

# ASCERTAINING THE PRESIDENT-ELECT: PROBLEMS AND SUGGESTED REFORMS

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*On November 23, 2020, more than two weeks after the 2020 presidential election, the Administrator of the General Services Administration (GSA) ascertained Joe Biden as President-elect, allowing the presidential transition to officially begin. This delay had strong echoes of the delayed ascertainment following the 2000 presidential election, which hampered the transition and the beginning of the Bush Administration. This Note provides an analysis of the ascertainment process under the Presidential Transition Act and compares the delayed ascertainments in 2000 and 2020. This Note argues that reform is necessary to avoid delayed transitions in the future and suggests a comprehensive set of statutory reforms that would address the current problems associated with delayed ascertainments. Three major changes are proposed: (i) increasing the independence of the individual who ascertains the results, (ii) codifying a three-factor test for ascertainment, and (iii) ensuring that both candidates have access to needed information and resources if a winner cannot be ascertained within a week of the election.*

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#### INTRODUCTION

On Saturday, November 7, 2020, after four days of closely-watched but still uncertain presidential election results, major news networks including CNN, NBC, CBS, MSNBC, ABC, the Associated Press, and Fox News projected that Democratic candidate and former Vice President Joe Biden had won the 2020 presidential election.<sup>1</sup> However, incumbent President Donald Trump did not publicly concede and, in the days that followed, continued to insist that he would emerge victorious.<sup>2</sup> For more than two weeks after news networks called the election, the Biden transition team waited for the Administrator of the General Services Administration (GSA), Emily Murphy, to officially designate, through a process known as ascertainment, Joe Biden as the apparent winner of the election. Official ascertainment allows the formal transition to begin and the President-elect's team to

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1. Elahe Izadi, *First CNN, Then Within Minutes, Most Other News Organizations Called the Race for Biden*, WASH. POST (Nov. 7, 2020, 12:32 PM), <https://www.washingtonpost.com/media/2020/11/07/fox-news-biden-president/>.

2. Philip Rucker, Josh Dawsey & Ashley Parker, *Trump Insists He'll Win, But Aides Say He Has No Real Plan to Overturn Results and Talks of 2024 Run*, WASH. POST (Nov. 11, 2020, 8:23 PM), [https://www.washingtonpost.com/politics/trump-election-results-strategy/2020/11/11/a32e2cba-244a-11eb-952e-0c475972cfc0\\_story.html](https://www.washingtonpost.com/politics/trump-election-results-strategy/2020/11/11/a32e2cba-244a-11eb-952e-0c475972cfc0_story.html).

access, among other resources, \$7.3 million of funds.<sup>3</sup> Finally, on November 23, Administrator Murphy ascertained Biden as the winner, still without a Trump concession, allowing the Biden transition team access to the entitled funds and institutional support.<sup>4</sup>

This incident echoed the ascertainment process that occurred during the 2000 presidential election, when GSA Administrator David J. Barram also did not ascertain an apparent winner for almost a month amidst ongoing legal battles. He ascertained the election only after Democratic candidate and Vice President Al Gore gave a December 13 concession speech acknowledging Republican candidate and Texas Governor George W. Bush as the winner of the election.<sup>5</sup> And, as in 2000,<sup>6</sup> there has been a proliferation of calls to change the governing statute, the Presidential Transition Act of 1963 (PTA), to prevent the stalling of the transition period in the future.<sup>7</sup>

The GSA Administrator holds the key to the presidential transition by controlling ascertainment. Ascertainment occurs when the GSA Administrator names the President-elect. In doing so, the GSA Administrator is of course not actually *determining* or *choosing* the next President.<sup>8</sup> Rather, ascertainment *designates* the President-elect

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3. Brian Naylor & Alana Wise, *President-Elect Biden to Begin Formal Transition Process After Agency OK*, NPR (Nov. 23, 2020, 6:30 PM), <https://www.npr.org/sections/biden-transition-updates/2020/11/23/937956178/trump-administration-to-begin-biden-transition-protocols>.

4. *Id.*; see also Letter from Emily Murphy, Adm'r, Gen. Servs. Admin., to Joseph R. Biden, Jr. (Nov. 23, 2020) (available online at <http://cdn.cnn.com/cnn/2020/images/11/23/gsa.biden.pdf>) [<https://perma.cc/8AH5-9SD6>].

5. See *GSA Releases Transition Funds*, GOV'T EXEC. (Dec. 14, 2000), <https://www.govexec.com/federal-news/2000/12/gsa-releases-transition-funds/8146/>.

6. See generally, e.g., H.R. 5643, 106th Cong. (2000); Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U. L. REV. 1573, 1637–40 (2001).

7. See generally, e.g., Promoting Accountability and Security in Transition (PAST) Act, S. 5059, 116th Cong. (2020) (with identical text introduced the House as H.R. 9022, 116th Cong. (2020)); Protecting Our Democracy Act, H.R. 5314 § 1102, 117th Cong. (2021); Protecting Our Democracy Act, S. 2921 § 1102 117th Cong. (2021) (companion bills cited); *The Elements of Presidential Transitions: Hearing Before the H. Subcomm. on Gov't. Operations*, 116th Cong. (2020) (written statement of Donald K. Sherman, Deputy Dir., Citizens for Resp. and Ethics in Wash.) [hereinafter statement of Donald K. Sherman]; *The Elements of Presidential Transitions: Hearing Before the H. Subcomm. on Gov't. Operations*, 116th Cong. (2020) (written statement of Max Stier, President and CEO, P'ship for Pub. Serv.) [hereinafter Statement of Max Stier]; Paul Friesen, Rachel Gagnon, Shadwa Ibrahim, William Kakenmaster, and Maggie Shum, *KEOUGH SCHOOL OF GLOBAL AFFAIRS, THE PRESIDENTIAL TRANSITION INDEX: CONTEMPORANEOUS ASSESSMENTS OF THE TRUMP-BIDEN TRANSITION* (2021).

8. Members of the electoral college vote for the President and Vice President. U.S. CONST. art. II, § 1; amend. XII. The President and Vice President must win a majority of electoral college votes for their respective positions. *Id.* If no individual has won a

for the purposes of the transition.<sup>9</sup> Once a President-elect has been ascertained, the transition team is given access to the funding, along with resources like office space, to facilitate planning for the new administration.<sup>10</sup> Lastly, and perhaps even more importantly, ascertainment also allows for the sharing of government information to authorized officials to bring the President and others up to speed on critical issues prior to taking office.<sup>11</sup>

The consequence of the Presidential transition for an incoming administration cannot be overstated. A President must be ready “on day one”—and it is necessary to use the limited pre-inauguration days to have an administration in place on January 20.<sup>12</sup> Presidents ideally use this time to pick and vet appointees, to formulate strategies and aspects of their agendas, and to gain information on the status of agency activity.<sup>13</sup> U.S. national security relies on a successful transition; the President must have time to be briefed on current issues, and a contentious transition has the potential to signal weakness abroad.<sup>14</sup>

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majority of electoral votes for President, then the House of Representatives chooses the President (and if no individual has won a majority of electoral votes for Vice President, the Senate chooses the Vice President). *Id.* The only time the House of Representatives has chosen the President under this contingency system was in 1825, when John Quincy Adams ultimately proved victorious despite having won fewer votes in the electoral college than the candidate who had won a plurality, Andrew Jackson. *See generally* THOMAS H. NEALE, CONG. RSCH. SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 5–6 (2020).

9. While this has never occurred, it is theoretically possible that the person ascertained as the President-elect does not become the actual next President. For example, imagine a scenario in which the GSA Administrator ascertains a President-elect quickly after the election based on the available facts at the time, but a subsequent recount changes a state’s results, such that that the actual President-elect is now the other presidential candidate. The statute does not address such a scenario.

10. *See infra* Part II.B.

11. *Id.*

12. *See* Statement of Max Stier, *supra* note 7, at 1 (“From the very first day in office, a new president must be ready to make countless domestic, economic and foreign policy decisions of great consequence, deal with unexpected crises and manage relations with Congress. The chief executive must oversee an enterprise that spends \$4 trillion a year as well as a workforce of 2 million civilian employees and more than 2 million active-duty and military reserve members. A new president also typically fills more than 4,000 political jobs, including roughly 1,250 positions requiring Senate confirmation. Even in so-called ‘normal’ times, preparing for these tasks is daunting. . . . [T]he stark reality is that the time between the election and the inauguration – roughly 75 days – is insufficient given the enormous scope of responsibility. That is why Congress has acted over the years to promote and enable planning well before Election Day.”).

13. PARTNERSHIP FOR PUBLIC SERVICE, PRESIDENTIAL TRANSITION GUIDE 17 (4th ed. 2020).

14. JOHN ROLLINS, CONG. RSCH. SERV., RL34456, 2008-2009 PRESIDENTIAL TRANSITION: NATIONAL SECURITY CONSIDERATIONS AND OPTIONS 22–23 (2008).

This period is also critical for presidential appointees, who must undergo background checks and obtain security clearances, prepare for confirmation hearings (as appropriate), and ready themselves to assume their new jobs.<sup>15</sup>

Given the need for both clarity and time, observers are justifiably concerned about potential setbacks in the ascertainment process. Todd J. Zywicki, a Professor at George Mason University Antonin Scalia Law School whose 2001 article *The Law of Presidential Transitions and the 2000 Election* in the *BYU Law Review* remains the most in-depth analysis of this issue in a law review to date,<sup>16</sup> predicted that the issue of ascertainment would likely create controversy in future elections, explaining, “[t]he ability of the incumbent administration to manipulate the [Presidential Transition] Act for political purpose and to thereby undermine the transition efforts of a rival party is certain to tempt future administrations.”<sup>17</sup> This prediction has proved prescient given there has now been a second stalled ascertainment twenty years after the first. The rise of political polarization in recent years<sup>18</sup> points to even more contentious battles in the years to come.

Any deficiencies in the law should therefore be addressed as soon as possible. The real consequences that can result from transition delay favor amendment. Reforms must be implemented to systematize the process and prevent the interference of partisan actors in determining who gains access to critical transition resources. Additionally, these reforms must ensure that whoever is elected can be as prepared as possible by inauguration day. A process that better accounts for these various considerations will promote fairness, stability, and more successful early administrations—all worthy goals to strive for in government.

This paper evaluates the areas for potential manipulation and discretion within the ascertainment process and suggests a unique package of reforms to the PTA, with the twin goals of achieving certain and accurate results. Part I describes the key values that comprise the

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15. See generally PARTNERSHIP FOR PUBLIC SERVICE, *supra* note 13, at 62–75.

16. In 2000, Zywicki testified before the Subcommittee on Government Management, Information, and Technology in December 2000 that under the Presidential Transition Act, Bush should be certified immediately as President-elect. *Transition 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. 132 (2000) [hereinafter *Hearing Before the Subcomm. on Gov’t Mgmt., Info., & Tech. of the H. Comm. on Gov’t Reform*] (statement of Todd Zywicki, Assoc. Professor of L. at Geo. Mason Univ. Sch. of L.).

17. Zywicki, *supra* note 6, at 1640.

18. Michael Dimock & Richard Wike, *America is Exceptional in Its Political Divide*, TRUST MAG. (Mar. 29, 2021) (publication of the Pew Research Center).

ascertainment decision. Part II lays out the current ascertainment process as set out within the PTA and the legislative history with respect to ascertainment. Part III focuses on the two major delayed ascertainties in U.S. history, in 2000 and in 2020, emphasizing their causes, eventual resolutions, and consequences. Part IV asks and answers the question whether reform is necessary and determines that it is. Part V discusses proposals for change, both laying out the types of suggestions that have already been made in the academic and policy literature, and then building on these potential reforms to create a comprehensive policy agenda. I ultimately propose making three major changes: (i) increasing the independence of the individual who ascertains the results, (ii) codifying a three-factor test for ascertainment not to be determined until at least 5 AM EST the day after the election, and (iii) ensuring both candidates have access to needed information and resources if a winner cannot be ascertained within seven days of the election. Part VI concludes.

