



11-10-2020

The GSA's Delay in Recognizing the Biden Transition Team and the National Security Implications

Katherine A. Shaw

Benjamin N. Cardozo School of Law, kshaw2@yu.edu

Ryan Goodman

NYU School of Law

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-online-pubs>



Part of the [National Security Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Shaw, Katherine A. and Goodman, Ryan, "The GSA's Delay in Recognizing the Biden Transition Team and the National Security Implications" (2020). *Online Publications*. 28.

Available At <https://larc.cardozo.yu.edu/faculty-online-pubs/28>

This News Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Online Publications by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

The GSA's Delay in Recognizing the Biden Transition Team and the National Security Implications

by [Ryan Goodman](#) and [Kate Shaw](#)

November 10, 2020

I. Who Is Responsible

Pressure is [mounting](#) on a usually low-profile government official to activate the full range of resources ordinarily provided to an incoming administration's presidential transition team. Under the [Presidential Transition Act](#) of 1963, a statute that has been revised a number of times since passage, it is not until the Administrator of the General Services Administration (GSA) "ascertain[s]" the "apparent successful candidate" of a presidential election that the president-elect and his transition team gain access to the office space, funds, briefings, and other government resources necessary to effect a smooth and effective transfer of power.

As we explain in detail below, GSA Administrator Emily Murphy's failure to make a timely ascertainment could have significant national security implications by putting the transition team in suspended animation, particularly in the midst of a global pandemic that is worsening by the day.

But the responsibility for this failure also lies elsewhere. Although a concession is by no means required by law, were Trump to have issued such a customary statement, the bureaucratic gears at the GSA would have more easily kicked into motion. The primary blame lies with Trump.

Responsibility also lies with those of his closest advisors and Republican leaders who have yet to urge the president to concede, or have appeared to credit the President's baseless fraud allegations. They have reportedly done so not due to the justness of Trump's cause, but to give him room to come to terms with his loss. Many elected Republicans have also failed to make statements congratulating or even acknowledging Biden as the ["apparent"](#) winner. Were they to instead make such statements, it could help bolster the GSA to move ahead with the process.

The restraint of these advisors and politicians may be motivated by a desire to preserve relations with Mr. Trump, but they should recognize the immense national security stakes that hang in the balance.

II. The Administrator's Role

All that said, the role of the GSA administrator in this matter should be straightforward, and there is no valid reason for her to wait. In 2000, the GSA Administrator took a no-action stance on ascertaining a winner of the presidential election, initially claiming it was because neither candidate had conceded, and later pointing to pending litigation. But he was roundly criticized for those positions. “Whatever factors the Administrator relied upon in making his decision, it is clear that the two that he articulated were uniquely poor choices in that they had been squarely considered and rejected by the authors of the Act,” wrote Todd J. Zjwicki in a [law review article](#) following his congressional testimony. Similarly, a scholar of the Presidential Transition Act, Paul C. Light [testified](#) before Congress in Nov. 2000:

Unfortunately, the Administrator of the General Service Administration . . . in a November 9 press advisory . . . said that the losing candidate would have to concede before it could determine the “apparent successful candidates.” In a November 27 press advisory, his agency dropped the concession requirement and said that continued legal challenges by both candidates rendered the election outcome “unclear and un-apparent.” *Both definitions would give future losing candidates extraordinary authority to delay transitions through legal challenges, whether legitimate or frivolous.* (our emphasis added)

These justifications, which many found deficient in 2000, are significantly more problematic today. Concessions are a norm of governance of precisely the sort President Trump has disregarded throughout his time in office; no one should expect him to offer a traditional concession at any point, and nothing should turn on his failure to make one. What’s more, while the litigation in Florida in 2000 involved a tiny number of votes in a single state that was required to put either candidate over 270 electoral votes, President Trump’s team would need to flip the results in at least three states – none of which is anywhere near as close as Florida in 2000, and none of which has seen any serious legal challenges. Neither recounts nor lawsuits, most of which border on frivolous, will change the results of the election. Neither Administrator Murphy nor GSA’s new General Counsel, Trent J. Benishek – a former White House lawyer who moved to GSA five days before the election – could reasonably come to any different conclusion.

