NOTE

# INDEPENDENCE IN THE INTERREGNUM: DELAYED PRESIDENTIAL TRANSITIONS AND THE GSA ADMINISTRATOR'S ASCERTAINMENT UNDER THE PRESIDENTIAL TRANSITION ACT OF 1963

*Christopher D. Johnson*†



## INTRODUCTION

Who is Emily Murphy? Do not be alarmed if the name is not familiar. If you do know it, it is almost certainly because,

† J.D., Cornell Law School, 2021; Articles Editor, *Cornell Law Review*, Volume 106; B.S., Northwestern University, 2014. I am especially grateful for the critiques and insight Cornell Law Professor Michael Dorf provided for this Note. Tim Birchfield's review of part of the Note's administrative-law analysis is also much appreciated. I am particularly thankful for the love and support of my mother, father, two sisters, brother, and grandmother. Finally, I sincerely thank the *CLR* staff for all the hard work and care that went into preparing this Note for publication.

for a short while in November 2020, Murphy was one of the most powerful people in the federal government. As the Administrator of the General Services Administration ("GSA"), Murphy oversaw an Executive Branch agency whose portfolio includes, among other roles, managing and formulating policy for government property, procurement contracts, and information technology.[1] Charged with handling the nuts and bolts of other agencies' everyday work, the GSA—which itself was created in 1949 as a multi-agency merger—ordinarily draws little public notice. But in the days following election day 2020, Murphy, the Administrator heading the agency, faced a decision with major practical and political implications: whether to "ascertain[ ]" Joe Biden and Kamala Harris as the election's "apparent successful candidates" for President and Vice President.[2] Doing so would unlock $6.3 million for transition expenses, including, for an important example, compensation for office staff.[3]

Murphy was required to make this ascertainment under the Presidential Transition Act of 1963 ("PTA").[4] The PTA is designed to facilitate "orderly" presidential transitions, which is "not a partisan issue" and fundamentally about the "efficient and effective functioning of government for the people it serves."[5] Murphy's predecessors had ordinarily satisfied this statutory requirement promptly and without controversy.[6] But when Murphy made the ascertainment on November 23, 2020, more than two weeks had passed since it became clear that Biden would be the nation's forty-sixth President.[7] The Biden transition continued nonetheless during that period, but it

---

1 *See* 41 C.F.R. § 105-53.112 (2020); *Our Mission's Evolution*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/about-us/mission-and-background/our-missions-evolution [https://perma.cc/93QF-PE8B] (last visited Dec. 15, 2020).

2 3 U.S.C. § 102 note (Presidential Transition Act of 1963) § 3(c) (2018).

3 *Id.* § 3(a); Letter from Emily W. Murphy, U.S. Gen. Servs. Adm'r, to Joseph R. Biden, at 2 (Nov. 23, 2020) [hereinafter Ascertainment Letter], https://www.gsa.gov/cdnstatic/2020-11-23_Hon_Murphy_to_Hon_Biden_0.pdf [https://perma.cc/3PT7-7RLD].

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

5 § 102 note (PTA) § 2; *The Elements of Presidential Transitions: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Reform*, 116th Cong. 45:34–:41 (2020) [hereinafter *2020 Election Hearing*], https://www.youtube.com/watch?v=GGw6a-eU1fs&feature=Emb_logo [https://perma.cc/VY4Y-AWND] (statement of Lisa Brown, agency review codirector for the Barack Obama-Joe Biden transition).

6 The one notable exception is the contested 2000 election. *See infra* subpart I.B.

7 Ascertainment Letter, *supra* note 3, at 1; *infra* subpart I.C.

could not operate at full speed without the resources the ascertainment makes available to transition teams.

A delayed transition is no trivial matter. During transitions, the president-elect seeks to choose nominees for thousands of appointed positions, prepare a legislative and executive agenda, and plan to fulfill campaign policy promises, among other goals.[8] The potential knock-on effects of a delay range from the debilitating (a first term characterized more by learning how to govern than actually governing) to the devastating (a failure to detect a national security threat).[9] To note one tragic example, the 9/11 Commission Report pointed to the difficulty the Bush administration faced in timely making important appointments due to the shortened transition period after the contested 2000 election.[10] Michael Lewis has written that the interregnum between election day and inauguration day "has the feel of an AP chemistry class to which half the students have turned up late and are forced to scramble to grab the notes taken by the other half, before the final."[11]

If presidential transitions are so important, should a political appointee whose performance is subject to the control and direction of the outgoing President have virtually unfettered discretion to determine whether they have the resources they need to succeed?[12] This Note answers that question in the negative. It argues that the ascertainment the PTA assigns to the GSA Administrator should be an independent determination insulated from political pressure exerted by the President.

---

8 P'SHIP FOR PUB. SERV.: CTR. FOR PRESIDENTIAL TRANSITION, PRESIDENTIAL TRANSITION GUIDE: A COMPREHENSIVE GUIDE TO THE ACTIVITIES REQUIRED DURING THE TRANSITION 3 (2020), https://presidentialtransition.org/wp-content/uploads/sites/6/2018/01/Presidential-Transition-Guide-2020.pdf [https://perma.cc/UT2W-72PC].

9 The PTA states that "[a]ny disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people." § 102 note (PTA) § 2.

10 *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 198 (2004) [hereinafter 9/11 REPORT], https://govinfo.library.unt.edu/911/report/911Report.pdf [https://perma.cc/TW5N-DKDL].

11 MICHAEL LEWIS, THE FIFTH RISK 38 (2018); *cf.* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 240 (1990 ed.) (presenting two definitions of a presidential transition, the first a narrow one covering the "time span between election and inaugural" and the second a broad one covering the time until the President and "principal associates become familiar with the work they have to do").

12 40 U.S.C. § 302 (2018). Notwithstanding their significance to incoming administrations in particular and the functioning of the federal government in general, presidential transitions have drawn only scant scholarly attention. *See* Joshua P. Zoffer, Note, *The Law of Presidential Transitions*, 129 YALE L.J. 2500, 2506, 2506 n.19 (2020).

As it stands now, the ascertainment is an unguided decision left to a political appointee.[13] This arrangement carries the troubling potential for an outgoing administration to engage in partisan sabotage that undermines the smooth transfer of power. To be clear, this Note does not contend that the ascertainment, in its current form under the PTA, is unconstitutional.[14] Instead, it makes a policy-based claim for independence from political influence the President can bring to bear on the ascertainment through the GSA Administrator. In doing so, it draws on a theory of independence expounded to defend the Federal Reserve's independent structure.