## I.

### KEY VALUES IN THE ASCERTAINMENT DECISION

As indicated above, the two values I emphasize throughout this Note are certainty and accuracy. I use the word certainty to refer to the fact of having a decision itself.<sup>19</sup> Determining the next leader of the country is vital for the operation of the government and ultimately, the public as a whole. Without certainty, a candidate does not receive access to particular resources and information crucial to helming an administration.<sup>20</sup> Other government officials and the outgoing, or potentially outgoing, administration may be unable to adequately prepare for the change while waiting for a result to be finalized. Further, absent a definitive answer, the country may be left in limbo, contributing to confusion surrounding the election result.<sup>21</sup>

In contrast, I use accuracy to refer to getting the answer right. An incorrect ascertainment has the potential to wreak havoc on the transition process. The wrongly-declared loser in the ascertainment process would be injured, missing out on important time and resources to plan

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19. Certainty is interrelated with, but not exactly the same, as what Zywicki, *supra* note 6, at 1632, identifies as “[t]he primary purpose of the Act” which “is ‘to promote 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.’” Certainty is more foundational than speed or order, as it is having a decision that allows the process to move forward at all.

20. See *infra* Part II.

21. *Id.*

his or her administration.<sup>22</sup> The country could also be confused, potentially leading to further distrust in the political and electoral system—especially if the result appeared to be tainted by bias.<sup>23</sup>

Certainty and accuracy are values that can be promoted together, but they may also conflict. The need for certainty encourages announcing the result quickly. At the same time, the need for accuracy may cause a delay as waiting for one more court case or recount to finish improves the likelihood of ascertaining the true winner. Any successful reform agenda will need to determine how best to balance these competing values. The reforms offered in the paper attempt to do so.

## II.

### HOW THE ASCERTAINMENT PROCESS WORKS

#### A. *Background on the Presidential Transition Act of 1963*

The Presidential Transition Act of 1963 (PTA) represented a turning point in the way presidential transitions occurred, operating as a correction to a previous lack of official process. Prior to the enactment of the law, presidential transitions were less formalized and relied heavily on private funding and volunteers.<sup>24</sup> As part of a larger project to study and suggest changes in the financing of presidential elections, President John F. Kennedy enacted a bipartisan commission called the President’s Commission on Campaign Costs a year after the 1960 election.<sup>25</sup> In its 1962 report, the Commission made a number of

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22. *Id.*

23. The delayed ascertainment in the 2020 election may have fed into doubts surrounding the legitimacy of the winner. See PARTNERSHIP FOR PUBLIC SERVICE’S CENTER FOR PRESIDENTIAL TRANSITION & BOSTON CONSULTING GROUP, THE 2020-21 PRESIDENTIAL TRANSITION: LESSONS LEARNED AND RECOMMENDATIONS (2022), <https://presidentialtransition.org/publications/2020-21-lessons-learned/> (“The delay in ascertainment and the practical and symbolic effects of the official beginning of transition were at the forefront of media coverage, a national dialogue, grassroots organizing, and elite debate and worry. These narratives perpetuated the appearance of a disputed election, sowing distrust in American democratic institutions, well after it had been resolved.”). While impossible to know what the exact effect would be in advance, it is certainly imaginable that an inaccurately ascertained President-elect would foster similar (if not significantly greater) public confusion, cynicism, and false beliefs.

24. STEPHANIE SMITH, CONG. RSCH. SERV., RL30736, PRESIDENTIAL TRANSITIONS [hereinafter Smith, PRESIDENTIAL TRANSITIONS] 1 (2008); Richard Skinner, *How the Presidential Transition Process Has Evolved Over Time*, VOX (Oct. 3, 2016, 12:20 PM), <https://www.vox.com/mischiefs-of-faction/2016/10/3/13140900/presidential-transition-process-evolve>.

25. SMITH, PRESIDENTIAL TRANSITIONS at 2; see also Exec. Order 10974, 26 Fed. Reg. 10585 (Nov. 10, 1961).

recommendations and specifically suggested publicly financing the presidential transition.<sup>26</sup> The report pointed at the financial burden on the parties, which contributed a large part of the private funding, despite the fact that a successful transition is not for partisan ends.<sup>27</sup> The Commission also highlighted the need for “institutionaliz[ation]” of the transition process.<sup>28</sup>

Congress took up the Commission’s ideas on the issue, and legislators introduced a bill to enact the report’s recommendation for transition funding in 1962 and again in 1963.<sup>29</sup> During the floor debate on the 1963 version of the bill, the bill’s proponents also made similar arguments to those discussed in the Commission’s report, citing the magnitude of the private cost, the desirability of having the public foot the bill for a public benefit, and the need for a more formalized transition.<sup>30</sup> Legislators also argued that the bill would mitigate the corruption risk involved in private funding, as donors financing the transition might expect political favors for doing so.<sup>31</sup> The proponents of the

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26. See PRESIDENT’S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 6, 23–24 (1962).

27. *Id.* at 24.

28. *Id.*

29. See Presidential Transition Act of 1962, H.R. 12479, 87th Cong. (1962); Presidential Transition Act of 1963, H.R. 4638, 88th Cong. (1963).

30. See, e.g., 109 CONG. REC. 13347 (1963) (referring to the public funding provisions, Congressman John S. Monagan of Connecticut stated that “[t]his is the most important part of the bill because it does recognize that these days of big government, the expenses of preparation for office by an administration are so great that the country cannot reasonably expect that they will any longer be borne by individuals or even by a party organization. They are an integral part of the presidential administration and should be borne by the public.”); *id.* at 13349 (“I need not remind my colleagues of the House of the complexity of our governmental processes and the immense knowledge that must be quickly acquired by a new President and his close associates on their accession to power and the tremendously important decisions that must be made. It is true that in the past the transfer of office from one administration to the other has been accomplished without serious difficulty. But this need not always be so and it is the better part of wisdom for us to provide for this transfer for all time to come in an orderly and systematic manner.”) (statement of Congressman Dante Fascell).

31. See, e.g., *id.* at 13346 (“If someone is going to come forward and help pay what we now recognize is a cost of government, which is actually what it is, during the transitional period, that person may feel inclined to think that he is entitled to special consideration from the government. . . . If we [publicly fund the transition], Mr. Chairman, we can prevent any special group or any special interests from anxiously coming forward to help pay government expense.”) (statement of Congressman Benjamin Stanley Rosenthal); *id.* at 13352 (“[W]e should remove the opportunity for people to come in and expend money for the purposes of a transition of Government and thereby obtain a position of advantage and favor in the eyes of some people which might contribute to their personal financial welfare thereafter.”) (statement of Congressman Chester E. Holifield).



1963 bill were successful, and the Act passed in 1964.<sup>32</sup> Subsequent to its passage, the PTA has been amended multiple times, expanding the financial support it provides (including to major candidates prior to election day) and adding other components to the transition effort.<sup>33</sup>

### B. *How Ascertainment Occurs and What it Provides*

The PTA allocates the job of ascertaining the President-elect and Vice President-elect to the GSA Administrator, who is appointed by the President and confirmed by the Senate,<sup>34</sup> and subject to presidential removal.<sup>35</sup> Section 3(c) of the PTA states that “[t]he terms ‘President-elect’ and ‘Vice President-elect’ as used in this Act shall mean such persons as are the apparent successful candidates for the office of President and Vice President, respectively, as ascertained by the Administrator [of the GSA] following the general elections held to determine the electors of President and Vice President.”<sup>36</sup>

While the PTA provides some resources to certain candidates prior to the election and until an apparent winner is declared,<sup>37</sup> the PTA only releases the bulk of funds upon ascertainment.<sup>38</sup> These post-ascertainment resources include: office space (with furnishings and

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

33. See Pre-Election Presidential Transition Act of 2010, Pub. L. 111-283, 124 Stat. 3045; Edward ‘Ted’ Kaufman and Michael Levitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-136, 130 Stat. 301 (2016); Presidential Transition Enhancement Act of 2019, Pub. L. 116-121, 134 Stat. 138 (2020); Pub. L. No. 94-499, 90 Stat. 2380 (1976); Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, 102 Stat. 985 (1988); Presidential Transition Act of 2000, Pub. L. No. 106-293, 114 Stat. 711; Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 7601, 118 Stat. 3638, 3856.

34. 40 U.S.C. § 302. The GSA, as its name implies, provides a number of support services for federal government operations. In large part, its mission involves managing federal real estate and acquiring technology (in addition to other goods and services). *Our Mission’s Evolution*, U.S. GENERAL SERVICES ADMINISTRATION, <https://www.gsa.gov/about-us/mission-and-background/our-missions-evolution> (last visited Feb. 7, 2021).

35. *Id.* (text of the statute does not include for-cause removal protection, see *infra* note 180); see also *Humphrey’s Executor v. United States*, 295 U.S. 602, 629–32 (1935) (differentiating between the heads of “quasi-legislative” and “quasi-judicial” agencies that Congress may limit the President’s power to remove and the heads of “purely executive” agencies, like the GSA, that can be removed by a President at will).

36. 3 U.S.C. § 102(3)(c). Out of convience, for the rest of this paper I generally refer only to the ascertainment of the President, although as indicated here the Vice President must also be ascertained as well.

37. *Id.* § 102(3)(h).

38. See *id.* § 102(3)(a).

equipment);<sup>39</sup> payments for office staff;<sup>40</sup> payment for experts and consultants;<sup>41</sup> payments for travel expenses, subsistence allowances, and the provision of aircraft;<sup>42</sup> communications services;<sup>43</sup> payment for printing and binding;<sup>44</sup> postage (with reimbursement to the Postal Service);<sup>45</sup> payment to cover the costs of orientation activities, including facilitating transition meetings between certain current and potential presidential appointees and preparing a summary regarding military action and national security issues to be “provided to the President-elect as soon as possible after the date of the general elections”;<sup>46</sup> and a transition directory, which contains information on agencies, departments, and their officials.<sup>47</sup>

Gaining access to these significant benefits requires trade-offs. If the President and Vice-President elect to receive PTA funds, they face limits on how much private funding they may otherwise accept for the transition and must disclose information on private funding and the identities of transition personnel.<sup>48</sup> This provides a disincentive to take large (and therefore possibly corrupting) private funds while also ensuring that there can be oversight of outside influence on the transition process.

### C. *The Legislative History of the PTA*

Despite the necessity of ascertainment to access facilities, services and critical information, the statute provides no further instruction on the method by which the GSA Administrator should ascertain the apparent successful candidates.<sup>49</sup> However, the legislative history does touch on the issue of ascertainment.<sup>50</sup> Scholars and government officials have variously interpreted these statements (particularly with respect to the question of when ascertainment should or should not

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39. *Id.* § 102(3)(a)(1).

40. *Id.* § 102(3)(a)(2).

41. *Id.* § 102(3)(a)(3).

42. *Id.* § 102(3)(a)(4).

43. *Id.* § 102(3)(a)(5).

44. *Id.* § 102(3)(a)(6).

45. *Id.* § 102(3)(a)(7).

46. *Id.* § 102(3)(a)(8).

47. *Id.* § 102(3)(a)(9).

48. *Id.* § 102(6); *see also id.* § 102(6)(c) (“The President-elect and Vice-President-elect (as a condition for receiving services . . . and . . . funds provided . . .) shall not accept more than \$5,000 from any person, organization, or other entity for purposes of carrying out activities authorized by this Act.”).

49. *See generally id.* § 102(3).

50. *See generally* 109 Cong. Rec. 13344–52 (1963).

take place),<sup>51</sup> but a few general conclusions can be observed from the Congressional record.

