognizing an apparent President-elect may have awkward consequences for pending litigation. As one member recognized during the legislative debates, a candidate “designated as President and Vice President . . . would be given psychological and other advantages.”⁴⁴ Unseating the officially recognized President-elect is atmospherically quite different—and likely to be both portrayed differently by the media and understood differently by the public—than simply adjudicating a dispute between vying candidates, even if the “President-elect” designation is not intended to be dispositive.

39. Zywicki, *supra* note 22, at 1602.

40. *E.g.*, *Orderly Transfer Hearing*, *supra* note 31, at 16 (statement of former Deputy Director of the Bureau of Budget—the preceding agency to the Office of Mgmt. and Budget—Elmer Staats); 109 CONG. REC. 13,348 (1963) (statement of Rep. Dante Fascell).

41. 109 CONG. REC. 13,348 (1963) (statement of Rep. Harold Gross); *see also id.* at 13,349 (statement of Rep. James Haley).

42. *See, e.g.*, GA. CODE ANN. § 21-2-495(c)(1) (2021) (allowing a losing candidate to request a recount “within two business days following the certification of the election results” if the person “who has been declared elected to an office” won by a sufficiently narrow margin, including for “federal or state office[s]”); VA. CODE ANN. § 24.2-801.1(A)-(B) (2022) (specifying that a “petition for a recount for an election for presidential electors” must be filed within two days of certification and “set forth the results certified by the State Board”).

43. *See, e.g.*, TEX. ELEC. CODE ANN. § 243.002(b) (2021) (specifying that the contesters in a presidential election are the “presidential elector candidates officially determined to be elected”).

44. 109 CONG. REC. 13,348 (1963) (statement of Rep. Harold Gross).

Zywicki's strongest argument in favor of allowing the Administrator to rely on certified state results, regardless of any pending post-election litigation or other disputes, arose from the House's discussion of the presidential election of 1960, which had occurred prior to the PTA's enactment. At least two members declared that, even though that election had been "one of the closest . . . in history," the Administrator would have been able to ascertain John F. Kennedy as the winner.⁴⁵ In the weeks following that election, however, litigation ensued and allegations of extensive fraud persisted.⁴⁶ Zywicki argued that "[t]he only coherent understanding" of the members' comments was "that Kennedy was able to claim a certified electoral college majority . . . [d]espite the real threat that the electoral college majority might later be overturned."⁴⁷

Zywicki also pointed to the assertion during legislative debates that there had been only "three close elections" throughout American history.⁴⁸ He explained that this was a reference to the elections of 1800, 1824, and 1876, in which he contends it was impossible to determine which candidate had won a certified majority of presidential electors.⁴⁹ Zywicki contended that this narrow conception of "close elections" precludes the Administrator from ascertaining a winner only when, as in those races, a candidate lacks an apparent certified majority of electors. Post-election litigation over vote-counting, he maintained, does not impede ascertainment.⁵⁰

The main reason why Members of Congress believed that the 1960 election had a clear result, however, was because Nixon conceded.⁵¹ Such a public concession dramatically undercut the importance of post-election litigation by state parties or voters. Zywicki downplays the significance of the concession, claiming it was just for show and that Nixon "implicitly endorsed"

45. *Id.* at 13,345 (statement of Rep. George Brown); *see also id.* at 13,348 (statement of Rep. Dante Fascell).

46. Zywicki, *supra* note 22, at 1615.

47. *Id.*

48. *Id.* at 1627; *see* 109 CONG. REC. 13,348 (1963) (statement of Rep. Dante Fascell); *see also id.* at 13,349 ("In the whole history of the United States there have only been three close such situations. It is an unlikely proposition.").

49. Zywicki, *supra* note 22 at 1627.

50. *Id.* at 1615, 1626.