In a 2016 article praising the Fed's role in responding to the 2008 financial crisis, Professors Neil Buchanan and Michael Dorf argued that the desire for subject-matter expertise, in and of itself, cannot justify independence in agencies.[15] In their view, there must be a "special" reason for independence.[16] For the Fed, that reason is the capacity for "self-dealing" through the manipulation of monetary policy to distort the political process.[17] We shall see in Part III that Professor Buchanan and Dorf's framework for Fed independence is well suited to a claim for independence in the ascertainment assigned to the GSA Administrator by the PTA.

This Note considers reform proposals that could make the ascertainment an independent process. It ultimately, grudgingly settles on transferring the ascertainment from the GSA Administrator to a multi-member body as the best option. Yet while the PTA has been amended several times since it was signed into law in 1964 (and conceivably could be subject to

---

13 *See* 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

14 Although the topic is beyond the scope of this Note, professors Jack Beermann and William Marshall have suggested possible sources of constitutional concerns involving presidential transitions. Arguing generally that during transitions the sitting President is subject to "substantial and significant obligations" flowing from certain constitutional duties—and correlatively disagreeing with the notion that transitions are governed only by rules of "comity without legal force"—they sketch out a hypothetical in which an outgoing administration adopts a strategy of blanket refusal to assist or advise the incoming one. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1256, 1275 (2006). Professors Beermann and Marshall separately consider possible violations of the Oath Clause and Take Care Clause. *See id.* at 1275–76, 1278–79; U.S. CONST. art. II, §§ 1, 3.

15 *See* Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 67–68 (2016).

16 *Id.* at 68.

17 *See id.* at 69–70.

further amendment in the future),[18] this Note engages in an in-depth analysis of an important issue arising under the PTA as presently constructed: the possibility of legal action in the event the GSA Administrator unjustifiably withholds the ascertainment. As an illustration, it explores the possibility of an Administrative Procedure Act ("APA") claim that Murphy's delayed ascertainment after the 2020 election was unlawful on the ground that it was "arbitrary [or] capricious."[19] The Note concludes that such a claim is unlikely to have succeeded.

One question the reader may have at this point is why, in light of there not being another presidential election until 2024, a deep scholarly analysis of the PTA is really necessary right now. Here are three of the main reasons. First, it is a core premise of our representative democracy that power will be transferred peacefully between presidential administrations of opposing parties,[20] and politically motivated ascertainment delays are a grave threat to that core premise. Second, it is a fertile time for change. The aftermath of the 2020 election foregrounded a glaring issue—namely, the possibility of politically motivated ascertainment delays—that Congress can and should address before the next election, and this Note can aid that effort both through its theoretical case for independence and its reform proposals. Third, this Note argues that ascertainment-delay scenarios of the type that arose following the 2020 election are likely to crop up regularly after future elections because of the precedent set by Murphy's conduct.

This Note proceeds in four parts. Part I describes the purpose and relevant provisions of the PTA, explains its ascertainment trigger, and summarizes both the events surrounding and explanation provided for Murphy's delayed ascertainment after the 2020 election. Part II fleshes out the possibility of an APA challenge to that delay. Part III explicates the theoretical framework for this Note's call for independence and applies it to the ascertainment. Part IV briefly explores reform proposals. A conclusion follows.

---

18 Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (1964) (codified at 3 U.S.C. § 102 note); *see infra* note 31.

19 5 U.S.C. § 706(2)(A) (2018).

20 *See, e.g.*, S. Res. 718, 116th Cong. (2020); H. Res. 1155, 116th Cong. (2020) (resolutions passed by the House of Representatives and Senate stating that the "United States is founded on the principle that our Government derives its power from the consent of the governed" and "the people have the right to change their elected leaders through elections").

## I
## THE PTA, THE ASCERTAINMENT, AND THE 2020 ELECTION

### A. The PTA's Purpose and Relevant Provisions

The bill that became the PTA was introduced at the recommendation of a commission on campaign finance appointed by President John F. Kennedy.[21] The House report accompanying the bill explained that, in view of the federal government's "size and complexity," it was a "vital necessity" for the transition "machinery" to be "as smooth as possible" and for there to be adequate resources to "orient the new national leader."[22] Indeed, as congressman Dante Fascell, the bill's sponsor, remarked on the House floor, new presidents "begin[ ] working for the Government the morning after the election."[23] Recognizing the importance of this transition work, the PTA asserts that the "national interest" requires transfers of power to "assure continuity in the faithful execution of the laws" and the "conduct" of the federal government's domestic and foreign affairs.[24]

---

21 H.R. REP. NO. 88-301, at 4, 8 (1963). In its recommendation, the commission endorsed "institutionaliz[ing]" transitions between an outgoing administration of one party and an incoming administration of a different party. Recommendation No. 8, Report of the President's Commission on Campaign Costs, *reprinted in id.* at 8.

22 H.R. REP. NO. 88-301, at 4 (1963).

23 109 CONG. REC. 3758 (1963) (statement of Rep. Dante Fascell). In a different discussion of the bill on the House floor, another member of Congress may have exaggerated when he asserted that during presidential transitions the President is "called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office." 109 CONG. REC. 13348 (1963) (statement of Rep. Charles Joelson).

24 3 U.S.C. § 102 note (PTA) § 2 (2018). In addition to facilitating orderly transfers of power, an ancillary purpose of the PTA was to lessen private funding of presidential transitions. *See, e.g.*, 109 CONG. REC. 13346 (1963) (statement of Rep. Benjamin Rosenthal) (arguing that the government should fund transition costs to prevent "special group[s] or special interests from anxiously coming forward to help pay government expense"). Moreover, the PTA is explicit in acknowledging the national security stakes of transitions, providing that disruptions caused by a transfer of power can "produce results detrimental to the safety and well-being" of the U.S. and its population. § 102 note (PTA) § 2. The 9/11 Commission Report underscored these stakes, and the PTA was amended three years after the attacks to better prepare incoming administrations for national security challenges. *See* 9/11 REPORT, *supra* note 10, at 422; Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601, 118 Stat. 3638, 3856–57 (2004) (codified at 50 U.S.C. § 401 note). According to the PTA bill's sponsor, one national security concern in the early 1960s was that "[o]ur worldwide Communist adversaries are always ready to act at any moment of weakness in our governmental organization." 108 CONG. REC. 13182 (1962) (statement of Rep. Dante Fascell). For the 2020 election, national security concerns included cyber and terrorist threats, on top of the public health crisis caused by COVID-19—America's "greatest threat" at the time. Ryan Goodman & Kate Shaw, *The GSA's Delay in Recognizing the Biden Transition Team and the National Security*