First, the bill's proponents recognized that the apparent successful candidate might not end up being the actual winner of the election.<sup>52</sup> Florida Congressman Dante Fascell, a sponsor of the bill, explained the following:

The act and the Administrator could in no way, in any way, affect the election of the successful candidate. The only decision the Administrator can make is who the successful candidate—apparent successful candidate—for the purposes of this particular act in order to make the services provided by this act available to them.<sup>53</sup>

For this statement to make sense, there must be the possibility that the real election winner is different from the perceived election winner.<sup>54</sup> For example, a situation could arise where the GSA Administrator makes an ascertainment decision, but the different, true winner of the election becomes clear afterwards (this could happen for a variety of reasons: a recount, litigation, etc.). In this instance, the apparent winner (and beneficiary of the ascertainment decision) would differ from the actual President-elect. Consequently, the statute builds in room for the possibility of some inaccuracy in favor of allowing for certainty that the transition can begin.

Second, the bill's proponents provide no explanation as to *how* to determine the apparent winner—instead assuming (for the large part correctly) that making the decision should be easy.<sup>55</sup> Congressman Fascell repeatedly mentioned that other officials have successfully made similar determinations of the election winner.<sup>56</sup> For example, Fascell stated:

The Secret Service and the Secretary of the Treasury have had absolutely no difficulty in determining who the President-elect or the Vice-President-elect might be, so far as carrying out the administrative duties under that law is concerned. Therefore, I do not see why

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51. See, e.g., Zywicki, *supra* note 6, at 1622–1632 (explaining his view that GSA Administrator David J. Barram interpreted the relevant legislative history inaccurately).

52. See also Zywicki, *supra* note 6, at 1582 (“The use of the term apparent successful candidate makes it evident that the recipient of the funds need not be the officially designated, actually successful candidate, and since its enactment the Act has never been construed to require that the apparent successful candidate prove that he is the actual successful candidate.”); *id.* at 1614–15.

53. 109 CONG. REC. 13349.

54. See also Zywicki, *supra* note 6, at 1604–05 (making the same general observation as to the meaning of this section).

55. See also Zywicki, *supra* note 6, at 1605 (making the same general observation).

56. 109 CONG. REC. 13348, 13349 (1963).

the General Services Administrator should have any difficulty under the pending legislation.<sup>57</sup>

Congress likewise gave the Administrator no substantive guidance on how to make the ascertainment decision. While in most cases, this lack of guidance may be inconsequential, the legislators did not consider scenarios that would require more specific directions.

Third, the bill's proponents theorized that while it was possible, it was unlikely that there would fail to be an apparent winner.<sup>58</sup> Both Congressman Clarence J. Brown of Ohio and Congressman Fascell noted that even though the 1960 election was very close, the winner was apparent.<sup>59</sup> Further, Fascell explained that "[i]n the whole history of the United States there have only been three close such situations" where the winner was indeterminate.<sup>60</sup> However, he also recognized that there could be at least some rare situations where it would be too close an election for the Administrator to decide on an apparent winner and that it could even be possible that no winner might be apparent until the electoral college or Congress reaches a conclusion.<sup>61</sup> Here, in the closest of cases where there is the most risk that there would be a

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57. *Id.* at 13348.

58. *See also* Zywicki, *supra* note 6, at 1605 (making the same general observation).

59. 109 CONG. REC. 13345, 13348. The election of 1960 was notoriously close. *See, e.g., Kennedy Wins Election by Slim Margin*, UNITED PRESS INT'L (NOV. 9, 1960), <https://www.upi.com/Archives/1960/11/09/Kennedy-wins-election-by-slim-margin/5835485152054/> ("The margin of victory was less than 1% of the popular vote. Kennedy had 31,590,353 votes, or 50.31%. Nixon had 31,204,550, or 49.69%.").

60. 109 CONG. REC. 13349. Paul C. Light, at the time the Director for Public Service for the Brookings Institution, noted in written Congressional testimony that the three particular elections are "almost certainly" the presidential elections in 1800, 1824, and 1876. *Testimony: Implementation of the 1963 Presidential Transition Act*, BROOKINGS INST. (Dec. 4, 2000), <https://www.brookings.edu/testimonies/implementation-of-the-1963-presidential-transition-act/>.

61. 109 CONG. REC. 13348 (1963) ("[I]f they were unable at the time to determine the successful candidates, this act would not be operative. Therefore, in a close contest, the Administrator would simply not make a decision."); *id.* ("There is nothing in the act that requires the Administrator to make a decision which in his own judgment he could not make. If he could not determine the apparent successful candidate, he would not authorize the expenditure of funds to anyone; and he should not"); *id.* at 13349 ("And, if there is any doubt in his mind and if he cannot or does not designate the apparently successful candidate, then the act is inoperative. He cannot do anything. There will be no services provided and no money expended."); *id.* ("It is an unlikely proposition, but if it were to happen, if the administrator had any question in his mind, he simply would not make any designation in order to make the services available as provided by the act. If as an intelligent human being and he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress."). *See also* Zywicki, *supra* note 6, at 1622–23 (arguing that the statement regarding what to do in a close election contest refers specifically to a circumstance where there remain unpledged electors).

discrepancy between the actual and apparent winner, the legislators indicated a willingness to choose inaction over an inaccurate result.

Fourth, the bill's proponents were not worried about the possibility that the GSA Administrator would choose the apparent winner according to partisan or other outside influences. Congressman Brown stated:

I do not believe, regardless who might be in charge at the General Services Administration, that any man would dare to say that somebody else was elected President other than the man who all the American people knew had been elected. There would be a necktie party here in Washington. You know it and I know it, if any man occupying that post were to attempt any funny business in connection with that.<sup>62</sup>

Later, when confronted with the large discretion of the GSA Administrator to name the apparent winner, Congressman Fascell also expressed no concern, explaining that “this kind of discretion has been placed in many public officials” and that the Administrator would be performing only “ministerial functions” in carrying out this act.<sup>63</sup> Evidently, the proponents did not foresee that someone would fail to act in good faith or in response to political pressure.

The lack of clarity on how to determine if a winner is apparent allows for GSA Administrators to consider factors that *they* deem important. For example, Denise Turner Roth, former GSA Administrator under President Barack Obama, in one of the few public declarations of ascertainment factors, described how she ascertained the 2016 election:

What was clear was that the administrator really had a lot of discretion in this space. It was based on reasonable judgment of the administrator. And I said, “So what are the types of things that went into the determination? What’s reasonable?” And it was in the area of major news outlet reporting, reporting from the states, in terms of the final count that the states were reporting, and then, certainly, concession itself. Those are sort of the three areas that we were monitoring through the night to come to a determination.<sup>64</sup>

However, without statutory guidance or specification, GSA Administrators are free to follow their own set of factors (or lack thereof) when ascertaining the apparent winner. Indeed in 2020, reporting sug-

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62. 109 CONG. REC. 13345.

63. *Id.* at 13348.

64. Courtney Bublé, *Former GSA Administrator Reflects on Ascertainning the Election in 2016*, GOV'T EXEC. (Nov. 13, 2020), <https://www.govexec.com/management/2020/11/former-gsa-administrator-reflects-ascertainning-election-2016/170044/> [hereinafter, Bublé, *Former GSA Administrator Reflects*].

gested that it was “unclear” what former Administrator Emily Murphy was considering in her decision-making,<sup>65</sup> and in 2000, the factors considered shifted over time.<sup>66</sup> The structure of the process is up to the individual in charge at that moment, which creates uncertainty in the process.

The next section explores the impact of the statute’s lack of specificity and the absence of common standards for the decision-making process.

### III.

#### DELAYED ASCERTAINMENTS

Since the advent of the modern ascertainment process, there have been two times where ascertainments have been unusually delayed. The first occurred in 2000 and the second in 2020. In this Part, I examine each ascertainment in turn and offer comparisons between the two. Despite the more justifiable delay in 2000, both processes suffered from problems of potential politicization and a lack of clear standards. As time ticked by, the uncertainty surrounding when a decision would be made and what could be done while the candidates waited weighed heavily on the beginnings of both presidential transitions. A careful analysis of the problems within these two ascertainment processes reveals that these issues come from structural problems within the PTA itself.

##### A. *Ascertainment of the 2000 Election*

The uniquely chaotic 2000 election faced off Democrat and then current Vice President Al Gore against Republican and Texas Governor George W. Bush. Major news networks originally called Florida for Gore prior to 8 PM EST on Election Day, November 7.<sup>67</sup> However, it soon became apparent those calls were premature. It would take many more days to correctly determine the outcome in Florida, the winner of which would also be the winner of the election.<sup>68</sup> In the early hours of November 8, as vote counts continued to come in, major networks switched their calls, declaring that Bush had won Flor-

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65. Kristen Homes & Jeremy Herb, ‘*It’s a Terrible Situation*’: *Inside a Government Bureaucrat’s Pressure-Filled Decision to Delay the Transition*, CNN (Nov. 19, 2020, 7:27 AM), <https://www.cnn.com/2020/11/18/politics/biden-transition-trump-delay/index.html>.

66. *See infra* notes 85–86.

67. *How We Got Here: A Timeline of the Florida Recount*, CNN (Dec. 13, 2000, 9:30 PM), <https://www.cnn.com/2000/ALLPOLITICS/stories/12/13/got.here/index.html> [hereinafter *How We Got Here*].

68. *Id.*

ida.<sup>69</sup> This prompted Gore to call Bush to concede, but, on the way to delivering his concession speech, Gore learned that Bush's margin of victory in Florida was narrowing.<sup>70</sup> Gore quickly withdrew his concession and networks again retracted their statements on who had prevailed.<sup>71</sup>

Major political and legal battles ensued over the vote count in Florida, especially as it appeared that the ballot type and design likely affected how people's votes were recorded.<sup>72</sup> An automatic machine recount completed on November 10 put Bush ahead by just a few hundred votes, leading to further disputes over whether hand recounts should occur.<sup>73</sup>

Three days later, John Podesta, White House Chief of Staff for President Clinton, addressed the issue of the impending presidential transition, stating in a memorandum directed to the heads of executive-branch agencies (of which the GSA is included) that "no President-elect has been identified to receive federal funds and assistance under the Presidential Transition Act of 1963."<sup>74</sup>

The Gore team instigated various lawsuits, attempting to push for recounts of multiple Florida counties while the Bush team litigated to prevent further vote counting.<sup>75</sup> Despite the ongoing disputes, on November 26, the Florida Secretary of State certified the state's results

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Ballot design and form is thought to have contributed to voter confusion and a miscount in Florida. See generally Alan Agresti & Brett Presnell, *Misvotes, Undervotes and Overvotes: The 2000 Presidential Election in Florida*, 17 *STAT. SCI.* 436 (2002). While a number of ballot design choices may have led to these problems, two gained particular attention. *Id.* at 436. First, the use of a butterfly ballot design in Palm Beach County appeared to produce an unusually high number of votes for Pat Buchanan, a third-party candidate. *Id.* at 436–38. Second, in counties with punch-card ballots, there also appeared to be ballots indicating no vote for President. *Id.* at 438. Controversy arose over how to count partially punched-out ballots where the piece of paper meant to be removed (a "chad") remained. Julian Borger, *The Chad Debate—Are Dimples Gore's Best Hope?*, *GUARDIAN* (Nov. 21, 2000, 9:27 PM), <https://www.theguardian.com/world/2000/nov/22/uselections2000.usa>.

73. *Id.*

74. Memoranda from John Podesta, White House Chief of Staff, to the Heads of Exec. Dep'ts and Agencies (Nov. 13, 2000) (available at <https://presidentialtransition.org/wp-content/uploads/sites/6/2021/09/Podesta-memo-transition-guidance-11.13.2000.pdf>). Barram later claimed that the GSA acted "with no bias toward either candidate" and stated in answer to a question that he was not influenced by Podesta in delaying the ascertainment. *Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the H. Comm. on Gov't Reform*, *supra* note 16, at 70, 83 (statements of David J. Barram, Administrator of the General Services Administration).