51. 109 CONG. REC. 13,345 (1963) (statement of Rep. George Brown) (emphasizing that Nixon "admitted it, conceded it, the Republican leadership admitted it and conceded it, and there was no reason why the transition period should not have started"); *see* Richard Nixon, Remarks Conceding the Presidential Election (Nov. 9, 1960), reprinted in Gerhard Peters & John T. Wooley, *Richard Nixon: Remarks Conceding the Presidential Election in Los Angeles, California*, AM. PRESIDENCY PROJECT, <https://perma.cc/6M3D-UKGY>.

at least some of the post-election proceedings.⁵² Regardless of such potential maneuvering, a public, unretracted concession by the losing candidate⁵³ is an indisputable signal to the American public that they may coalesce around an apparent winner—even if post-election proceedings continue. Perhaps more importantly, Zywicki’s proposed standard is an inference from the legislative history—neither the committee reports nor any members debating the bill expressly identified or endorsed it. Especially given the importance that post-election lawsuits have come to assume over the past two decades, the PTA’s legislative history need not be read as definitively prohibiting an Administrator from declining to ascertain an election’s results due to such ongoing proceedings.

II. Ascertaining the President-Elect

A. Working Backwards from Inauguration Day

One way to approach the question of “ascertainment” under the PTA is to work backwards from Inauguration Day to identify potential benchmarks or criteria upon which the Administrator may rely in determining whether a candidate has apparently won the presidential election.

1. Inauguration Day

The Constitution specifies that the President shall be inaugurated at noon on the January 20 following a presidential election.⁵⁴ At that time, of course, the prevailing candidate becomes the President, not merely the President-elect, and any transition period necessarily terminates.⁵⁵ Ascertainment must occur, if at all, well in advance of this date.

2. Joint Session of Congress

The identity of the candidate who will be inaugurated as President is officially declared on January 6,⁵⁶ at the conclusion of the joint session of

52. Zywicki, *supra* note 22, at 1619.

53. Al Gore conceded to Bush on Election Day 2000, but he retracted his concession hours later. Matt Smith, *Gore Retracts Concession as Florida Eyes Recount in Presidential Race*, CNN (Nov. 8, 2000, 5:26 AM EST), <https://perma.cc/8AYM-33JJ>.

54. U.S. CONST. amend. XX, § 1.

55. Of course, in the catastrophic event that Congress has not finished counting electoral votes—or the House has failed to select a President—then an Acting President would temporarily assume power at noon on January 20 until the underlying presidential election was definitively resolved. *See id.* amend. XX, § 3.

56. 3 U.S.C. § 15.

Congress at which it counts electoral votes and resolves any lingering disputes.⁵⁷ In the unlikely event that no candidate for President receives valid electoral votes from a majority of electors appointed, the election is resolved by the House of Representatives;⁵⁸ there has not been a contingent election in the House since 1824.⁵⁹ Thus, unless such a contingent election becomes necessary, the Administrator could definitively ascertain the President-elect based on the results of the January 6 joint session. Such delay would leave only two weeks for a transition. It will hardly ever be necessary for the Administrator to wait so long.

3. Electors Cast Electoral Votes

The Constitution specifies that presidential electors throughout the nation must cast their electoral votes on the same day, which Congress may specify.⁶⁰ The Electoral Count Act requires electors to cast electoral votes on a specified day in mid-December.⁶¹ Any electoral votes cast after that date would violate the timing requirements of both the Constitution and federal law.⁶² The electors prepare certificates listing their votes for President and Vice President and send a copy to the Vice President (as President of the Senate).⁶³

Since the adoption of the Electoral Count Act in 1887,⁶⁴ Congress has received only a single slate of electoral votes from officially certified electors in each state with the exception of 1960.⁶⁵ And in that time, Congress has never rejected electoral votes from a state that submitted only a single set of officially

57. U.S. CONST. amend. XII.

58. The House would select from among the three presidential candidates who received the greatest number of electoral votes, with each state's delegation receiving a single vote. *Id.* A candidate must receive votes from a majority of state delegations to win the presidency through this "contingent election" procedure. *Id.*

59. See Michael T. Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, 15 HARV. L. & POL'Y REV. 81, 104 (2020).

60. U.S. CONST. art. II, § 1, cl. 4.

61. Electors must cast their votes "on the first Monday after the second Wednesday in December" of a presidential-election year. 3 U.S.C. § 7.