Indeed, a clear message was included in a recent [letter](#) from the nonpartisan Center for Presidential Transition, signed by luminaries from previous Republican and Democratic administrations. “While there will be legal disputes requiring adjudication, the outcome is sufficiently clear that the transition process must now begin.”

III. National Security Implications

The Presidential Transition Act contemplates the provision of access and information to the president-elect and his team as quickly as possible after the day of the general election. As successive amendments to the Act make crystal clear, this is due in large part to national security concerns. The need to address a raging pandemic—the greatest threat currently facing America—would clearly qualify.

The Act states, for example, that classified briefings on national threats and military and covert operations “shall be provided to the President-elect as soon as possible after the date of the general elections.” The Act also refers to the President-Elect’s submitting the names of candidates for high level national security positions to the FBI or other relevant agency “as soon as possible after the date of the general elections held to determine the electors,” and those agencies are then required “undertake and complete as expeditiously as possible the background investigations necessary to provide appropriate security clearances.”

What could go wrong if those actions are suspended or delayed?

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. The 9/11 Commission Report noted:

[T]he 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.

The point is that delaying these processes such as obtaining background checks can create significant later delays in putting new officials into place and in some cases obtaining Senate confirmations. Delays in the transference of information with the incoming team can also obstruct the next administration’s ability to carry out existing and new policies. At this stage, each federal agency should have already completed a set of briefing materials for the incoming administration. But agencies may conclude that they are only to be shared once the Administrator has made her ascertainment.

Based on these concerns, the 9/11 Commission strongly recommended not simply maintaining normal time periods for presidential transitions, but expediting the procedures and access to information for the incoming team:

Since a catastrophic attack could occur with little or no notice, we should minimize as much as possible the disruption of national security policymaking during the change of administrations by accelerating the process for national security appointments. We think the process could be improved significantly so transitions can work more effectively and allow new officials to assume their new responsibilities as quickly as possible.

Beyond security clearances, classified briefings are a critical component of transitions. Such briefings are not only designed to prepare the president-elect and his leadership team; they also help ensure that none of the public remarks made by the president-elect, vice president-elect, or other transition officials inadvertently undermines or creates tension with existing U.S. strategies or activities. This is especially important now that leaders of foreign countries and the heads of [multinational organizations](#) have made clear that they view Biden as the President-Elect.

Finally, it is important to resolve any uncertainty in who will be the next president so as to minimize US vulnerabilities during a transition. As the Congressional Research Service assessed in a 2008 [report](#):

Resolving the presidential election in a timely manner is crucial to allowing the incoming Administration the time necessary to prepare for current and future national security challenges. The longer the presidential election results are delayed the less time the current Administration has to assist the new Administration, President-elect personnel decisions are delayed, and, some security observers would see *the U.S. as increasingly at risk due to the uncertainty in who will lead the country.*

This becomes all the more acute when President Trump starts taking drastic actions like firing the Secretary of Defense—with the potential for more such actions in the coming days.

One final point. We believe it is clear that there is no merit to any of President Trump's wild accusations of fraud; neither lawsuits nor recounts stand any chance of changing the results of the 2020 election. But the GSA Administrator can make her ascertainment without taking any public position on such questions. She can simply determine that Biden is the *apparent* winner, and that based on the important national-security interests at stake, Biden should be treated as president-elect for purposes of the Presidential Transition Act. The cost of not doing so could be catastrophically high.

About the Author(s)

Ryan Goodman

Ryan Goodman (@rgoodlaw) is co-editor-in-chief of Just Security and Anne and Joel Ehrenkranz Professor of Law at New York University School of Law.

Kate Shaw

Professor of Law at the Benjamin N. Cardozo School of Law. She served in the Obama White House Counsel's Office and is a member of the National Task Force on Election Crises. Follow her on Twitter (@kateashaw1).