75. *How We Got Here*, *supra* note 67.

for Bush, declaring that he had won Florida by 537 votes.<sup>76</sup> Nevertheless, Clinton's GSA Administrator David J. Barram subsequently announced that the GSA would not release transition funds because of the uncertainty surrounding the ongoing litigation.<sup>77</sup>

Denied access to the funds, the Bush team stated that the campaign would privately fund their transition effort through a 501(c)(4) organization.<sup>78</sup> The same day, Gore opposed the Florida results in a state circuit court, a challenge he lost on December 4.<sup>79</sup> On appeal, the Florida Supreme Court ruled on December 8 that recounts should proceed.<sup>80</sup> The Bush team then appealed *that* decision to the U.S. Supreme Court, which promptly heard the case on December 11.<sup>81</sup>

In the interim period, despite the remaining legal uncertainty, Barram faced pressure to declare an election winner.<sup>82</sup> Barram was called to testify before the Subcommittee on Government, Management, Information, and Technology on December 4 to address why he had not yet done so, signaling some Congressional dissatisfaction with the delay.<sup>83</sup> Two days later, Congressman Spencer Bachus of Alabama

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76. *Id.*

77. *Transition Funds Remain in Limbo*, CHI. TRIB., NOV. 27, 2000, at 13; Esther Schrader, *GSA Denies Bush Transition Aid, Citing Legal Battle*, L.A. TIMES (NOV. 28, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-nov-28-mn-58239-story.html>.

78. Al Kamen & Ben White, *In Interim, Bush Seeks Private Funds*, WASH. POST (NOV. 28, 2000), <https://www.washingtonpost.com/archive/politics/2000/11/28/in-interim-bush-seeks-private-funds/6b50dcc1-906f-4fc9-a38d-589e3b59221f/>. The Gore team also proceeded with an independent transition effort. Richard Skinner, *Bill Clinton Set a Bad Example with His Transition*, VOX (OCT. 7, 2016), <https://www.vox.com/mischiefs-of-faction/2016/10/7/13143186/bill-clinton-transition-bad> (“Al Gore had appointed longtime aide Roy Neel to manage his transition, which moved ahead in late November, compiling preliminary lists of appointees and reaching out to possible Cabinet members.”).

79. *How We Got Here*, *supra* note 67.

80. *Id.*

81. *Id.*

82. *See, e.g.*, Beth W. Newburger, *Emily Murphy Was Right Not to Recognize Biden's Win Until Now*, WASH. POST (NOV. 24, 2020, 10:00 PM), <https://www.washingtonpost.com/outlook/2020/11/24/emily-murphy-gsa-transition-biden/> (former GSA Associate Administrator for Public Affairs Beth W. Newburger recalled that, “[a]s the spokesperson for the GSA administrator David J. Barram during the 2000 election between George W. Bush and Al Gore, I fended off unrelenting questions from domestic and foreign press, as well as elected officials and their constituents. For 37 days, I stood in front of GSA headquarters . . . trying to answer questions that all boiled down to what the BBC first threw at me: ‘Why can’t your administrator make up his mind? The answer should be obvious to him.’”).

83. *See generally* *Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the H. Comm. on Gov't Reform*, *supra* note 16.



introduced legislation that would allow for the designation of the President-elect based on state certification results.<sup>84</sup>

As Zywicki explains, Barram gave several different reasons as to why he would not ascertain a winner.<sup>85</sup> At various times, he indicated he would authorize the transition once Florida was certified, once there was a concession, or once the litigation was resolved.<sup>86</sup> In his testimony before the Subcommittee, Barram explained that he did not believe he was authorized to make a decision when the election was close, citing Congressman Fascell's floor statements to this effect.<sup>87</sup>

The Supreme Court decided Bush's appeal on the Florida recount in *Bush v. Gore* on December 12, one day after oral argument.<sup>88</sup> The Court ruled against the Gore campaign and overturned the decision of the Florida Supreme Court, thereby halting the recount.<sup>89</sup> Gore conceded the election on December 13.<sup>90</sup> Barram waited until after Gore's concession speech to name Bush as President-elect and officially com-

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84. H.R. 5643, 106th Cong. (2000).

85. Zywicki, *supra* note 6, at 1576–77 (Zywicki contends that prior to the eventual certification, “the Administrator refused to articulate any specific standard that he would use to make the determination. During this period he offered at least three different and mutually contradictory interpretations of the Act to justify his inaction.”).

86. *Id.* at 1576 (Zywicki argues that Barram “[i]nitially . . . indicated that he would release the transition resources as soon as a candidate was certified as having received a majority of electoral votes in the election, stating that he would release the transition funds and the keys to the transition office ‘to whichever candidate garnered the necessary 270 electoral votes after Florida’s outcome was certified.’ In the face of the Florida recount imbroglio and under political pressure from the White House, he quickly amended his position. Although he refused to articulate any express standard, he later suggested he would consider two other criteria as especially important. These two criteria were: (1) a concession by one of the candidates, and/or (2) a resolution of all election contests and all election-related litigation. At the same time he apparently repudiated his earlier position that the certification of an electoral college winner was even a relevant criterion. He provided no explanation as to why he considered those two factors to be especially relevant or why the certification of an electoral college winner would not be relevant. Nor did he ever declare whether these two criteria were disjunctive or conjunctive, or whether one was more important than the other.”).

87. *Hearing Before the Subcomm. on Gov’t Mgmt., Info., & Tech. of the H. Comm. on Gov’t Reform*, *supra* note 16, at 69 (statement of David J. Barram, Administrator of the General Services Administration); *see also supra* note 61.

88. *Bush v. Gore*, 531 U.S. 98 (2000).

89. *Id.* at 110–11.

90. *Gore Concedes in Speech Before Nation*, N.Y. TIMES (Dec. 13, 2000), <https://www.nytimes.com/2000/12/13/politics/gore-concedes-in-speech-before-nation.html>; *see also Text of Gore’s Concession Speech*, N.Y. TIMES (Dec. 13, 2000), <https://www.nytimes.com/2000/12/13/politics/text-of-goreacutes-concession-speech.html>.

mence the transition.<sup>91</sup> By the time Barram officially ascertained the President-elect, Bush had less than 40 days to conduct the transition.<sup>92</sup>

This shortened transition had meaningful consequences for the country's leadership and security. A 2008 CRS report stated, “[w]ith so little time before he took office, President-elect Bush narrowed his selections to nominees who had previously been through Senate confirmations in the past.”<sup>93</sup> Even more significantly, the 9/11 Commission Report noted the shortened transition period and failure to quickly confirm nominees contributed to the government's lack of preparedness for the 9/11 terrorist attacks.<sup>94</sup>

Despite a recognition of these outcomes, Congress failed to address any issues around ascertainment. This set the stage for problems to arise again in the future, which they did in 2020.<sup>95</sup>

### B. Ascertainment of the 2020 Election

The 2020 presidential election between Joe Biden and Donald Trump occurred in the middle of the deadly COVID-19 pandemic, which had, by early November, already claimed over 230,000 lives.<sup>96</sup> In preparation for the election under these unusual circumstances, a number of state governments enacted policies making it easier to vote by mail. Prevailing expectations were that the pandemic would encourage voters to use this method and that vote counts would take

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91. *GSA Releases Transition Funds*, GOV'T EXEC. (Dec. 14, 2000), <https://www.govexec.com/federal-news/2000/12/gsa-releases-transition-funds/8146/>.

92. Inauguration day is set at January 20th by the Twentieth Amendment. U.S. CONST. amend. XX.

93. STEPHANIE SMITH, CONG. RSCH. SERV., RS20709, PRESIDENTIAL TRANSITIONS: BACKGROUND AND FEDERAL SUPPORT 6 (2008) [hereinafter SMITH, PRESIDENTIAL TRANSITIONS: BACKGROUND AND FEDERAL SUPPORT].

94. NATIONAL COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 198 (2004) (“The dispute over the election and the 36-day delay cut in half the normal transition period. Given that a presidential election in the United States brings wholesale change in personnel, this loss of time hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees.”); *id.* at 422 (“[T]he new administration did not have its deputy cabinet officers in place until the spring of 2001, and the critical subcabinet officials were not confirmed until the summer—if then. In other words, the new administration—like others before it—did not have its team on the job until at least six months after it took office.”).

95. Zywicki, *supra* note 6 at 1573, in essence predicted this development, explaining “the issues surrounding the law of presidential transitions are likely to arise again in the future, especially because the way in which the Act was implemented raises substantial concerns of future mischief.”

96. Nigel Chiwaya & Corky Siemaszko, *Covid-19 Cases, Deaths Rising Rapidly Ahead of Election Day*, NBC (Nov. 2, 2020, 4:23 PM), <https://www.nbcnews.com/news/us-news/covid-19-cases-deaths-rising-rapid-rate-ahead-election-day-n1245780>.

longer than usual as a result.<sup>97</sup> Given the unique circumstances, some U.S. officials (a group which did not include Trump) and the media prepared the public for the possibility that vote counting could extend past election night.<sup>98</sup>

A delayed result was expected because of the increased use of vote-by-mail. Mail-in votes generally take longer to count than in-person votes, and this was compounded by rules in certain key swing states (Pennsylvania, Michigan, and Wisconsin) that did not allow the processing of mail-in votes prior to election day.<sup>99</sup> Election analysts and reporters warned of the possibility of a “red mirage” or a “blue shift” in certain states in which in-person votes, counted first, would show Trump ahead in the race before an influx of mail-in votes would push the results towards Biden.<sup>100</sup> This partisan divide between in-person vs. mail-in voting was expected in part because Trump continuously argued during the campaign that mail-in voting created opportunities for fraud,<sup>101</sup> encouraging his supporters to vote in person.<sup>102</sup> At the same time, in some states, such as Florida, where vote processing began prior to election day, the first reported results would reflect these early votes, likely favorable to Biden.<sup>103</sup> In these states, experts warned of a “blue mirage.”<sup>104</sup>

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97. *How to Vote by Mail in Every State*, WALL ST. J. (Sept. 18, 2020, 3:08 PM), <https://www.wsj.com/articles/how-to-vote-by-mail-in-every-state-11597840923> (“In response to the spread of Covid-19, at least four additional states—California, Nevada, New Jersey and Vermont—and the District of Columbia have pledged to mail ballots to all properly registered voters for the November election. Some other states made it easier to vote by mail in response to the coronavirus crisis by changing various rules.”).

98. See, e.g., Geneva Sands & Alex Marquardt, *Senior Officials Urge Election Day Patience, While Trump Calls for Fast Results*, CNN (Oct. 20, 2020, 8:39 PM), <https://www.cnn.com/2020/10/20/politics/election-day-results-calls-for-patience/index.html>; Andrew Prokop, *How Long It Could Take to Count the Vote This Year, Explained*, VOX (Nov. 3, 2020, 7:13 AM), <https://www.vox.com/21417179/election-2020-vote-count-results-when>.

99. Prokop, *supra* note 98.

100. Marshall Cohen, *Deciphering the ‘Red Mirage,’ the ‘Blue Shift,’ and the Uncertainty Surrounding Election Results This November*, CNN (Sept. 1, 2020, 6:49 PM), <https://www.cnn.com/2020/09/01/politics/2020-election-count-red-mirage-blue-shift/index.html> (explaining how this past trend would likely be exacerbated as greater numbers of voters plan to vote by mail).

101. *Id.*

102. E.g., Hannah Knowles & Josh Dawsey, *Trump Suggests Voting in Person After Mailing Ballot, Calling System Untrustworthy*, WASH. POST (Sept. 5, 2020), <https://www.washingtonpost.com/politics/2020/09/05/trump-voting-twice-north-carolina/>.

103. David Wasserman, *Beware the ‘Blue Mirage’ and the ‘Red Mirage’ on Election Night*, NBC (Nov. 3, 2020, 8:27 AM), <https://www.nbcnews.com/politics/2020-election/beware-blue-mirage-red-mirage-election-night-n1245925>.