62. In 1856, Wisconsin's electors cast their votes late due to a snowstorm, and the Vice President—as presiding officer of Congress's joint session—declared that the votes would be counted. CONG. GLOBE, 34th Cong., 3d Sess. 652-53 (1857).]

63. 3 U.S.C. §§ 9-11.

64. Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5-7, 15-18).

65. Then-Vice President Nixon, presiding over the joint session of Congress at which the electoral votes were counted, obtained unanimous consent to count only the later-submitted slate of votes for John F. Kennedy, which reflected the results of a court-ordered recount. 107 CONG. REC. 290 (1961) (statement of Vice President Richard Nixon).

certified electoral votes. Thus, if a candidate receives 271 electoral votes from officially certified electors, the Administrator would be justified in ascertaining that candidate as the President-elect, even though Congress has not yet reviewed and counted those votes. Putting off ascertainment until electoral votes are cast, however, would cause an even longer delay than that which followed the 2000 election.

4. Determination of Electors

States generally determine their official slates of electors at least a few weeks before electoral votes are cast, around late November, though the exact timeline varies based on both state law and any state-specific post-election litigation. Typically, a state official or board conducts a statewide canvass of the election results (which are usually reported by each county) and certifies the winning electors based on the statewide vote tallies.⁶⁶ The question arises whether the Administrator may rely on such statewide canvasses as the basis for ascertaining a presidential election's results. There are three possible approaches.

First, the Administrator could rely upon the appointments of any electors certified by a state based on the statewide canvass, as Zywicki recommends.⁶⁷ The potential problem with this policy, as mentioned earlier, is that some states do not conduct integral, statutorily authorized parts of their post-election processes—such as recounts and election contests—until after certification of the prevailing candidates. Especially since several states authorize recounts when only a fraction of a percent separates the two leading candidates, basing ascertainment decisions on certification alone seems premature and potentially error-prone.

Second, the Administrator could instead base ascertainment decisions on certified appointments of electors following the conclusion of—or expiration of the period for—any post-election proceedings authorized by state law. This would avoid the possibility that a recount may change the outcome of a razor-thin election in a state, in turn changing the apparent President-elect. This appears to be a reasonable approach in close elections that balances the need for minimizing unnecessary delays, respecting state processes, and ensuring that ascertainment decisions are based on sufficiently accurate and final results. The main potential drawback is that this interpretation would allow the Administrator to ascertain a candidate as the President-Elect even while his or her victory in one or more states is being challenged in constitutional cases in state or federal court—potentially including the Supreme Court.

66. See, e.g., CONN. GEN. STAT. § 9-315 (2021); NEV. REV. STAT. § 293.395(2)-(3) (2020).

67. See *supra* note 39 and accompanying text.

Finally, the Administrator could instead wait for the conclusion not only of any post-election proceedings authorized by state law, but also any other post-election constitutional litigation brought by the candidate, such as lawsuits under 42 U.S.C. § 1983.⁶⁸ This alternative creates a greater possibility of delay and gives the apparently losing candidate more opportunity to frustrate the transition process. On the other hand, once a President-elect has been officially named, large swaths of the public and media coalesce around the notion that such candidate has prevailed. With the transition process underway, a court may feel great pressure to stretch the law if at all possible to avoid dislodging such increasingly settled expectations and rapidly calcifying outcomes. A challenge to the President-elect may be atmospherically and psychologically quite different than a challenge to someone who is merely the leading candidate.⁶⁹ Moreover, ascertaining an election's apparent results while the losing candidate is actively litigating the outcome seems to marginalize the importance of those judicial proceedings. And, of course, there is the constant risk that a series of court rulings as a case is appealed could lead to rapid shifts in the identity of the apparent winner. Though the best way of balancing the competing considerations is far from clear, a persuasive case can be made that the Administrator should not rely on a state's certification of a slate of electors until the losing candidate's judicial challenges to that slate have been completed.⁷⁰