To effectuate smooth transitions, the PTA, through the GSA, provides support to the president-elect and vice president-elect in various forms, including office space and supplies; necessary communications services; and funds for travel, staff and consultant compensation, as well as preparatory workshops and briefings.[25] For leading presidential and vice-presidential candidates, the PTA offers transition assistance even before the November election.[26] But the full panoply of "services and facilities" outlined in section 3 of the PTA—for example, a classified summary for the president-elect of national security threats, covert or military operations, and pending decisions for the potential use of military force—is unavailable until the "ascertain[ment]" of the election's "apparent[ly] successful" presidential and vice-presidential candidates.[27] The official tasked with making the ascertainment is the GSA Administrator, a political appointee.[28] Moreover, the PTA authorizes the appropriation to the GSA Administrator of funds that "may be necessary" to carry out the PTA's purposes, though it imposes an inflation-adjusted cap on the amount appropriated for the provision of facilities and services to the president-elect and vice president-elect pursuant to section 3.[29] For the Biden administration's transition to power after the 2020 election, the GSA Administrator's ascertainment freed up $9.9 million.[30]

The PTA has been amended several times for various transition issues.[31] One circumstance the amendments did not

---

*Implications*, JUST SEC. (Nov. 10, 2020), https://www.justsecurity.org/73317/the-gsas-delay-in-recognizing-the-biden-transition-team-and-the-national-security-implications/ [https://perma.cc/YJ3H-95CR]; U.S. DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT: OCTOBER 2020 3–5 (2020), https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf [https://perma.cc/7L9S-WRDG].

25 § 102 note (PTA) § 3(a).

26 *See id.* § 3(h)(1)-(2), (4).

27 *Id.* § 3(a), (c).

28 GSA Administrator is a position that requires appointment by the President with the Senate's consent and lacks statutory for-cause removal protection. 40 U.S.C. § 302(a) (2018). The Administrator's performance of functions is subject to the President's "direction and control." *Id.*

29 3 U.S.C. § 102 note (PTA) § 7 (2018).

30 The GSA requested $9.9 million for "transition activities." 2020 PRESIDENTIAL TRANSITION ACTIVITIES: PROGRESS REPORT AS OF MAY 2020. Of that $9.9 million, $6.3 million was specifically reserved for transition facilities and services available to the president-elect and vice president-elect under section 3 of the PTA. Ascertainment Letter, *supra* note 3, at 2.

31 *See* Presidential Transition Enhancement Act of 2019, Pub. L. No. 116-121, § 2(b), 134 Stat. 138, 139–41 (2020) (codified at 3 U.S.C. § 1 note); Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvement Act of 2015, Pub. L. No. 114-136, § 2, 130 Stat. 301, 301–03 (2016) (codified at 5 U.S.C.

adequately provide for is a noncompliant outgoing administration withholding the ascertainment. It does not seem that noncompliance was viewed as an overwhelmingly likely possibility in the lead up to the PTA's enactment in 1964. The House report accompanying the PTA bill explained that while the two new presidents who had been inaugurated on January 20, Kennedy and Dwight D. Eisenhower,[32] benefited from their access to required information and their predecessors' cooperation, it was "conceivabl[e]" that "unfortunate results" could flow from allowing outgoing presidents discretion over these issues.[33] Thus, "remote as it may" have seemed at the time, noncooperation is a possibility the report urged guarding against.[34]

### B. The GSA Administrator's Duty to "Ascertain" the "Apparent" Election Winners

The previous subpart introduced the "ascertain[ment]" trigger in the PTA.[35] This subpart will analyze the provision governing that trigger in greater detail. The PTA directs the GSA Administrator to ascertain the "apparent successful candidates" for President and Vice President in the general election.[36] On the surface, the PTA's call for an ascertainment of apparent election success appears hopelessly subjective. One might think the PTA supplied clear standards, or at least suggestive guideposts, for this task. After all, in any given election

---

§ 101 note); Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, § 2, 124 Stat. 3045, 3045–47 (2010) (codified at 3 U.S.C. § 1 note); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601, 118 Stat. 3638, 3856–57 (2004) (codified at 50 U.S.C. § 401 note); Presidential Transition Act of 2000, Pub. L. No. 106-293, § 2, 114 Stat. 711, 711–12 (2000) (codified at 3 U.S.C. § 1 note); Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 3, 102 Stat. 985, 985–86 (1988) (codified at 3 U.S.C. § 102 note) (reflecting the PTA's history of amendments, which have addressed a range of transition matters).

32 Presidential transition periods were significantly reduced in 1933 by the ratification of the twentieth amendment, which pushed inauguration day up to January 20 from March 4. U.S. CONST. amend. XX, § 1. In 2020–21, seventy-eight days separated election day (November 3) and inauguration day (January 20). By the time Murphy made the ascertainment, there were fifty-eight days left in the transition period.

33 H.R. REP. NO. 88-301, at 4, 7 (1963).

34 *Id.* at 4. Echoing that sentiment, one lawmaker characterized the PTA's ascertainment provision as a "particularly safe section." 109 CONG. REC. 13345 (1963) (statement of Rep. Clarence Brown).

35 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

36 *Id.* Section 3(c) provides that the "terms 'President-elect' and 'Vice-President-elect' as used in [the PTA] shall mean such persons as are the apparent successful candidates for the office of President and Vice President, respectively, as ascertained by the [GSA] Administrator following the general elections" held for determining presidential and vice-presidential electors. *Id.*

cycle, at least eight weeks pass between election day and January 6, when the election results are finalized under federal law.[37] Surely there is some legally significant event or process during that period incorporated into the PTA as a definitive marker for a candidate's "apparent" success, right?[38]

The short answer is no. The PTA, as Murphy explained upon making the ascertainment in November 2020, offers "no procedures or standards" for it.[39] True, the PTA contemplates a pivotal difference between a candidate's "apparent" and "actual" success.[40] And the statute does specify that the GSA administrator is to make the ascertainment "following" the election.[41] But that specification does not count for much because it is plain that there can be no "apparent" successful candidate until after votes are cast on the Tuesday following the first Monday in November.[42] The term "apparent," Justice Scalia might have noted, is one no lawyer needs to "open up a dictionary in order to realize [its] capaciousness."[43] No less opaque is the GSA's description of the Administrator's role in the ascertainment: making it "once a winner is clear based on the process laid out in the Constitution."[44]

What we are left with on our quixotic quest for clarity is a somewhat informative House floor debate for the bill that became the PTA and an unilluminating line of interpretations from scholars and past GSA administrators. Start with the House floor debate. In it, the PTA bill sponsor was asked about the possibility of the ascertainment providing "psychological" advantages to candidates in the eyes of "independent"—other-

---

37 Elections take place every fourth year on the Tuesday following the first Monday in November. 3 U.S.C. § 1. In 2020, that day was November 3. Congress is statutorily required to meet on January 6 after elections to count electoral votes and announce the elected President and Vice President. 3 U.S.C. § 15. A rigidly formalistic interpretation of this process would withhold use of the terms "president-elect" and "vice president-elect" until the latter date. For example, one lawmaker remarked during a House floor debate over the PTA bill that no person is the president-elect "until after the Congress has had an opportunity to examine the ballots cast in the electoral college." 109 CONG. REC. 13349 (1963) (statement of Rep. James Haley).

