

# Presidential Transition Improvement Act

Successful presidential transitions are at the core of our democratic process and are vital to effectuate the will of the voters. To ensure that the executive branch can act effectively after the Inauguration on January 20, the winning candidate needs time and certain tools to prepare. This work includes learning about key national security threats, compiling lists of candidates for Cabinet and sub-Cabinet posts and beginning their vetting and security clearance processes, organizing the White House and key offices, and beginning to create the new Administration's first budget proposal.

Following the contentious 2020 presidential election and transition, Congress acted on a bipartisan basis to improve the laws governing this important period. The most prominent effort was updating the antiquated law governing the casting and counting of electoral votes, with a law called the Electoral Count Reform Act. At the same time, lawmakers also updated another aspect of the presidential transition process – the rules by which the federal government acknowledges the winning candidate and provides transition resources. The new rules seek to clarify the timing and triggers for the federal government to provide transition resources, and ensure that a close election does not unduly delay a smooth transition process. They also seek to add accountability to the determination by requiring ongoing reporting about the decision process.

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## Transition Resources for Incoming President

Under the Presidential Transition Act, the General Services Administration (GSA) is charged with helping a president-elect prepare for the presidency.<sup>1</sup> One of the key provisions concerns access to funding and briefings following the election.<sup>2</sup> The GSA Administrator must first determine that there is an apparent winner (a process that has previously been known as “ascertainment”), which then frees up resources to help the president-elect get ready to assume office on January 20 of the following year. That includes office space, money to hire transition staff, and access to briefings with federal agencies.<sup>3</sup> This process has typically proceeded smoothly but faltered in some cases. Amid

<sup>1</sup> 3 U.S.C. §102 note (“Presidential Transition Act of 1963” as amended by Pub. L. 117–328, div. P, title II, § 202)

<sup>2</sup> Other aspects of the law govern pre-election expenses and preparations within the outgoing administration. See U.S. Library of Congress, Congressional Research Service, Presidential Transitions: A Brief Summary of the Presidential Transition Act, by Henry Hogue, IF12725 (2024). <https://crsreports.congress.gov/product/pdf/IF/IF12725>

<sup>3</sup> The incoming administration works in coordination with GSA and a transition council that includes more than 20 federal agencies. See National Task Force on Election Crises, Transition Period (2020). <https://electiontaskfo.wpenginepowered.com/wp-content/uploads/2024/01/TransitionPeriod.pdf>

the extraordinarily close 2000 race between candidates Al Gore and George Bush, the GSA did not release resources until December 13, after the Supreme Court ruling on the disputed results and Vice President Gore's subsequent concession speech.<sup>4</sup> In 2020, the GSA did not declare Biden the apparent winner until November 23rd, well after most news organizations had affirmed Biden's victory.<sup>5</sup>

The Presidential Transition Improvement Act<sup>6</sup> seeks to adjust the process to better address a close race where there is not a clear winner immediately. It amended the Presidential Transition Act to clarify when a candidate or candidates should receive transition resources under the Act and to ensure both candidates begin receiving resources in the event there is not a clear winner five days after Election Day.<sup>7</sup> This should help the eventual winning candidate move ahead with critical transition work with less delay.

As amended by the new law, the Presidential Transition Act sets up the following framework for federal transition resources to flow to one or both candidates.

## Initial Post-Election Day Rules

If the losing candidate(s) concedes, the remaining candidate must be treated as the apparent winner for purposes of the Presidential Transition Act. Such a concession triggers transition resources for the remaining, successful candidate at any point it is made and it is the only way a winning candidate can begin to receive federal transition resources in the first five days after Election Day. This provision only applies to major party candidates; a successful presidential candidate would not need to wait for a concession from one or more minor candidates in order to receive transition resources.<sup>8</sup>

Absent such a concession(s), the law provides the GSA Administrator with a framework to determine the "apparent successful candidate," including one set of criteria for a discretionary determination and another set for a mandatory one .

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<sup>4</sup> Veronica Stracqualursi, "Former GSA Administrator: 'it's Clear' We Should Recognize Biden as the President-Elect," CNN.com, November 19, 2020, <https://www.cnn.com/2020/11/19/politics/david-barram-gsa-2020-election-cnntv/index.html>.