One potential objection to allowing the Administrator to rely on a state's appointment of electors is that those electors may choose to cast their electoral votes in an unexpected manner. The U.S. Supreme Court has recognized that states may require electors to cast their electoral votes in accordance with the outcome of the presidential election in that state.⁷¹ Although a majority of states have laws binding their electors, only a subset of them provide an effective enforcement mechanism.⁷² In those jurisdictions, if an elector casts their vote for the "wrong" candidate, it is treated as an automatic resignation

68. 42 U.S.C. § 1983 (permitting citizens to sue certain government officials for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

69. *See supra* note 30 and accompanying text (discussing the potential "psychological" impact of the Administrator's determination).

70. The Administrator need not give similar deference to litigation brought by third parties. Taking such litigation into account would be impracticable because there can be a virtually limitless number of such suits. Many of those cases are pro se and involve baseless theories and claims, and courts do not always feel the need to rapidly dispose of them in advance of electors casting their electoral votes.

71. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

72. *Presidential Elections*, FAIRVOTE, <https://perma.cc/TJTT6-9HU9> (last updated July 7, 2020).

and a replacement is appointed.⁷³ For states that lack such provisions, it is unclear whether their elector binding laws are enforceable. And over a dozen states lack any such elector binding laws at all.

Nevertheless, faithless electors remain very rare⁷⁴ and have never changed the outcome of a presidential election—though in 1836 they did force Richard Johnson to be elected Vice President by the Senate rather than the Electoral College.⁷⁵ The theoretical possibility that electors from states without effective enforcement mechanisms may cast enough “faithless” votes to change the ultimate result of a presidential election is too remote and speculative to preclude the Administrator from ascertaining election results based on electors’ appointments.

5. County Canvasses

Moving back still earlier in the process, in most states, the vote tallies for the statewide canvass are drawn from county canvasses that are typically completed by mid-November.⁷⁶ County canvasses reflect all of the valid votes cast in the county, including Election Day ballots, absentee or vote-by-mail ballots, early voting ballots, provisional ballots, and military and overseas ballots. In many states, the deadlines for receiving absentee ballots in general,⁷⁷ or military and overseas ballots in particular,⁷⁸ can be as late as twenty days after the election. And some states wait just as long before reviewing and counting provisional ballots.⁷⁹

The county canvass provides an important opportunity to identify and correct errors in the vote counting or tabulation process. Such errors can include anything from inadvertent transpositions in recording results from voting machines, arithmetic mistakes in tallying results, or failure to include results from a particular voting machine, batch of absentee ballots, or data card.⁸⁰ Election officials can compare the total number of voters logged into

73. See, e.g., COLO. REV. STAT. § 1-4-304(1), (5) (2022).

74. See Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 678-80 (1996) (listing examples from throughout American history).

75. ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE 132 (2019).

76. See, e.g., FLA. STAT. §§ 102.141, 102.151 (2012).

77. See *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT’L CONF. OF STATE LEGISLATURES, (Mar. 15, 2022), <https://perma.cc/X93A-SHXF>.

78. FED. VOTING ASSISTANCE PROGRAM, 2020 REPORT TO CONGRESS 10 (2020), <https://perma.cc/7J3E-NUK8>.

79. See *Provisional Ballots*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 10, 2022), <https://perma.cc/SUS9-3M7J>.