38 § 102 note (PTA) § 3(c).

39 Ascertainment Letter, *supra* note 3, at 1.

40 *See* Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. REV. 1573, 1583.

41 § 102 note (PTA) § 3(c).

42 *Id.*; § 1.

43 Michigan v. Env't Prot. Agency, 576 U.S. 743, 752 (2015); § 102 note (PTA) § 3(c).

44 *GSA's Role in Presidential Transitions*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/about-us/mission-and-background/gsas-role-in-presidential-transitions [https://perma.cc/AU8P-4LDB] (last visited Dec. 21, 2020).

wise known as "faithless"—electors who do not necessarily adhere to the near-universal convention of voting for the candidate who won their state's popular vote.[45] The bill sponsor replied that he thought such advantages were unlikely to materialize because the bill does not require that an ascertainment be made.[46] The bill sponsor explained that he did not envision the GSA Administrator struggling to make the ascertainment because the operative language was pulled from a law authorizing the Secret Service to protect the president-elect and vice president-elect, and there had been "absolutely no difficulty" in making the analogous ascertainment for that law.[47] In a "close contest" or if the GSA Administrator had "any question" about ascertaining the apparent successful candidates for President and Vice President, which the bill sponsor viewed as an "unlikely proposition," the bill would be "inoperative" and the Administrator "simply would not make" the ascertainment.[48]

As for interpretations of the PTA's ascertainment, one that is especially relevant to the aftermath of the 2020 election is that of David Barram, the Administrator in charge of the GSA when Republican George W. Bush narrowly defeated Democrat Al Gore in the 2000 election.[49] At a congressional hearing held about a month after election day—and before the Supreme Court issued a decision that in effect ended the election—Barram spoke about why he had not yet "ascertained" either Bush or Gore as the "apparent[ly] successful" presidential candidate.[50] Barram explained that the PTA "does not authorize me

---

45 109 CONG. REC. 13348 (1963) (statement of Rep. H.R. Gross). In future elections, there may be even fewer faithless electors in light of the Supreme Court's 2020 decision holding that states can penalize electors who breach pledges to vote for their party's nominee. Chiafolo v. Washington, 140 S. Ct. 2316, 2323 (2020).

46 *See* 109 CONG. REC. 13348 (1963) (statement of Rep. Dante Fascell).

47 *Id.*; Act of Oct. 15, 1962, Pub. L. No. 87-829, §§ 1, 3, 76 Stat. 956, 956 (1962).

48 109 CONG. REC. 13348–49 (statement of Rep. Dante Fascell).

49 *Past Administrators*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/about-us/organization/office-of-the-administrator/past-administrators [https://perma.cc/K38T-F4PD] (last visited Dec. 17, 2020).

50 *See Transitioning to a New Administration: Can the Next President Be Ready?: Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the H. Comm. on Gov't Reform*, 106th Cong. 69 (2000) [hereinafter *2000 Election Hearing*] (statement of David Barram, GSA Administrator); 3 U.S.C. § 102 note (PTA) § 3(c) (2018). In the 2000 election, an extremely close vote tally in Florida—537 out of roughly six million total votes—precipitated a spate of litigation, multiple recounts, and a controversial U.S. Supreme Court decision disallowing a statewide recount authorized by the Florida Supreme Court. Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam).

to pick the next President or predict who the next President will be" but instead "creates a simple common-sense requirement for me to identify the President-elect after it is clear that one candidate has won the election."[51] Barram's understanding of the ascertainment tracks the view held by some scholars that the GSA assigns the Administrator a "ministerial" function rather than a judgment entailing broad discretion.[52] One such scholar put forward a different interpretation of the ascertainment dealing not with the Administrator's discretion in making it but rather when it can be withheld: only "under the most extreme and uncertain of circumstances."[53]

Of course, neither the House floor debate nor the different interpretations of the PTA's ascertainment trigger definitively resolve what an Administrator like Murphy should do in any given situation. What about this one: a President running for re-election who refuses to concede or otherwise accept the election results, which the President pursues frivolous litigation and undemocratic schemes to overturn despite suffering defeat of a considerable margin in both the Electoral College and popular vote?

### C. The GSA Administrator's Delay After the 2020 Election

In the next Part, this Note fleshes out a possible claim under the Administrative Procedure Act that Murphy's withheld ascertainment was unlawful because it was "arbitrary or capricious."[54] Before doing so, it briefly summarizes what took place in the wake of the 2020 election.

At the end of election day, Tuesday, November 3, it was not clear whether Joe Biden or Donald Trump would receive the

---

51 *2000 Election Hearing*, *supra* note 50, at 69 (statement of David Barram, GSA Administrator). More recently, Denise Turner Roth, the Administrator in charge of the GSA when Donald Trump won the 2016 presidential election, described the ascertainment as a determination involving "wide discretion" and noted that the Administrator has "latitude to make the ascertainment because the presidential transition is too important to be left to political games." Denise Turner Roth, *Obama's GSA Administrator: Presidential Transition Is Too Important to Politicize*, CNN (Nov. 18, 2020), https://www.cnn.com/2020/11/18/opinions/obama-gsa-administrator-transition-turner-roth/index.html [https://perma.cc/M7N4-D5RF].

52 *See* 2000 *Election Hearing*, *supra* note 50, at 105–06, 133, 148 (statements of Todd Zywicki, associate professor of law, George Mason University School of Law; Norman J. Ornstein, resident scholar, American Enterprise Institute for Policy Research; and Paul Light, director, Center for Public Service, Brookings Institution).

53 *Id.* at 109 (written statement of Paul Light).