104. E.g., *id.*

On election night and into the early hours of Wednesday morning, it remained unclear who would win the election.<sup>105</sup> As forecasted, there were delays in counting votes.<sup>106</sup> News outlets also disagreed on whether a winner could be projected in certain states.<sup>107</sup> Fox News and the Associated Press called Arizona, a key swing state, for Biden well before other decision desks agreed.<sup>108</sup>

Towards the end of the week, it became increasingly obvious that major news outlets would declare Biden the winner.<sup>109</sup> Still, it would not be until late morning on Saturday, November 7, that major news outlets began projecting that Biden would win a majority of electoral votes.<sup>110</sup> And it was not until November 19 that the Associated Press finally made their last state call for Georgia (though other networks had called Georgia earlier on November 13<sup>111</sup>) after a hand-count audit.<sup>112</sup>

In order to shift the numbers in his favor, President Trump launched a variety of lawsuits to prevent the vote from being fully

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105. Aric Jenkins, *The Winner of the 2020 Presidential Election Remains Unclear*, FORTUNE (Nov. 4, 2020, 2:49 AM), <https://fortune.com/2020/11/04/the-winner-of-the-2020-presidential-election-remains-unclear/>.

106. Domenico Montanaro, *Results Still Unclear, and 5 Other Takeaways from Election Night 2020*, NPR (Nov. 4, 2020, 5:09 AM), <https://www.npr.org/2020/11/04/931083534/6-takeaways-from-election-night-2020>. As of early November 4, significant numbers of votes were yet to be counted in a number of states, including in Pennsylvania, Michigan, North Carolina, and Georgia. *Id.*

107. Domenico Montanaro, *AP Explains Calling Arizona for Biden Early, Before It Got Very Close*, NPR (Nov. 19, 2020, 4:13 PM), <https://www.npr.org/2020/11/19/936739072/ap-explains-calling-arizona-for-biden-early-before-it-got-very-close>.

108. *Id.*

109. See Paul Fahri & Elahe Izadi, *Biden's Victory Seemed Clear for More Than a Day. So Why Did the Media Hold Off on Calling It?*, WASH. POST (Nov. 7, 2020, 5:57 PM), [https://www.washingtonpost.com/lifestyle/media/biden-victory-media-call-delay/2020/11/07/58cd5198-210f-11eb-ba21-f2f001f0554b\\_story.html](https://www.washingtonpost.com/lifestyle/media/biden-victory-media-call-delay/2020/11/07/58cd5198-210f-11eb-ba21-f2f001f0554b_story.html).

110. Izadi, *supra* note 11.

111. AP: *Trump Wins North Carolina But Georgia Too Close to Call*, TEGNA & ASSOCIATED PRESS (Nov. 13, 2020, 3:31 PM), <https://www.abc10.com/article/news/politics/elections/trump-wins-north-carolina-election-georgia-biden/507-1459be8a-f5f9-4346-907c-c72ea0ada13d>.

112. Elena Moore, *Biden Flips Coveted Georgia, The Last State To Be Called By The AP*, NPR (Nov. 19, 2020, 8:24 PM), <https://www.npr.org/sections/live-updates-2020-election-results/2020/11/19/934889071/biden-flips-coveted-georgia-the-last-state-to-be-called-by-the-ap>; see also Montanaro, *supra* note 107 (“In making race calls, the AP has been traditionally known for its caution. It is sometimes deliberately slower than other networks, because it likes to say it isn’t making projections but, rather, calls based on solid math. Editors at the AP stress that they make a call only when they have determined that a candidate has no remaining path.”); see also, e.g., Adam Edelman, *With Final States Called, Biden's Projected Electoral College Victory Matches Trump's in 2016*, NBC (Nov. 13, 2020, 4:01 PM), <https://www.nbcnews.com/politics/2020-election/final-states-called-biden-s-projected-electoral-college-victory-matches-n1247766>.

counted (including by attempting to have ballots thrown out).<sup>113</sup> Trump supporters also took to protesting at election sites, trying to either stop election officials from counting the votes or to encourage tallying them, depending on the location.<sup>114</sup> Despite the overwhelming failure of these efforts to change the results, Trump refused to admit defeat.<sup>115</sup>

Quickly after major media outlets called the election, public attention shifted to Emily Murphy, the GSA Administrator.<sup>116</sup> Despite the media's widespread agreement on Biden's win, the GSA refused to ascertain the election on November 7.<sup>117</sup> This left the incoming Biden Administration without access to the post-election transition resources and information that President-elects use to prepare for the job.<sup>118</sup> In addition, a number of commentators and experts explained how a delayed transition could harm the Biden Administration, especially given his need to coordinate a government pandemic response and, invoking the specter of 9/11, the national security implications of

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113. Alana Abramson & Abigail Abrams, *Here Are All the Lawsuits the Trump Campaign Has Filed Since Election Day—And Why Most Are Unlikely to Go Anywhere*, TIME (Nov. 18, 2020, 1:28 PM), <https://time.com/5908505/trump-lawsuits-biden-wins/>. In total, Trump's team filed 62 lawsuits, losing 61 of them. William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

114. E.g., Bill Bostock, *Videos Show Trump Protesters Chanting 'Count Those Votes' and 'Stop the Count' Outside Separate Ballot-Counting Sites in Arizona and Michigan*, BUS. INSIDER (Nov. 5, 2020, 6:16 AM), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11> (explaining that in Detroit, Michigan, a state in which Biden was already projected to be the winner, Trump supporters chanted "stop the count" outside a ballot counting location. However, in Arizona's Maricopa County, a state where Biden was ahead, Trump supporters chanted "count those votes" outside the county election center.).

115. Cummings et al., *supra* note 113. 61 of 62 lawsuits did not succeed: "[s]ome cases were dismissed for lack of standing and others based on the merits of the voter fraud allegations. . . . State Supreme Courts in Arizona, Nevada and Arizona each rejected or declined to hear Trump's appeals to overturn results in those states, while the Pennsylvania and Michigan supreme courts denied multiple lawsuits."). *Id.* The one successful lawsuit had a negligible impact. *Id.*

116. Alex Thompson, *Pressure Mounts on Federal Agency to Affirm Biden Victory*, POLITICO (Nov. 8, 2020, 5:30 PM), <https://www.politico.com/news/2020/11/08/general-services-administration-biden-win-435203>.

117. *Id.* ("In a statement released Saturday, the agency [GSA] said, 'an ascertainment has not yet been made. GSA and its Administrator will continue to abide by, and fulfill, all requirements under the law.' The agency did not comment further on Sunday.").

118. *Id.*

being unprepared for assuming office.<sup>119</sup> Similarly to the Bush team in 2000, Biden used private funding during this period to begin transition planning outside the formal processes of the PTA, raising at least \$10 million in funds.<sup>120</sup>

The longer the wait, the greater the attention and pressure Murphy faced.<sup>121</sup> Murphy was excoriated by many in the press for failing to ascertain Biden as the winner, and, among other things, she was accused of being an “ideologue”<sup>122</sup> or one of Trump’s “enablers.”<sup>123</sup> Reporting indicated she was worried about President Trump’s reaction if she let the transition move forward.<sup>124</sup> During this period, as Murphy later explained, she (along with her family, staff, and pets) faced numerous threats to her safety.<sup>125</sup> Finally on November 23, following Trump’s failures to halt certification for Biden in Michigan or in Pennsylvania, Murphy ascertained Biden as the apparent winner of the election and, therefore, the President-elect.<sup>126</sup>

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119. *E.g.*, Allan Smith & Heidi Pryzbyla, *Trump Appointee Slow-Walks Biden Transition. That Could Delay the President-Elect’s Covid-19 Plan*, NBC (Nov. 10, 2020, 11:00 AM), <https://www.nbcnews.com/politics/2020-election/trump-appointee-slow-walks-biden-transition-could-delay-president-elect-n1247152> (“With the ascertainment delayed, the Biden transition team has been prevented from meeting with officials heading Operation Warp Speed and other Trump administration coronavirus efforts.”); Ryan Goodman & Kate Shaw, *The GSA’s Delay in Recognizing the Biden Transition Team and the National Security Implications*, JUST SECURITY (Nov. 10, 2020), <https://www.justsecurity.org/73317/the-gsas-delay-in-recognizing-the-biden-transition-team-and-the-national-security-implications/> (“When the presidential transition was stalled following the 2000 election, the delay may have contributed to the Bush administration’s failure to stop the terrorist attacks on September 11, 2001.”).

120. Anya van Wagendork, *Why Biden is Crowdfunding His White House Transition*, VOX (Nov. 21, 2020, 5:00 PM), <https://www.vox.com/2020/11/21/21588817/biden-gsa-white-house-transition-fundraising>.

121. Homes & Herb, *supra* note 65.

122. Anne Applebaum, *Why Won’t Emily Murphy Just Do Her Job?*, ATLANTIC (Nov. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/why-wont-emily-murphy-just-do-her-job/617184/>.

123. Bess Levin, *The Trump Appointee Blocking Biden’s Transition is Reportedly Trying to Line Up a New Job for 2021*, VANITY FAIR (Nov. 16, 2020), <https://www.vanityfair.com/news/2020/11/emily-murphy-joe-biden-transition>.

124. Lisa Rein, *Under Pressure, Trump Appointee Emily Murphy Approves Transition in Unusually Personal Letter to Biden*, WASH. POST (Nov. 23, 2020, 10:41 PM), [https://www.washingtonpost.com/politics/gsa-emily-murphy-transition-biden/2020/11/23/c0f43e84-2de0-11eb-96c2-aac3f162215d\\_story.html](https://www.washingtonpost.com/politics/gsa-emily-murphy-transition-biden/2020/11/23/c0f43e84-2de0-11eb-96c2-aac3f162215d_story.html).

125. Letter from Emily Murphy, *supra* note 4, at 1.

126. *Id.*; Matthew Daly, Zeke Miller & Mary Clare Jalonick, *US Agency Ascertains Biden as Winner, Lets Transition Begin*, ASSOCIATED PRESS (Nov. 23, 2020), <https://apnews.com/article/joe-biden-health-national-security-rob-portman-coronavirus-pan-demic-ac923137dfb664e5c3a1923f52eabbad>.

Murphy maintained the correctness of her decision to delay,<sup>127</sup> and was defended by others such as former GSA Associate Administrator for Public Affairs Beth W. Newburger (who had been involved in publicly justifying the delayed 2000 ascertainment).<sup>128</sup> Prior to the election, Murphy had spoken to Barram about his ascertainment experience, and he stated that he told her to “do the right thing.”<sup>129</sup> The GSA itself defended its position by relying on the precedent of the 2000 election, when the Administrator waited to ascertain Bush as the winner until after Gore’s concession following the resolution of *Bush v. Gore*.<sup>130</sup> In Murphy’s letter to Biden, she stated that she “came to [her] decision independently” and had been influenced to delay not because of political considerations, but rather precedent.<sup>131</sup> She also noted the lack of standards in the PTA for ascertaining the election results and called for the Act to be amended.”<sup>132</sup>

For his part, President Trump contradicted Murphy’s claimed independence by tweeting that he had advised Murphy to proceed with the transition.<sup>133</sup> But Trump continued to refuse to concede that he lost the election.<sup>134</sup> On January 6, 2021, Trump gave a speech to his supporters from the Ellipse, and afterwards, many of these supporters attacked the Capitol in an ultimately unsuccessful attempt to prevent Congress’ official certification of the electoral college results.<sup>135</sup> Mur-

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127. *Id.*

128. Newburger, *supra* note 82.

129. *President-Elect Biden Pressures Trump Administration to Authorize Transition*, NPR (Nov. 19, 2020, 5:06 AM), <https://www.npr.org/2020/11/19/936567309/president-elect-biden-pressures-trump-administration-to-authorize-transition>.

130. Andrea Shalal & Trevor Hunnicutt, *Amid Coronavirus Spike, Pressure Grows on U.S. Agency to Approve Trump-to-Biden Transition*, REUTERS (Nov. 18, 2020, 4:53 PM), <https://www.reuters.com/article/us-usa-election-transition/amid-coronavirus-spike-pressure-grows-on-u-s-agency-to-approve-trump-to-biden-transition-idUSKBN27Y2YS>.