80. See, e.g., Yann Ranaivo, *Election Official: Vote Count Correction Changes Result of Christianburg Council Race*, ROANOKE TIMES (Nov. 6, 2021), <https://perma.cc/437S-DZZJ>.

each polling place with the number of votes cast there to make sure that no ballots have been inadvertently omitted. Canvasses can also uncover errors in programming for tabulation devices.⁸¹ Particularly for states where the leading candidate is several points ahead of the others, the collective results of county canvasses can be a reliable basis for ascertainment decisions. In closer races, however, where the leading candidates are separated by only a point or two, the Administrator would likely be better served by waiting until the state's full post-election process plays out.

6. Ballot Receipt Deadline

Particularly in close elections, the Administrator may wish to refrain from concluding that a candidate is likely to win a state's electoral votes until that state's deadline for the return of ballots and "cure" of provisional ballots. As discussed above, many states allow absentee ballots to be returned after Election Day.⁸² In addition, states have cure periods of varying length after Election Day during which voters may present identification to election officials or correct other defects in order to ensure their provisional ballots are counted.⁸³ Moreover, military and overseas ballots are frequently accepted after Election Day, as well.⁸⁴ There is a date certain within each state, however, by which all ballots must be received or validated. The Administrator could attempt to ascertain the results of an election based on the unofficial returns as of that date.

7. Election Night Unofficial Returns

The earliest possible stage at which an Administrator could ascertain the results of a presidential election would be election night itself, based on unofficial results that polling place officials relay in real time to county officials, who in turn report them to the public. Initial election night results can be rushed, harried, and erroneous. Moreover, in the modern era, substantial numbers of votes may not even be counted by election night. Indeed, for states that only require absentee ballots to be postmarked, rather than received, by Election Day, election officials will not even *have* all of the valid votes cast in the election by that time. And many states provide a post-election "cure" period during which voters may provide identification,

81. See, e.g., Jocelyn Benson, *Isolated User Error in Antrim County Does Not Affect Election Results, Has No Impact on Other Counties or States* (2020), <https://perma.cc/S8CZ-KU6C>.

82. See *supra* note 77.

83. See *supra* note 79.

84. See *supra* note 78.

evidence of their eligibility, or other information to election officials to ensure that provisional ballots they cast are counted.

Ned Foley has gathered extensive empirical evidence showing that in recent election cycles, the apparent winner can shift between election night and the results of the final canvass; in recent years, these shifts have disproportionately benefited Democratic candidates.⁸⁵ Such a “blue shift” following Election Day occurred in several states during the 2020 presidential election. By the end of Election Day, Donald Trump led Joe Biden in states such as Pennsylvania, Nevada, and Georgia, but saw that lead dissolve as absentee and other ballots were counted.⁸⁶ The Administrator should accept a state’s unofficial election night results for ascertainment purposes only when they are so one-sided that no subsequent developments are likely to dislodge them. Using a perhaps overly cautious estimate that a fifteen-point election night lead in a state is insurmountable, for example, the Administrator in 2020 would have been able to rely on election night results from over half of the states (plus the District of Columbia) in the nation.⁸⁷

B. A Proposed Framework

Rather than a single, discrete standard, ascertainment may best be approached through a framework. If a major-party candidate publicly concedes, then—absent a highly unusual scenario involving a viable third-party or independent candidate who amassed a substantial number of votes—the Administrator may ascertain the other major-party candidate as the apparent winner without further consideration of any state-level data.

In the absence of a concession, however, the Administrator should assess whether results in each state are sufficiently certain or instead remain reasonably debatable. The earlier in the post-election process, the larger the apparently prevailing candidate’s lead within a state would have to be for the Administrator to attribute that state’s electors to that candidate for ascertainment purposes. On election night, for example, a leading candidate’s margin would have to be much larger to warrant ascertainment than following the county canvass. The exact thresholds the Administrator should apply at each stage, of course, are debatable.

85. Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 J.L. & POL. 501, 507 (2013).