54 5 U.S.C. § 706(2)(A) (2018).

required 270-electoral vote majority in the Electoral College.[55] Not until several days later did media organizations and the major television networks call the race for Biden.[56] Yet those calls did not prompt Murphy to make the ascertainment, and the GSA did not explain the delay.[57] Meanwhile, lawyers working on Trump's behalf pursued litigation to challenge the results in key states Trump lost,[58] and Trump himself leveled baseless allegations of widespread voter fraud, repeatedly casting doubt on the fairness and integrity of the election.[59]

As more time passed after the Biden-Harris ticket's emergence as the obvious winner of the 2020 election, the GSA stated that the GSA and Murphy would follow the precedent set by the agency after the 2000 election.[60] Murphy reportedly felt "extreme pressure" in connection with her ascertainment responsibility and feared that Trump may fire her.[61] Murphy ultimately did not publicly acknowledge making the ascertainment until November 23, about three weeks after election day.[62]

In a letter to Joe Biden acknowledging the ascertainment, Murphy cited the following as her rationale: "recent developments involving legal challenges and certifications of election

---

55 *See* Domenico Montanaro, *Results Still Unclear and 5 Other Takeaways from Election Night 2020*, NPR (Nov. 4, 2020), https://www.npr.org/2020/11/04/931083534/6-takeaways-from-election-night-2020 [https://perma.cc/C3HM-EMZN].

56 David Bauder, *After Waiting Game, Media Moves Swiftly to Call Biden Winner*, AP NEWS (Nov. 7, 2020), https://apnews.com/article/media-calls-joe-biden-winner-bee69f9d1d32e84d68e6164ea956e67a [https://perma.cc/U4MM-ZX5T].

57 *See* Zeke Miller, *What's Ascertainment? The Green Light to Launch Transition*, AP NEWS (Nov. 9, 2020), https://apnews.com/article/joe-biden-transition-ascertainment-238c8bd1733abb9d5419678e427ea4de [https://perma.cc/KZ2S-RFM4].

58 *See Case Tracker*, ELECTION LAW AT OHIO ST., https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords&status=All&state=all&topic=25 [https://perma.cc/H8GQ-AR7F] (last visited Dec. 20, 2020) (listing the plethora of pending litigation matters disputing the outcome of the election).

59 *See, e.g.*, Donald Trump, President, Remarks on the Election at the Press Briefing Room (Nov. 5, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-election/ [https://perma.cc/HNV7-8FQ5] (claiming "tremendous corruption and fraud" in connection with mail-in ballots).

60 Lisa Rein, Jonathan O'Connell, Carol D. Leonnig & Josh Dawsey, *As Democrats Fume, the Trump Appointee who Can Start the Biden Transition Is in no Hurry*, WASH. POST (Nov. 20, 2020), https://www.washingtonpost.com/politics/murphy-trump-biden-transition-/2020/11/20/93c42044-29d2-11eb-92b7-6ef17b3fe3b4_story.html [https://perma.cc/5VUU-8XJU].

61 *Id.*

62 Ascertainment Letter, *supra* note 3, at 1.

results."[63] Murphy stated that her decision was "based on the law and available facts," and that it was reached independently, with no pressure from "any Executive Branch official" about the ascertainment's "substance or timing."[64] Murphy clarified that she "did not receive any direction" to withhold the ascertainment, that she did not make it "out of fear or favoritism," and that she "strongly" believes the PTA mandates the GSA Administrator to "ascertain, not impose, the apparent president-elect."[65] Because the PTA does not supply any "procedures or standards" for the ascertainment, Murphy explained, she relied on precedents set after previous elections that "involv[ed] legal challenges and incomplete counts."[66]

In tweets posted the same day the GSA publicly released Murphy's ascertainment, Trump thanked Murphy for "steadfast dedication and loyalty" to the U.S. and stated that he was "recommending that Emily and her team do what needs to be done with regard to initial protocols."[67]

## II
## WAS THE DELAYED ASCERTAINMENT "ARBITRARY OR CAPRICIOUS"?

Biden's transition team reportedly considered pursuing legal action over Murphy's delayed "ascertain[ment]" but ultimately decided against it.[68] This Part analyzes one possible claim—that the delayed ascertainment was unlawful because it was "arbitrary [or] capricious" within the meaning of the Administrative Procedure Act.[69] Before turning to the analysis, it

---

63 *Id.* The rationale Murphy provided for making the ascertainment—though not the timing of it—is similar to the rationale Denise Turner Roth, the GSA's Administrator during the 2016 election, provided for ascertaining Donald Trump as the apparently successful presidential candidate the day after the election. *See* Roth, *supra* note 51.

64 Ascertainment Letter, *supra* note 3, at 1.

65 *Id.*

66 *Id.* Murphy also asserted that, rather than "pick[ing] or certify[ing]" presidential election winners, the GSA Administrator has an "extremely narrow" role under the PTA that consists of making available transition support. *Id.* at 2.

67 *Trump Twitter* Archive, https://www.thetrumparchive.com/ [https://perma.cc/3JWS-3SEH] (last visited Dec. 1, 2021).

68 3 U.S.C. § 102 note (PTA) § 3(c) (2018); Molly Nagle, Lucien Bruggeman, Katherine Faulders & Benjamin Siegel, *Biden Team Says Legal Action is 'Certainly a Possibility' as Agency's Delay Hampers Transition*, ABC NEWS (Nov. 10, 2020), https://abcnews.go.com/Politics/biden-team-legal-action-possibility-agencys-delay-hampers/story?id=74121057 [https://perma.cc/PU89-UZEK].

69 5 U.S.C. § 706(2)(A) (2018). A different question under the APA would be whether the ascertainment could have been compelled on the ground that it was "unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The Supreme Court has clarified that the only circumstance in which such a claim can succeed is

is worth commenting on the utility of this exercise. Murphy withheld the ascertainment in a distinct factual context: the aftermath of the 2020 election, which President Joe Biden and Vice President Kamala Harris won both "apparent[ly]" and actually.[70] It is theoretically possible that no similar scenario will unfold after the 2024 election or any election after that one. But it seems more likely that similar situations *will* arise after future elections, and that they will do so with troubling regularity. Why? Murphy's conduct set a precedent that will not soon fade from memory for outgoing presidential administrations transferring power to administrations of the opposing political party.[71] So if, following in Murphy's footsteps, President Biden's GSA administrator or a successor refuses to make the ascertainment after election day even though one presidential ticket has clearly emerged victorious, legal action will again surface as a possibility. When it does, the 2020 election will be the most important reference point for analyzing the merits of any case.