131. Letter from Emily Murphy, *supra* note 4, at 1.

132. *Id.*

133. Jen Kirby, *The Presidential Transition Begins as the GSA Formally Recognizes Biden’s Victory*, VOX (Nov. 23, 2020, 7:50 PM), <https://www.vox.com/2020/11/23/21611906/biden-transition-gsa-trump-emily-murphy-acertain> (“Nevertheless, in the best interest of our Country, I am recommending that Emily and her team do what needs to be done with regard to initial protocols, and have told my team to do the same.”).

134. Jessica Gresco, *Trump Never Conceded He Lost, But His Impeachment Lawyer Did*, ASSOCIATED PRESS (Feb. 10, 2021), <https://apnews.com/article/trump-impeachment-lawyer-concede-13f27eab74b260d2a41b331e2adf3461>.

135. Maggie Haberman, *Trump Told Crowd ‘You Will Never Take Back Our Country with Weakness,’* N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html>.

phy resigned on January 15,<sup>136</sup> and President Biden assumed office on January 20 as expected.<sup>137</sup>

### C. Pressure Points

Certain common themes emerge from these two episodes. This section analyzes the points of similarity in the events just recounted: the (real or perceived) politicization of the GSA Administrator's role; the uncertain basis for ascertainment within the statute; the stressors around the timing of the ascertainment decision; and the absence of any contingency plan.

#### i. Politicization of the GSA Administrator's Role

A process free from political involvement is important for the accuracy, and especially the perceived accuracy, of the result. Bias could lead a GSA Administrator to the wrong conclusion. Even if a decision impacted by bias is correct, it has the potential to decrease the trust in the process and its integrity overall.

Both ascertainment processes were marred by real or perceived political pressures coming from the White House. In 2000, candidate Al Gore was the current Vice President, and some viewed the process as favoring him at the expense of the candidate from the opposing party.<sup>138</sup> Podesta's instructions to federal agencies as White House Chief of Staff—a uniquely political position—indicated that perhaps the White House was unduly involved in the transition decision-making process.<sup>139</sup> Additionally, Barram's changing justifications for his decisions created a situation where it could be seen, rightly or wrongly, as being driven by improper partisan considerations.<sup>140</sup> The episode suggested that the GSA Administrator's decision on ascertainment would not necessarily be independent of the appointing President.

In 2020, the appearance of impropriety rematerialized when the incumbent President was himself a candidate in the election. In this situation, the opportunity for improper political pressure was particularly high. Regardless of whether Trump directly pressured Murphy,

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136. Courtney Bubl , *GSA Administrator Resigns*, GOV'T EXEC. (Jan. 15, 2021), <https://www.govexec.com/management/2021/01/gsa-administrator-resigns/171451/>.

137. Jacob Pramuk, *Joe Biden Sworn in as President: 'Democracy Has Prevailed,'* CNBC (Jan 20, 2021, 8:51 PM), <https://www.cnbc.com/2021/01/20/joe-biden-sworn-in-46th-president-united-states.html>.

138. *E.g.*, Zywicki, *supra* note 6, at 1600–01.

139. *Id.* at 1600; *see supra* Part III.A.

140. *See* Zywicki, *supra* note 6, at 1601; *see supra* Part III.A.



he created an atmosphere in the Executive Branch in which an agency's acknowledgment that he lost the election would appear to contradict the President.<sup>141</sup> In this environment, what would normally be a neutral decision for the GSA Administrator became seen as a political statement. The appearance of partisanship did not end with her authorization of the Biden transition. Despite her claims of independence, a Trump tweet subsequently suggested he had allowed her to move forward.<sup>142</sup> As such, this situation, as in 2000, left the GSA Administrator subject to accusations of bias and overall created a sense of unfairness.

*ii. Uncertain Basis for Ascertainment*

Absent a justification for an ascertainment decision, it is impossible to evaluate that decision's accuracy. But the issues within the 2000 and 2020 ascertainment processes demonstrate the statute lacks clarity on this issue: the text of the statute does not provide any guidance to the GSA Administrator for determining the President-elect. In choosing the phrase "apparent successful candidate," the drafters appear to have thought that even if an election was contested, it would at least be generally obvious whether there existed an apparent winner.<sup>143</sup> But as both Barram and Murphy found, there are multiple ways of evaluating whether a winner is apparent. Barram's changing rationales fed into this problem as both the candidates and the public were left without a clear roadmap for when, and under what conditions, a decision would be made.<sup>144</sup>

Lacking a clear definition of an apparent successful candidate, the GSA Administrators instead reached for accuracy by delaying the process (and thereby decreasing the certainty of the result). While the statute contains language that recognizes the determination could theoretically be incorrect (as the Administrators do not release the funds to the actual winner, only the apparent winner),<sup>145</sup> the Administrators found that possibility unacceptable.<sup>146</sup> Whether or not the Administrators struck the appropriate balance between certainty and accuracy here, their subjective judgments alone determined the outcome.

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141. Lisa Rein, Matt Viser, Greg Miller & Josh Dawsey, *White House, Escalating Tensions, Orders Agencies to Rebuff Biden Transition Team*, WASH. POST (Nov. 9, 2020), [https://www.washingtonpost.com/politics/trump-transition-agencies-biden/2020/11/09/ad9f2ba2-22b7-11eb-952e-0c475972cfc0\\_story.html](https://www.washingtonpost.com/politics/trump-transition-agencies-biden/2020/11/09/ad9f2ba2-22b7-11eb-952e-0c475972cfc0_story.html).

142. See *supra* Part III.B.

143. *Supra* Part II.

144. See *supra* Part III.

145. See *supra* Part II.

146. See *supra* Part III.

iii. *Lack of a Timeline*

Tied to how the ascertainment decision should be made is when it should be made. A delayed decision is a more uncertain one. Both delays in 2000 and 2020 left incoming administrations waiting for a decision without clarity from the GSA Administrators on when exactly one would occur.<sup>147</sup> The Administrators waited for the challenges to the election to unfold and resolve, even with no obvious endpoint, and despite pressure to speed up the timeline.<sup>148</sup>

iv. *Absence of a Contingency Plan*

A contingency plan can help balance the need for certainty and accuracy in decision-making by lowering the stakes of making a (possibly incorrect) choice. In both scenarios, when no apparent winner could be ascertained (or at least ascertained quickly), there was no secondary way to allow substantial transition planning to begin. In 2000, both candidates pursued their own necessary transition measures but without the full strength of government behind them in this process.<sup>149</sup> In 2020, once all major media outlets called the race for Biden, it was essentially certain that he would come into office.<sup>150</sup> Under these circumstances, even if the winner was not apparent in Murphy's view, the almost definite winner was denied funds to begin his planning. Without any alternative, the only result was that no candidate received funding for many days after election day.<sup>151</sup>

#### IV.

#### IS REFORM NECESSARY?

Before discussing the reform proposals that have proliferated after the 2000 and 2020 elections, it is worth considering whether there is need for reform or whether the statute should instead remain unchanged. For example, Zywicki argued that transition funding should not have been held from the Bush campaign under the rules of the current PTA.<sup>152</sup> More recently, commentators have stated or implied that Murphy should have ascertained the election for Biden if truly

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147. *Id.*

148. *Id.*

149. *See supra* Part III.A.

150. *See supra* Part III.B.

151. *See supra* Part III.

152. Zywicki, *supra* note 6, at 1578. To be clear, Zywicki suggests reforms to the statute despite this position, for the very reasons suggested here. *Id.* at 1638–40; *see also infra* Part V.A.

abiding by text of the law as it currently stands.<sup>153</sup> This contention is particularly compelling in the case of the 2020 election: unlike in 2000, in which a series of serious court challenges ultimately did determine the outcome of the election, the legal challenges in 2020 were almost entirely specious.<sup>154</sup> Under these views of the statute, there is not a problem with the text itself but rather with the Administrators properly applying it.

Regardless of whether the statute was misapplied in those circumstances, the *potential* for misapplication makes statutory reform necessary. Whether a result is apparent is subjective and, without clarification, entirely left to the Administrator's best judgment. There have now been two GSA Administrators who have faced close elections without guidance, twenty years apart. Given the precedent President Trump set during the 2020 election in refusing to concede and claiming the process was rigged, there may be more contested elections in the future.<sup>155</sup> It is reasonable to think that, without changing the statute, it is likely that future GSA Administrators will face this problem again. Reform should occur to ensure that they do not.

## V.

### PROPOSALS FOR CHANGE

A number of analyses have proliferated, both after the 2000 and the 2020 elections, that suggest reforms for the transition process. Broadly speaking, they are designed to address each of the four pressure points discussed above: the politicization of the GSA Administrator's role, the lack of clear factors to consider when making the ascertainment decision, timing, and the absence of a contingency plan

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153. *E.g.*, Goodman & Shaw, *supra* note 119; Letter from Reps. Carolyn Maloney, Nita M. Lowey, Gerald E. Connolly, and Mike Quigley, House of Rep., to Emily Murphy, General Services Adm'r (Nov. 19, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-11-19.CBM%20Lowey%20GEC%20Quigley%20re%20Biden-Harris%20Transition%20Team%20Access%20FINAL.pdf>).

154. *See supra* Part III.

155. *See* Matt Vasilogambros, *Disinformation Fears Came True for Election Officials. What Does That Mean for Future Elections?*, USA TODAY (Nov. 24, 2020, 10:00 AM), <https://www.usatoday.com/story/news/politics/elections/2020/11/24/2020-presidential-election-misinformation-could-impact-future-votes/6396649002/> (“These attacks on election officials and the voting process also give politicians dangerous grounds to reject unfavorable election outcomes, said Justin Levitt, associate dean for research at Loyola Law School in Los Angeles, and a former U.S. Department of Justice senior voting rights official in the Obama administration. . . . [This outcome is] already happening. Republican candidates who lost congressional and gubernatorial races in several states, echoing the president, refused to concede after their races were called, claiming without evidence there was massive voter fraud.”).

in the face of non-definitive results. In Part V.A, I lay out the main types of reforms suggested and provide some examples of what has already been proposed within the literature. In Part V.B, I draw on these categories and ideas for reform in my own suggestions and will discuss differences and similarities between my proposals and what other authors advocate.

### A. *Types of Reforms*

The types of reforms regarding ascertainment can largely be described as fitting into four categories: reforming *who* makes the ascertainment decision, reforming *how* the ascertainment decision should be made, reforming *when* the ascertainment decision is made, and reforming *what* should happen if there is no apparent winner.

#### i. *Reforming Who Makes the Ascertainment Decision*

One suggested reform is to change who makes the ascertainment decision. In his 2001 article, Zywicki argued that if the ascertainer is supposed to be given meaningful discretionary authority:

[T]he Administrator of the GSA is not the appropriate party to make this determination. At the very least the power to ascertain an apparent winner should be vested in a more senior official, preferably one with some degree of expertise to make such a determination, such as the Attorney General.<sup>156</sup>

Recognizing that the Attorney General is also a political appointee, he clarified that “[i]f Congress pursues this course, it may be more appropriate to create an independent commission to make the determination of when an apparent winner can be identified.”<sup>157</sup>

Recent commentators have also weighed in on the Administrator’s role in the process. Jim Walden, a board member of the government accountability group Citizens Union specifically endorsed Zywicki’s independent commission suggestion, explaining, “it is ridiculous that the act gives power to determine the ‘apparent winner’ to a political appointee of the current administration, who has an obvious conflict of interest, pitting the incentive to protect the president’s longevity against his or her duty to the American people.”<sup>158</sup> On the other hand, Professor of Law at the University of Baltimore Kimberly Wehle has suggested removing the power from an “unelected bureau-

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156. Zywicki, *supra* note 6, at 1638–39.

157. *Id.* at 1639.