86. Jonathan Martin & Katie Glueck, *Biden Pulls Ahead in Key States as Anxious Nation Awaits Winner*, N.Y. TIMES (updated Nov. 7, 2020), <https://perma.cc/S8AS-ZX6N>; see also Richard Fausset & Stephanie Saul, *As Biden Takes the Lead in Georgia, State Officials Say a Recount is Inevitable*, N.Y. TIMES (updated Nov. 7, 2020), <https://perma.cc/3ZND-F5R9>.

87. See *Presidential Results*, CNN, <https://perma.cc/C3MX-6UTQ> (last updated May 5, 2020).

Throughout most of the past half-century, Administrators could generally rely on a losing candidate's concession as a basis for ascertaining the President-elect. When a major-party candidate refuses to concede, however, the Administrator must ascertain the election's results for him- or her-self, considering not only the vote margin between the leading candidates in each state, but the stage of the post-election proceedings to which that state has progressed. This approach provides a balance among the major competing considerations governing the ascertainment decision, including the winning candidate's need to begin the transition process as soon as possible, the Administrator's need to avoid reaching needlessly controversial or inaccurate results or unfairly tipping the scales of post-election challenges in a particular candidate's favor, and the public's need for stability during potentially heated post-election disputes.

C. Reforming the Presidential Transition Act

If Congress were to amend the PTA, it could reduce uncertainty and opportunities for partisan manipulation by clearly defining the standards for "ascertainment"—whether by adopting the suggested interpretation set forth above or some other conception. Regardless of the definition Congress adopts, having a more clearly defined statutory standard established in advance of a contested election under a "veil of ignorance" is preferable to leaving it to the sole discretion of the Administrator—possibly influenced by the White House⁸⁸—to determine amid highly charged post-election disputes.

Additionally, Congress could ameliorate many of the consequences of any delay in ascertainment by authorizing GSA to provide transition-related space, funding, resources, and information to both campaigns if an election's results have not been ascertained with a certain number of days—perhaps three—of Election Day. The Pre-Election Presidential Transition Act of 2010 already allows GSA to provide limited amounts of pre-transition funding and support to both candidates starting before Election Day and continuing until the Administrator has ascertained the apparent winner.⁸⁹ The suggested amendment would simply expand the scope, nature, and degree of such assistance, to provide the full extent of transition support to both sides until the Administrator can ascertain an apparent winner. This alternative was unavailable in the aftermath of the 2000 election,⁹⁰ but several Members of

88. See *supra* note 38 and accompanying text.

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

90. See Memorandum from Randolph D. Moss, Assistant Att'y Gen., Off. of Legal Couns., to the President 322 n.2 (Nov. 28, 2000), <https://perma.cc/NDR2-9YKY> (discussing the
footnote continued on next page

Congress⁹¹ and witnesses testifying before Congress⁹²—including Administrator Barram⁹³—suggested it.

Finally, Congress should consider a cosmetic change. The PTA requires the Administrator to ascertain the “President-elect.”⁹⁴ The Administrator’s decision has no legal consequences beyond the transition process and is not binding on either Congress or courts with regard to post-election disputes. Allowing an obscure federal bureaucrat to designate someone as President-elect nevertheless seems like an unnecessarily weighty matter. Only Congress may officially designate a President-elect.⁹⁵ The term President-elect should be replaced in the PTA and other related statutes⁹⁶ with a less charged, less seemingly significant term—preferably something completely innocuous, such as the “Federal Designee.” The risks of an early ascertainment and negative consequences of an erroneous ascertainment can be at least partly mitigated by substantially reducing the symbolic importance of the Administrator’s determination.