<sup>5</sup> Holmes, Kristen, and Jeremy Herb. "Key Government Agency Acknowledges Biden's Win and Begins Formal Transition." CNN.com, November 24, 2020. <https://www.cnn.com/2020/11/23/politics/transition-biden-gsa-begin/index.html>.

<sup>6</sup> P.L. 117-328, Div. P, Title II. (Text available at Congress.gov. "Text - H.R.2617 - 117th Congress (2021-2022): Consolidated Appropriations Act, 2023." December 29, 2022. <https://www.congress.gov/bills/117/congress/house-bill/2617/text>)

<sup>7</sup> §3(c)(2) of the Presidential Transition Act of 1963 (as amended); The House had previously endorsed a similar provision in Title XI of the Protecting Our Democracy Act (H.R. 5314, S. 2921), namely that if the GSA Administrator does not declare an "apparent winner" within five days of the election, both major candidates are authorized to receive transition resources.

<sup>8</sup> The rule applies to major party candidates whose political party received more than 25 percent of the popular vote in the preceding presidential election. 3 U.S.C. 102 (note) at §3(c)(3) of the Presidential Transition Act of 1963.

This determination may not come immediately however, and in a close race without a concession the determination is likely to take longer than a few days. Under the updated federal law, if there is not a clear successful candidate within five days of Election Day, the GSA is directed to provide transition resources to both candidates (or as many major party candidates as remain in contention) until the determination can be made.<sup>9</sup>

## Subsequent Criteria for Determining “Apparent Successful Candidate”

**Discretionary:** Five days after the election or later, the GSA Administrator “may” declare an apparent winner if it is “substantially certain” one candidate will receive a majority of pledged electoral votes taking into consideration:

- The results in states where significant legal challenges that could affect the outcome in that state are substantially resolved;
- The certified results in states that have completed certification;
- The results in states where there is “substantial certainty” of the result based on “the totality of the circumstances.”

**Mandatory:** The GSA Administrator “must” declare an apparent winner if:

- The candidate receives a majority of pledged electoral votes based on certifications of states that have finished their final canvass and the conclusion of any recounts, or legal or administrative actions regarding the results; or
- The candidate receives a majority of electoral votes based on the meeting of the electors in their respective states in mid-December (pursuant to 3 U.S.C. §7);<sup>10</sup> or
- The candidate is declared the winner at the joint session of Congress in January (pursuant to 3 U.S.C. §15).

The law thus adds a mandatory duty to announce an apparent successful candidate once there is a clear winner, although it should be noted that some of the proposed benchmarks - such as the vote of the Electoral College in mid-December – fall fairly late in the post-election process. Thus, if there is a close race with no concession and significant non-frivolous post election litigation, there is a significant possibility that both candidates will receive federal support to conduct transition activities for a number of weeks after Election Day.

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<sup>9</sup> §3(c)(2) of the Presidential Transition Act of 1963 (as amended)

<sup>10</sup> In 2024, this date is December 17, 2024.

## Transparency

The legislation also requires that the GSA Administrator submit certain reports on the transition process to increase transparency around the resources going to candidates and a determination regarding an apparent winner. Specifically, the administrator would have to:

- Submit weekly reports to Congress summarizing the transition process, including access to space and briefings by candidates and the distribution of transition funds as well as the status of candidates with regard to meeting the qualifications to be declared the apparent successful candidate; and
- Upon determining that a candidate for President or Vice President is the apparent successful candidate, issue a public, written statement laying out the decisions and reasons supporting it under the statutory guidelines.

## Conclusion

These changes in the GSA's duties regarding transition resources fall within a broader framework of the presidential transition process.<sup>11</sup> For instance, additional federal laws govern the preservation of federal records and provide for the expedited consideration of nominees for critical national security positions in the incoming administration. Together, these laws and accompanying norms seek to ensure a smooth and speedy transition to maximize national security and effective governance.

### ***About the National Task Force on Election Crises***

*The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure free and fair elections by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except elections that are free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.*

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<sup>11</sup> National Task Force on Election Crises, Transition Period (2020).  
<https://electiontaskfo.wpenginepowered.com/wp-content/uploads/2024/01/TransitionPeriod.pdf>