158. Jim Walden, *To Prevent a Future Transition Mess, Congress Should Fix the Law*, USA TODAY (Nov. 21, 2020, 9:11 PM), <https://www.usatoday.com/story/opinion/2020/11/18/presidential-transitions-how-law-needs-clarified-column/6314157002>.

crat” altogether, proposing that Congress “instead impose neutral, self-executing terms for unlocking transition dollars and access to information crucial to the transition effort.”<sup>159</sup>

*ii. Reforming How the Ascertainment Decision Is Made*

The next type of reform is how the ascertainment decision should be made. A number of proposals suggest various standards for ascertainment. In 2000, those offering testimony at the December Subcommittee hearing indicated that clarifying the test is an issue for Congress to at least “explore”<sup>160</sup> or “consider.”<sup>161</sup>

Some proposals suggest that certain factors could be automatic triggers for ascertainment. For example, Walden argues that, along with other “objective criteria” (such as whether there has been a concession), Zywicki’s proposed independent commission “should be required to declare the likely winner — and then start the transition procedures — when the average state election count is 90% complete and one candidate is above the 270 electoral vote threshold.”<sup>162</sup>

Congress has already introduced legislation on this issue. The Promoting Accountability and Security in Transition Act or PAST Act (the first major piece of legislation coming out of Congress after the 2020 election to address ascertainment) would enact a more subjective test.<sup>163</sup> The PAST Act would require that ascertainment occur “with-

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159. Kimberly Wehle, *4 Ways to Prevent a Future Insurrection*, ATLANTIC (Jan. 13, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/how-remove-danger-period-american-law/617651/>.

160. Statement of Max Stier, *supra* note 7, at 7 (explaining that despite the Partnership for Public Service’s view that the statute is clear already, “it would make sense to explore whether the statute could provide additional clarity to ensure that the country avoid the unnecessary controversy we experienced this year.”).

161. Statement of Donald K. Sherman, *supra* note 7 (“Congress should consider whether GSA should be required to have clearly articulated and public criteria for how to ascertain the apparent winner of a presidential election, including guidance on how to handle situations where the election result is unclear shortly after Election Day, where one candidate refuses to concede, or where a candidate or candidates contest multiple state results.”).

162. Walden, *supra* note 158. Zywicki discusses the possibility of a similar rule—“the Act could be amended to define the term ‘apparent successful candidate’ to make explicit what is already implicit in the Act, namely that the apparent winner should be declared as soon as one candidate has a majority of certified and pledged electors”—but quickly notes this rule might create implementation issues. Zywicki, *supra* note 6, at 1638 (“Substituting this language might imply that this is the exclusive way of ascertaining the apparent winner. One could imagine scenarios where the apparent winner could be easily ascertained, even if he lacks an electoral college majority.”).

163. Promoting Accountability and Security in Transition (PAST) Act, S. 5059, 116th Cong. (2020); Promoting Accountability and Security in Transition (PAST) Act, H.R. 9022 116th Cong. (2020) (identical text contained in both bills).

out any interference or undue pressure from the President or a candidate for President, or any representative thereof.” The GSA Administrator would make the decision “based on provisional results from State election officials and expert analysis of results.”<sup>164</sup> The statutory text does not provide a further explanation of what “expert analysis of results” means. Another bill, the Protecting Our Democracy Act, which passed the House of Representatives in December 2021, does not specify certain “standards and procedures” but instead would require the GSA Administrator to enact standards and procedures through regulations.<sup>165</sup>

*iii. Reforming When the Ascertainment Decision Is Made*

Supporters of reform have also advocated for creating deadlines for ascertainment, such as a requirement that the decision should be made “at the earliest reasonable time.”<sup>166</sup> This differs from “how” the ascertainment decision should be made by specifying a timeframe for the decision, rather than advancing criteria for making that decision. Other proposals advocate for introducing more explicit timelines.<sup>167</sup> One suggestion would require the decision to be made within a week of the election.<sup>168</sup> The PAST Act would set a deadline for ascertainment to happen within 6 days of election day, while the Protecting Our Democracy Act proposes that if ascertainment has not taken place within 5 days, both candidates would be treated as if each had won the election (until an ascertainment is made or Congressional certification of the election occurs).<sup>169</sup>

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164. S. 5059 § 9; H.R. 9022 § 9.

165. Protecting Our Democracy Act, H.R. 5314 § 1102, 117th Cong. (2021); Protecting Our Democracy Act, S. 2921 § 1102 117th Cong. (2021) (companion bills are cited here). The legislation would require regulations be passed “[n]ot later than 270 days after the date of enactment.” *Id.*

166. Walden, *supra* note 158; *see also* KEOUGH SCHOOL OF GLOBAL AFFAIRS, *supra* note 7, at 7 (recommending that Congress “[e]nact[] legislation that explicitly mandates the GSA to ascertain the election results as soon as possible after Election Day.”).

167. Statement of Donald K. Sherman, *supra* note 77 (“Congress may also want to consider adding procedural guardrails to ensure that the transition begins no later than a certain date—for example, releasing a certain proportion of the funds no later than a specified time following the election.”).

168. Lawson Fite, *The GSA Delayed Biden’s Transition. Future Presidents-Elect Could Sue to Speed Things Up*, LAWFARE (Nov. 30, 2020, 2:54 PM), <https://www.lawfareblog.com/gsa-delayed-bidens-transition-future-presidents-elect-could-sue-speed-things>. This proposal, however, assumes that a lower threshold for ascertainment is in place.

169. S. 5059 § 9; H.R. 9022 § 9; H.R. 5314 § 1102; S. 2921 § 1102.

iv. *Reforming What Happens When There Is No Apparent Winner*

A final major group of reforms relates to what should happen when no apparent winner exists.<sup>170</sup> The idea of releasing funds to both candidates was discussed during the December 2000 Subcommittee hearing, but, as Barram indicated, the law as enacted did not allow for this outcome.<sup>171</sup>

Both the PAST Act and the Protecting Our Democracy Act contain contingency plans. The PAST Act would “provide a portion of the services and facilities authorized to be provided . . . to all parties with a plausible chance of being the successful candidate” in a situation in which “there is a plausible chance that the apparent successful candidate for the office of President and Vice President, respectively, are not the incumbent or if the incumbent was not a candidate.”<sup>172</sup> Similarly, the Protecting Our Democracy Act would require that if a winner cannot be chosen within a 5 day timeframe, “each eligible candidate for President and Vice President shall be treated as if they are the apparent successful candidate for purposes of this Act” until either ascertainment occurs or Congress certifies the election.<sup>173</sup>

v. *Other Reforms*

Other reforms relate to encouraging transparency, such as by requiring a report on the ascertainment decision to Congress after every presidential election;<sup>174</sup> enacting review by the U.S. Government Accountability Office (GAO);<sup>175</sup> providing a means for expedited review

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170. *See, e.g.*, Zywicki, *supra* note 6, at 1638; *see also* Fite, *supra* note 168 (referencing the possibility “that transition assistance [be made] available to multiple candidates in a close election”).

171. *Hearing Before the Subcomm. on Gov’t Mgmt., Info., & Tech. of the H. Comm. on Gov’t Reform, supra* note 16, at 68 (statement of David J. Barram, Administrator of the General Services) (“I would like to put into the record or make sure it gets into the record an opinion by the Department of Justice about whether we can fund two candidates, and their answer is no. Although I think, like a lot of people, it would be nice if we thought the law would work to do that . . . .”); *see also id.* at 63–65, 83 (discussing whether providing assistance to two candidates was possible under the law). As suggested here, Barram appears favorable to a system where both candidates could receive funding. *Id.* at 68.

172. S. 5059 § 9; H.R. 9022 § 9.

173. H.R. 5314 § 1102; S. 2921 § 1102.

174. Statement of Donald K. Sherman, *supra* note 7 (“[A]fter every presidential election, the GSA administrator should have to provide a public report to Congress announcing their ascertainment of the apparent successful candidates for president and vice president and describing the process by which they reached that decision.”).

175. *Id.* (“GAO’s review should document best practices and potential pitfalls from prior presidential transition periods. GAO should present its findings and submit specific and tangible recommendations for ways that GSA and Congress could reform

under the statute in the courts;<sup>176</sup> changing the “apparent winner” language to language that allows for an easier determination;<sup>177</sup> and ensuring that if a mistake is made and the “actual winner” differs from the ascertained President-elect, that actual winner is provided with funding.<sup>178</sup>

### B. *Concrete Proposals*

The specific reforms I propose in this paper include: (i) increasing the independence of the individual ascertaining the election results, (ii) codifying a three-factor test to determine who has won the election, and (iii) establishing a plan to begin releasing resources and information to both candidates if a winner is not known within seven days of the election. These proposals draw on some of the already existing suggestions but are fleshed out to create a more comprehensive and detailed scheme. The reforms outlined here cohesively address the previously discussed central problems that affected the 2000 and 2020 ascertainment: who should make the ascertainment decision, how and when it should be made, and what should be done if there is no apparent winner. Together, they represent a unique legislative package that, if enacted, would allow transitions to proceed without meaningful delay.

As I plan to demonstrate, each element provides a balance between the need for certainty and accuracy within the ascertainment process—ensuring that in most cases a decision is quickly and independently reached, with an alternative process for elections that present particular challenges. Critically, while the reforms would work best in operation together, each one could be enacted on its own if legislators were so inclined. I also suggest that transparency mechanisms be built into each part of the system so that the public—and the candidates—can understand how important decisions are made.

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ascertainment and other aspects of the presidential transition process to ensure they are initiated promptly, transparently, and without political interference.”).

176. Zywicki, *supra* note 6, at 1639 (“Because any of these solutions would leave the potential for arbitrary or politically-motivated action, Congress should also allow for the expedited appeal to federal court of any decision made under the Act by a party who unsuccessfully requests a release of the transition resources” or “by a party who has attained a majority of certified and pledged presidential electors.”); Fite, *supra* note 168.

177. Fite, *supra* note 168. In addition to changing the statutory language, Fite suggests that in a close election, more than one candidate could be provided with resources for the transition. *See supra* note 170.

178. Zywicki, *supra* note 6, at 1638.



*i. Independent Ascertainment*

The GSA Administrator should appoint a separate individual responsible for election ascertainment, an individual known as the Special Ascertainment Officer (SAO). The SAO would be a senate-confirmed position required to be chosen without regard to political affiliation and selected based on integrity, experience, and knowledge of the law (similar criteria as exists for appointing an inspector general).<sup>179</sup> Examples of those who might meet these requirements include a career civil servant within the agency or a subject-matter expert outside the agency. This office would have the responsibility of ascertaining the President-elect and Vice President-elect, enabling the GSA to move forward with the release of the funds, at which point the SAO's term would end. Finally, the SAO should be given for-cause removal protection: a job-security measure where the protected individual may only be fired for particular reasons, rather than at will.<sup>180</sup>

This structure has several benefits. Assigning one individual to oversee the ascertainment process promotes speed and certainty of the result (as opposed to a process undertaken by an independent commission,<sup>181</sup> which would naturally require more time to convene and deliberate). At the same time, the independence of the position promotes a fair process and an accurate ascertainment free from political pressure. Asking the GSA Administrator to appoint a separate individual creates a buffer between the SAO and the President (who may be a candidate him or herself). Additionally, articulating the qualifications of the SAO (and prohibited bases upon which they can be appointed) emphasizes and encourages the non-partisan nature of the role.

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179. 5 U.S.C. app. § 3(a) (“There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”); *id.* § 8G(c) (“ . . . the Inspector General shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity. Each Inspector General shall be appointed without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”).

180. For-cause removal protection is generally given to officials who need a certain degree of independence in order to do their jobs effectively and who might otherwise be subject to outside pressure. *See, e.g.*, 28 U.S.C. § 596 (requiring good cause for removal of the now defunct position of Independent Counsel); *see also* Morrison v. Olson, 487 U.S. 654, 693 (1988) (“[T]he congressional determination to limit the removal power of the Attorney General [over the Independent Counsel] was essential, in the view of Congress, to establish the necessary independence of the office.”).