---

when the claimant alleges that the agency "failed to take a *discrete* agency action that it is *required to take*." Norton v. S. Utah Wilderness All. (SUWA), 542 U.S. 55, 64 (2004). A close reading of the PTA reveals that the statute does not actually require the GSA Administrator to make the ascertainment. The relevant provision phrases the Administrator's duty in the passive voice, providing that the terms "president-elect" and "vice president-elect" are defined as the election's "apparent" successful candidates, "as ascertained by" the Administrator. 3 U.S.C. § 102 note (PTA) § 3(c) (2018). There is no requirement phrased in the form of "shall" or a similar word for the ascertainment trigger in particular (though there is elsewhere in the ascertainment provision, which uses "shall mean" to articulate definitions of "president-elect" and "vice president-elect"). *Id.* Moreover, the legislative history reinforces that, in closely contested elections, an Administrator with doubt about the identities of the election's apparently successful presidential and vice-presidential candidates should refrain from making the ascertainment. *See supra* subpart I.B. Because the PTA did not legally require Murphy to ascertain Joe Biden as the election's apparent winner at any time—much less within a couple weeks after election day, when a hypothetical legal challenge would have been filed—a section 706(1) claim likely would have failed. *See SUWA*, 542 U.S. at 64–65.

70 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

71 Note, too, that if the recent past is any guide, we will continue to have close presidential elections. The 2020 presidential election was the ninth consecutive time in which the major-party candidates were separated by a popular-vote margin of fewer than ten percentage points. Geoffrey Skelley, *Are Blowout Presidential Elections a Thing of the Past?*, FIVETHIRTYEIGHT (May 28, 2019), https://fivethirtyeight.com/features/are-blowout-presidential-elections-a-thing-of-the-past/ [https://perma.cc/Q223-LELZ]; *2020 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS [hereinafter *Elections Atlas 2020*], https://uselectionatlas.org/RESULTS/national.php?year=2020&f=0&off=0&elect=0 [https://perma.cc/Z3BV-J3TE] (last visited Dec. 26, 2020). A narrow victory margin in the general election is—or at least should be—a factual predicate to any defensible ascertainment delay.

For simplicity, this analysis of a potential arbitrary or capricious claim under the APA will rely on the rationale Murphy provided in the ascertainment letter to Biden—namely that she was making the ascertainment because of "recent developments involving legal challenges and certifications of election results," and that as precedent she relied on previous elections that involved "legal challenges and incomplete counts."[72] This Note will proceed on the reasonable assumption that the precedent Murphy primarily considered is the 2000 election.[73] Relying solely on the rationale provided in the ascertainment letter—and not, for example, on anonymously sourced news reports—is consistent with administrative law's "foundational principle" that courts can "uphold agency action only on the grounds that the agency invoked when it took the action."[74] While not the focus of this Note's analysis, rationales other than those provided in the Administrator's official acknowledgement of the ascertainment—including purely political ones, such as the desire to show loyalty to the party of the sitting President—could become relevant if there is credible evidence that the rationales in the official acknowledgement are merely pretexts.[75]

---

72 Ascertainment Letter, *supra* note 3, at 1.

73 This assumption is a reasonable one for at least two reasons. First, in response to inquiries from media outlets after election day, the GSA communicated that the agency and Murphy were following the GSA's precedent from 2000. *See supra* note 60 and accompanying text. Second, before election day, Murphy reportedly discussed with former GSA Administrator David Barram the ascertainment he made after the 2000 election. Aamer Madhani, *Murphy's Choice: Fed Official Has Say on Transition Launch*, AP NEWS (Nov. 17, 2020), https://apnews.com/article/emily-murphy-say-transitional-launch-110eea5e33860598a0e177708081dd47 [https://perma.cc/3XTZ-VDRH].

74 Michigan v. EPA, 576 U.S. 743, 758 (2015).

75 A recent Supreme Court case involving the Trump administration's attempt to add a citizenship question to the census questionnaire speaks directly to how federal courts can address allegations of pretext. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019). In a case involving such allegations, a court could not reject the rationales provided in an official acknowledgement of the ascertainment on the ground that, in addition to the reasons articulated in the acknowledgement, the GSA Administrator "might also have had other unstated reasons." *Id.* at 2573. The possibility that an ascertainment "might have been influenced by political considerations or prompted by an Administration's priorities" also would not suffice to invalidate it. *Id.* Yet a court could inquire into whether there is a "significant mismatch between the [ascertainment] the [Administrator] made and the rationale" she provided. *Id.* at 2575. Such a "disconnect" could lead to the conclusion that the rationales provided in the official acknowledgement were "distraction[s]" rather than "reasoned explanation[s]." *Id.* at 2575–76. A court need not "exhibit a naiveté from which ordinary citizens are free" when evaluating the Administrator's explanation for the ascertainment. *Id.* at 2575 (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

### A. Preliminary Hurdles

We begin with a couple of preliminaries. The GSA is an agency within the meaning of the APA's judicial review provisions,[76] and it is unlikely that either standing or the requirement that there be a cause of action would be a barrier to suit.[77] A more interesting question is whether the contemplated arbitrary or capricious claim would have satisfied the requirement for APA judicial review that there be "final agency action for which there is no other adequate" court remedy.[78] The Supreme Court has stated that two conditions must be met to satisfy this requirement: that the contested agency action (1) "mark[s] the 'consummation' of the agency's decisionmaking process"; and (2) either "legal consequences will flow from" it or "rights or obligations have been determined" by it.[79] It is

---

76 The GSA is an "agency in the executive branch" that qualifies as an "authority" of the U.S. government. 40 U.S.C. § 301 (2018); 5 U.S.C. § 701(b) (2018).

77 There must be "at least one plaintiff" with standing; as the president-elect, Biden would have qualified. *Dept' of Com.*, 139 S. Ct. at 2565. The Supreme Court has explained that an APA claimant must pass two standing tests: (1) the constitutional standing test, which is rooted in Article III's case-or-controversy requirement, and (2) the zone-of-interests test, which is rooted in the APA's standing provision and is properly understood as an inquiry into whether the claimant has a "legislatively conferred cause of action." *See* U.S. CONST. art. III, § 2; 5 U.S.C. § 702 (2018); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012). For Article III standing, Biden would have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision:" Biden would have been asking a federal court to invalidate the GSA Administrator's decision to delay publicly recognizing Biden and Harris as the election's "apparent" winners through the ascertainment, which deprived his transition team of millions in resources. 3 U.S.C. § 102 note (PTA) § 3(c) (2018); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). Turning to the cause-of-action requirement under the zone-of-interests test, the issue would have been whether Biden's interest was "arguably within the zone of interests to be protected or regulated by" the PTA. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 395–96 (1987) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp., 397 U.S. 150, 153 (1970)). This test is not designed to be "especially demanding," with no need for an "indication of congressional purpose to benefit" the APA claimant. *Id.* at 399–40. It is clear that Biden's interest—the smooth and sufficiently resourced operation of his transition team's preparations for a transfer of power—is at least "arguably" within the zone of interests the PTA protects. *Id.* at 395–96 (quoting *Data Processing*, 397 U.S. at 153). For example, the PTA states that its purpose is to "promote the orderly transfer of the executive power in connection with" the transition from a sitting to a new President. § 102 note (PTA) § 2.