Conclusion

The Administrator of the GSA lacks the constitutional or statutory authority to determine which candidate has been elected as President of the United States. The Administrator’s authority to “ascertain” the “apparent” winner of an election for purposes of officially initiating transition efforts under the PTA is nevertheless significant. Needless delay in ascertaining a winner hinders transition efforts, potentially impeding the incoming administration’s preparedness to address national security and other critical matters.⁹⁷ Premature ascertainment of a winner, in contrast, may have an

“authority of the General Services Administration to provide assistance to transition teams of two presidential candidates”).

91. See *Presidential Transition Hearing*, *supra* note 8, at 84, 110 (statement of Rep. Jim Turner); *id.* at 18, 92 (statement of Rep. Doug Ose); see also *id.* at 65 (statement of Rep. Thomas Davis).

92. *Id.* at 22 (statement of former New Hampshire Governor John H. Sununu); *id.* at 66 (statement of former Chief Legal Strategist of Monsanto Jack H. Watson); see also Zywicki, *supra* note 22, at 1638.

93. *Presidential Transition Hearing*, *supra* note 8, at 68 (statement of former Administrator of the General Services Administration David Barram).

94. Presidential Transition Act of 1963, Pub. L. No. 88-277, § 3(c), 78 Stat. 153, 155 (1964) (codified at 3 U.S.C. § 102 note).

95. See U.S. CONST. amend. XII.

96. See, e.g., 18 U.S.C. §§ 871(a), 3056(a)(1).

97. See NAT’L COMM’N ON TERRORIST ATTACKS, THE 9/11 COMM’N REPORT 198 (2004) (“[T]he dispute over the [2000] election and the 36-day delay cut in half the normal
footnote continued on next page”).

unfair and illegitimate impact on public perceptions and practical realities on the ground. Despite the Administrator’s lack of authority over the electoral process or its results, placing the Executive Branch’s imprimatur on a particular candidate as the President-elect, and having the media repeatedly recognize that candidate as the President-elect, may impact election administrators’, courts’, or other officials’ willingness to grant post-election relief in close cases.

The PTA’s current “ascertainment” standard is reasonably susceptible of multiple interpretations. Congress should amend the PTA to provide objective standards for ascertainment. In the absence of such an amendment expressly addressing the issue, Administrators should choose to interpret the PTA to allow them to ascertain a winner upon the *earliest* of:

1. the losing candidate’s concession;
2. a majority of electors whose appointments have been officially certified under state law cast their electoral votes for the winning candidate;
3. states have collectively certified a total of 271 electors of the winning candidate’s political party (including other electors who are pledged or statutorily bound to cast their electoral votes for that candidate). The Administrator may conclude that this policy should require the exclusion of electors whose appointments remain subject to statutory state-level proceedings (i.e., a recount or election contest) or a constitutional challenge in state or federal court by the losing candidate; or
4. in states collectively possessing at least 271 electoral votes, the winning candidate’s margin of victory at an earlier stage of the proceedings (such as the county canvass, final deadline for ballot receipt, or election night) exceeds a specified margin, such that there is no reasonable possibility that the state’s results would change.⁹⁸

One drawback of this approach is that it could lead to delays of over a month, as in the 2000 presidential election.⁹⁹ Accordingly, Congress should further amend the PTA to specify that, if the Administrator has not “ascertained” the President-Elect within 3 days of Election Day, both candidates may receive full transition-related funding, information, and other assistance until either the Administrator ascertains the “apparent” winner, or Congress

transition period . . . [which] hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees.”)

98. This prong of the standard would take into account states such as Maine and Nebraska, which allocate most of their elections by congressional district rather than solely on a statewide basis.

99. In the rare and extreme case where no candidate wins electoral votes from a majority of electors appointed, the Administrator would not ascertain a winner until the House of Representatives resolved the election. *See* U.S. CONST. amend. XII.

actually declares the President-elect. Allowing both campaigns to engage in simultaneous transition efforts helps to mitigate the risks of delay. It would also alleviate the more intangible, but possibly more pernicious, risks of a premature and inaccurate ascertainment of the apparently prevailing candidate.