181. *See supra* Part V.A.i.

Of course, it remains possible that a GSA Administrator acting in bad faith may still appoint someone in line with his or her political leanings. But this is a potential problem for any government appointee. The SAO proposal is not a perfect solution, but it improves upon the current situation in which a Presidential appointee, one with fewer protections and who is therefore more susceptible to partisan pressures, is in charge of ascertainment.

This reform also houses ascertainment within the GSA, which has institutional experience with the transition process and the ascertainment decision. Rather than elevating the decision to a significantly more senior level, such as the Attorney General, returning the decision to a ministerial, independent functionary keeps the process from being used as a tool of partisans and also encourages others to see the decision as fair.<sup>182</sup>

### ii. *Three-factor Test*

Using a test for ascertainment should provide guidance for the ascertainment on what constitute acceptable factors to consider in making the decision. The test should consist of the three parts described by former GSA Administrator Denise Turner Roth: (1) what major news outlets are reporting, (2) the state counts, and (3) whether there is a public concession, alongside a short but mandatory waiting period (until 5 AM EST).<sup>183</sup> If upon balancing these factors the decisionmaker still cannot determine an apparent winner after seven days, then no official ascertainment of either candidate as president-elect should occur. In such a case, a contingency plan would be enacted, as discussed in the next section, *infra*.

This type of approach is not without criticism. In discussing potential congressional changes, Lawson Fite in a post for *Lawfare* explains:

Perhaps the apparently successful candidate could be the one projected to win by the Associated Press and major television networks. But which networks, and how many of them? Alternatively, there could be guidance regarding the number of states that have certified their results, but that would not accelerate the ascertainment any further than in 2020. Where one candidate has not con-

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182. Zywicki, *supra* note 6, at 1639. Zywicki himself notes the potential problem of having the Attorney General make the decision, “[a]lthough an improvement over the current regime, the Attorney General is still a political appointee; thus this solution would not wholly eliminate the political influences that noticeably influenced the Administrator’s decision.” *Id.*

183. See Publ , *Former GSA Administrator Reflects*, *supra* note 64; *see also supra* Part II.

ceded, there are few practical benchmarks that don't simply rely on the agency's common sense.<sup>184</sup>

To the extent that any one factor could be definitive, Fite raises a valid concern. But when considered as part of a multi-factor test, a factor that may be indeterminate on its own can be folded into a larger analysis and properly weighed. Subjectivity may not be eliminated entirely, but that is true with any form of governing decision-making where discretion is involved.

Codification of these three requirements as considerations should be written into the statute. Rather than requiring a certain number of factors to be met, the ascertainment should be able to consider all three and their relative importance in a particular election. Additionally, the ascertainment should publicly release a justification for his or her decision so that it is clear what factors were considered and how they entered into the decisionmaker's analysis.<sup>185</sup>

These three factors are chosen both because there has been past precedent of their use under Administrator Roth, and more importantly, because together they strike an appropriate balance between certainty and accuracy. Once a state has released its final or near final vote count, a decisionmaker can be sure of who won that state. Tallying up the states expected to be won and lost by each candidate should give the decision-maker a clear picture of the election.<sup>186</sup>

Vote counts are obviously a determinant and the way that news outlets themselves make their projections and figure out who has won the election. With the exception of the 2000 and 2020 elections as discussed above, major news outlets have largely been accurate in projecting the election results, even before every last vote has been counted.<sup>187</sup> Major news outlet decision desks work independently

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184. Fite, *supra* note 168.

185. This suggestion is in line with Sherman's suggestion, *supra* note 174, although I would not suggest that the explanation need to be provided to Congress. The formality of that step is not necessary as long as the public is aware of the basis of the decision. The ascertainment should be free to post the explanation online.

186. This factor is essentially the same as the language in the PAST Act on "provisional results from State election officials." S. 5059 § 9; H.R. 9022 § 9.

187. Dylan Matthews & Kay Steiger, *How the Press Calls Elections, Explained*, Vox (Nov. 6, 2020, 11:04 AM), <https://www.vox.com/policy-and-politics/21535103/when-will-we-get-election-results-calls-networks>. The Associated Press, whose predictions and data a number of other networks rely on for their ultimate reporting, is particularly known for its careful calls and did not wrongly announce Al Gore had won the presidential election in 2000. Katie Robertson, *In a Hot Election, the Cool-Headed Associated Press Takes Center Stage*, N.Y. TIMES (Nov. 8, 2020), <https://www.nytimes.com/2020/11/02/business/media/associated-press-presidential-election.html>; see also *Understanding the Election*, ASSOCIATED PRESS, <https://www.ap.org/media-center/understanding-the-election> (last visited Apr. 12, 2021);

from the rest of their operations, increasing the reliability of the results.<sup>188</sup> In addition to vote counts, news outlets may use exit polls, interviews, statistical modeling, and other tools for data analysis to determine in advance of a final vote count who has won an election.<sup>189</sup>

While it is true that what qualifies as a “major news outlet” could be unclear, this can easily be left to the discretion of the ascertainment based on metrics such as viewership or readership. An election close enough where the definition of a major news outlet would shift the outcome would likely indicate that no apparent winner should be identified. Further, major news outlet is preferable to “expert analysis,” the language included in the PAST Act.<sup>190</sup> Who an expert is requires delving into an individual or organization’s credentials and experience, unlike a measurement of a publication’s audience.

The third factor of the test is a concession. The public concession of one of the candidates does provide a definitive element for the ascertainment, and as such should not be left out as it is in the PAST Act.<sup>191</sup> Once one of the candidates has publicly conceded, it should be clear that the conceding candidate will not lay claim to any of the transition resources. Consequently, it is a useful factor to take into consideration—although its presence should be weighed more heavily than its absence and when it occurs, is likely to be definitive.<sup>192</sup>

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(“[i]n 2016, we were 99.8% accurate in calling U.S. races, and 100% accurate in calling the presidential and congressional races for each state.”).

188. See Matthews & Steiger, *supra* note 187. For example, despite Fox News’ support of Trump, the decision desk projected Arizona—a critical battleground state—for Biden on election night, even before other major news outlets had projected Biden as the winner there. Sarah Ellison, *Top Fox News Managers Depart Amid Murdoch’s Concerns Over Controversial Arizona Election Night Projection*, WASH. POST (Jan. 19, 2021, 6:01 PM), [https://www.washingtonpost.com/lifestyle/media/fox-news-stirewalt-sammon-murdoch-arizona/2021/01/19/a54e9f72-5a8f-11eb-a976-bad6431e03e2\\_story.html](https://www.washingtonpost.com/lifestyle/media/fox-news-stirewalt-sammon-murdoch-arizona/2021/01/19/a54e9f72-5a8f-11eb-a976-bad6431e03e2_story.html). That being said, there should be concerns that Fox’s decision desk’s independence may be under greater pressure in the future. In the wake of the Arizona decision, Bill Sammon, the editor overseeing Fox’s decision desk, announced his retirement and Chris Stirewalt, a political editor who also worked on the decision desk, was fired. *Id.* Reporting suggests that these personnel changes may have happened because Fox News co-founder Rupert Murdoch was unhappy with timing of the Arizona call. *Id.*

189. See Matthews & Steiger, *supra* note 187.

190. S. 5059 § 9; H.R. 9022 § 9.

191. See *id.*

192. Zywicki, *supra* note 6, at 1618, notes the potential usefulness of a concession, while finding it to be unnecessary, stating: “[t]here is nothing in either the legislative history of the Act or the Act itself to imply that the lack of a concession would be relevant in any way to the triggering of the Act. Obviously, if one candidate did concede an election, this would be relevant to determining an apparent winner. But the absence of a concession cannot be a valid basis for refusing to act. The failure to concede an election is simply too prone to manipulation and strategic behavior to be a

Beyond the three-factor proposed test, the ascertainer should not decide until at least 5 AM EST following election day. This is to prevent a situation in which an ascertainer declares the apparent winner of the election prior to the counting of significant numbers of votes or late breaking news on election night itself. This mandatory waiting period is relatively short, however, given the need for the transition to start as soon as possible and to promote certainty within the process.

These factors are both more concrete and comprehensive than others that have been put forward. Altogether, this test would provide some guidance—and guardrails—for the ascertainer’s decision-making process. While it may not be possible to totally eliminate arbitrariness, these factors will go a long way in directing the ascertainer to an accurate and definitive result.

### *iii. Dual Release of Funds*

The third part of the reform scheme would create a contingency plan in case the ascertainer decides that no determination can be made based on the three factors. If no decision can be made within seven days, the benefits that normally only the President-elect would receive should automatically be released to both candidates (if neither are currently President) or the challenger (if one candidate is the President).<sup>193</sup>

While at least one previous proposal has explicitly mentioned releasing only a portion of the funds,<sup>194</sup> this proposal suggests releasing a full amount to each candidate. In the event where there is a contested election, it may take a long time for the winner to become clear, and neither transition team should be hampered by a scaled-down transition. As soon as new developments occur (for example, the outcome of a court decision) and the ascertainer can decide using the above test, access to services and information for the losing candidate should be withdrawn. Funds already spent would not need to be reimbursed, as long as they are determined by the GSA to have been spent on appropriate transition-related expenses.

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reliable factor on which to rely in administering the Act.” See also Light, *supra* note 60 (explaining that requiring a concession in order to determine a winner “would give future losing candidates extraordinary authority to delay transitions through legal challenges, whether legitimate or frivolous”).

193. This idea incorporates several aspects of the plans discussed in Part V.A.iii & iv. It would add a set time (like Fite, *supra* note 168, at one week) and also ensures funds would go to both candidates when the winner is not definitive.

194. See *supra* Part V.A.iii & iv.

There are several benefits to this structure. It allows for the promotion of certainty because the ascertainer can act even when results are not yet fully clear but also enables the accurate selection of the winner. An ascertainer who is unable to decide will also not be able to stall a transition indefinitely, as the automatic release of funds and access will benefit both candidates and allow them to further engage in transition planning. While it may be regrettable to expend funds on a candidate who does not end up needing them, the possibility of an indeterminate winner and extremely shortened transition, as in 2000, is even less preferable. Additionally, it avoids the problem of private funding, like the funding Bush accepted in 2000 and Biden accepted in 2020 when they were denied access to funds through normal government channels: a concern the proponents of the PTA had mentioned as one of their motivations for the legislation.<sup>195</sup>

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These various reforms directly take on the most problematic deficiencies that came to light in both 2000 and 2020. Under this suggested model, an independent actor, not subject to political pressure, will make the ascertainment decision. This ascertainer will have statutory direction for how to make his or her decision and will articulate how the decision comports with enumerated factors. And importantly, if no decision can fairly be made within a specified period, a non-incumbent candidate or candidates can begin preparing for a future presidency. Together, this is a comprehensive system that aims to make the ascertainment process both more certain and accurate. Ultimately, this reform will allow for greater public oversight, and hopefully with it, public trust.

#### CONCLUSION

In creating the PTA, legislators developed a mostly functional method of ensuring a President-elect has the resources and information to prepare for the job of President. But this system can break down if that President-elect is not quickly or clearly identified and guardrails for the determination process are lacking. The 2000 and 2020 election ascertainment processes present cautionary tales, and without reform, it is possible that similar events may reoccur.

A number of reforms have been put forward to address the statutory deficiencies. This paper surveys these proposals and then refines

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195. *See supra* Parts II.A., III.A.

and builds upon them to develop a comprehensive way of addressing the current problems with the ascertainment process, ultimately suggesting (i) transferring the ascertainment decision to an independent actor, (ii) using a three-factor test for determining the apparent successful candidate in the election, and (iii) creating a contingency plan that would allow for the release of resources and information to both candidates if no apparent winner can be determined. Under this plan, the public domestically and abroad can be assured that the President-elect will be given the necessary time and resources to begin leading the United States.