78 5 U.S.C. § 704 (2018).

79 Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted). The Court has adopted a "pragmatic' approach" for evaluating the finality of agency action. U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016).

doubtful that Biden would have been able to satisfy both conditions. Although the second condition may have been met because there were "legal consequences" that flowed from Murphy's withholding of the ascertainment—namely, the nontriggering of the full suite of transition assistance available under section 3 of the PTA—the first condition would have been problematic. The main argument standing in Biden's way would be that up until when Murphy ultimately acknowledged making the ascertainment in the November 23 letter to Biden, her "decisionmaking process" was ongoing and therefore not "consummat[ed]."[80]

Moving on in any event, the next issue would have been whether either of the two exceptions to the APA's judicial review provisions could have blocked Biden's attempt to obtain judicial review of Murphy's delayed ascertainment. An entrenched background principle that would have worked in Biden's favor is that there is a "basic presumption of judicial review" embodied in the APA, whose "generous review provisions" are to be interpreted "hospitabl[y]."[81] The first exception, under which judicial review can be implicitly or explicitly precluded by statute, is highly unlikely to have applied in this case.[82]

The second exception requires a more nuanced inquiry. It denies review when the agency action at issue is "committed to agency discretion by law."[83] While this exception is "very narrow," it can have preclusive effect based on "two related, but distinct" grounds: for types of agency decisions courts "traditionally have regarded" as committed to discretion and statutes constructed "so that a court would have no meaningful standard against which to judge" an agency's discretionary deci-

---

80 *Bennett*, 520 U.S. at 177–78; 3 U.S.C. § 102 note (PTA) § 3 (2018). *But see* Lawson Fite, *The GSA Delayed Biden's Transition. Future Presidents-Elect Could Sue to Speed Things Up*, LAWFARE (Nov. 30, 2020), https://www.lawfareblog.com/gsa-delayed-bidens-transition-future-presidents-elect-could-sue-speed-things [https://perma.cc/QBM7-CGPK] (concluding in an APA analysis of Murphy's withheld ascertainment that the "final agency action" requirement would have been satisfied).

81 Abbott Lab'ys v. Gardner, 387 U.S. 136, 140–41 (1967) (internal quotation marks omitted).

82 5 U.S.C. § 701(a)(1) (2018). The APA's presumption of judicial review can be implicitly rebutted "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350 (1984) (quoting *Abbott Lab'ys*, 387 U.S. at 141). Another possibility is that a statute will explicitly block review. Yet in this case, the PTA would neither have expressly prevented review nor implicitly evinced an intent to do so; the statute, read as a whole, does not indicate that it was meant to shut off a president-elect's lawsuit over a delayed ascertainment. *See* Johnson v. Robison, 415 U.S. 361, 367, 373–74 (1974); 3 U.S.C. § 102 note (PTA) (2018).

83 5 U.S.C. § 701(a)(2) (2018).

sion.[84] To restate the second ground, the exception applies when a statute is constructed "in such broad terms that in a given case there is no law to apply."[85] That seems true for the PTA: Murphy accurately explained in her ascertainment letter that the statute provides for the ascertainment without supplying any "procedures or standards" for making it.[86] That the ascertainment does not fall under the rubric of administrative decisions "traditionally" regarded as committed to agency discretion would have cut against the exception's application to Biden's claim.[87] But there would have been a strong case that it should apply nevertheless by virtue of the no-law-to-apply ground.

A comparison to a recent Supreme Court case is instructive. In *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, a timber company challenged the designation of certain land as "critical habitat" of an endangered species (the dusky gopher frog) under the Endangered Species Act ("ESA"), as well as the decision to not exclude the land from critical habitat based on a comparison of the benefits of exclusion and designation.[88] In its analysis of whether the "committed to agency discretion" exception would apply to preclude review, the Court characterized the case as involving the "sort of routine dispute that federal courts regularly review," one wherein the agency "issues an order affecting the rights of a private party," which objects because the agency "did not properly justify its determination under a standard set forth in the statute."[89] The statute in *Weyerhaeuser* mandated that the Secretary of the Interior consider economic impact before making the designation and authorized the secretary to exclude land from critical habitat upon weighing the benefits of exclusion and designation.[90] Accordingly, the Court concluded that the committed-to-discretion exception did not apply because the timber company's

---

84 Lincoln v. Vigil, 508 U.S. 182, 191 (1993); Heckler v. Chaney, 470 U.S. 821, 830 (1985); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 642 (D.C. Cir. 2020).

85 *Chaney*, 470 U.S. at 830 (quoting *Overton Park*, 401 U.S. at 410).

86 Ascertainment Letter, *supra* note 3, at 1.

87 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2568 (2019). Such decisions include the decision not to enforce, an intelligence agency's decision to fire an employee for national security reasons, the decision to allocate funds from an appropriated lump sum, and the decision to refuse reconsideration of a final action due to a material error. *Id.*; *Vigil*, 508 U.S. at 191–92.

88 139 S. Ct. 361, 365, 367 (2018).

89 *Id.* at 370.

90 16 U.S.C. § 1533(b)(2) (2018).

claim was the "familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency" in its exercise of discretion.[91]

This case may well have compelled a different result. Whereas in *Weyerhaeuser* there was a "standard set forth in the [ESA]" to evaluate the Secretary of the Interior's exercise of discretion regarding critical habitat designations, here there is a *standardless* modifier for the statutory term "candidates"—"apparent[ly] successful"—that is mostly unhelpful for evaluating Murphy's delayed ascertainment after the 2020 election.[92] Section 3(c) of the PTA passively assigns the ascertainment to the GSA Administrator without specifying how the Administrator is to carry out this assignment.[93] Unlike the ESA provision in *Weyerhaeuser*, the PTA would not have provided the basis for a "routine dispute that federal courts regularly review."[94] To the contrary, its open-ended language would have charged a federal court with the extraordinary task of reviewing a novel dispute with highly indeterminate paths to its resolution.[95]

### B. The Merits

Assuming that Biden's suit would have overcome the preliminary hurdles described in the prior subpart, the key merits question would be whether Murphy's delayed ascertainment was "arbitrary [or] capricious" within the meaning of the APA.[96] In the Court's canonical articulation of this standard, agencies are required to "examine the relevant data and articulate a satisfactory explanation" for decisions that includes a "rational connection between the facts found and the choice made."[97] While this is a "narrow" standard of review, and courts cannot "substitute [their] judgment" for the agency's, they are to consider whether the agency's decision was "based on a consideration of the relevant factors" and whether "there has been a clear

---

91 *Weyerhaeuser*, 139 S. Ct. at 371.

92 *Id.* at 370; 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

93 *See* § 102 note (PTA) § 3(c).

94 *Weyerhaeuser*, 139 S. Ct. at 370.

95 *See* § 102 note (PTA) § 3(c).

96 The APA provision best equipped as a vehicle to challenge Murphy's delayed ascertainment is section 706(2)(A) of Title 5 of the U.S. Code, which then-D.C. Circuit Judge Scalia described as a "catchall" that sweeps up "administrative misconduct not covered by" section 706(2)'s other paragraphs. Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 745 F.2d 677, 683 (D.C. Cir. 1984).

97 Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

error of judgment."[98] At bottom, the arbitrary or capricious standard demands that agencies engage in "reasoned decisionmaking."[99]

One view would be that Murphy's decision making in connection with the PTA "ascertain[ment]" after the 2020 election was not "reasoned" because it was plainly divorced from reality.[100] On November 23, the date of Murphy's ascertainment letter, it had long been clear that Joe Biden (as President) and Kamala Harris (as Vice President) won the election. Media organizations and the major television networks had called the race for Biden more than two weeks earlier.[101] Less than a week after election day, Biden was projected to finish with commanding leads in both the Electoral College and popular vote.[102] Judges were turning away numerous lawsuits filed on Trump's behalf to alter or overturn state voting results.[103] All that remained were undemocratic schemes to convince state officials to override the people's choice at the polls,[104] long-shot requests for federal- or state-court intervention,[105] and imprac-

---

98 *Id.* (internal quotation marks omitted). Although the *State Farm* Court noted that courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," it enumerated several reasons an agency decision nonetheless could fail arbitrary or capricious review:

> [I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* (internal quotation marks omitted).

99 Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019) (internal quotation marks omitted).

100 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

101 *See* Bauder, *supra* note 56.

102 *See* Nate Silver, *Biden Won – Pretty Convincingly in the End*, FIVETHIRTYEIGHT (Nov. 7, 2020), https://fivethirtyeight.com/features/a-pretty-convincing-win-for-biden-and-a-mediocre-performance-for-down-ballot-democrats/ [https://perma.cc/366N-5XHG].

103 *See* Amy Sherman & Miriam Valverde, *Joe Biden is Right that More than 60 of Trump's Election Lawsuits Lacked Merit*, POLITIFACT (Jan. 8, 2021), https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-l/ [https://perma.cc/WZP6-4T3D] (stating that "[i]n more than 60 cases, judges 'looked at the allegations that Trump was making and determined they were without any merit'").

104 *See, e.g.*, Stephen Fowler, *'This Was a Scam': In Recorded Call, Trump Pushed Official to Overturn Georgia Vote*, NPR (Jan. 3, 2021, 2:51 PM), https://www.npr.org/2021/01/03/953012128/this-was-a-scam-in-recorded-call-trump-pushed-official-to-overturn-georgia-vote [https://perma.cc/X5H6-K9K7] (reporting on Trump's call urging Georgia's secretary of state to nullify his election loss in the state).

105 *See, e.g.*, Bill of Complaint at 39–40, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155) (Supreme Court lawsuit brought by Texas seeking to

tical campaigns to subvert the nation's electoral process at the eleventh hour.[106]

To be sure, Biden's victory was not finalized under federal law until Congress met—and was forced to reconvene, after a horde of Trump supporters disrupted the proceedings by rushing into the Capitol Building—to officially count electoral votes on January 6, 2021.[107] And his 74-vote margin in the Electoral College was not confirmed until December 14, 2020.[108] But Murphy needed neither of those benchmarks—nor others, such as the certification of state voting results—to conclude that Biden was the election's "apparent[ly]" (as opposed to "actually") successful presidential candidate.[109] She had all of the information needed to reach that conclusion much sooner. Therefore, the argument would go, Murphy's untimely decision making process was not "based on a consideration of the relevant factors" and entailed a "clear error of judgment": that Biden was not the election's apparent winner until November 23.[110] Further, Murphy's rationale for making the ascertainment after a long delay—"recent developments involving legal challenges and certifications of election results"—does not amount to a "satisfactory explanation" with a "rational connection between the facts found and the choice made."[111] The relevant "facts" supported the conclusion that Biden's success was apparent well before Murphy made the ascertainment; the "choice" to wait until late November thus did not reflect a "rational" connection to those facts.[112]

The 2000 election—on which the GSA and Murphy are said to have relied—is inapt as a controlling precedent. From a broad perspective, the GSA Administrator's withholding of the

---

invalidate election results in Georgia, Michigan, Pennsylvania, and Wisconsin); Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (order denying relief on standing grounds).

106 *See, e.g.*, Lindsay Wise, *Electoral College Results to be Contested by Group of GOP Senators*, WALL ST. J. (Jan. 2, 2021), https://www.wsj.com/articles/group-of-gop-senators-plans-to-reject-some-electoral-college-results-11609613305 [https://perma.cc/2U6H-MMSG] (reporting on eleven Republican senators' plans to vote in rejection of several states' electoral votes at the required January 6 joint congressional session absent an emergency audit).

107 *See* 3 U.S.C. § 15 (2018).

108 Federal law directs presidential and vice-presidential electors to meet in their respective states to cast electoral votes on the Monday following the second Wednesday in December. 3 U.S.C. § 7 (2018). In 2020, that Monday fell on December 14.

109 *Id.*; § 102 note (PTA) § 3(c).

110 Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

111 *Id.*; Ascertainment Letter, *supra* note 3, at 1.

112 *State Farm*, 463 U.S. at 43.

ascertainment in 2000 was a historical outlier.[113] More specifically, while it was practically unlikely that Al Gore would defeat George Bush once Florida completed and sent its certificate of ascertainment for its twenty-five electoral votes on November 26,[114] the 2000 election was ultimately decided by a margin of less than 600 votes in one state.[115] The GSA Administrator's decision to delay making the ascertainment until after the Supreme Court issued a decision barring another recount in Florida was objectively defensible based on the closeness of the election.[116] Simply put, Murphy's decision to delay the ascertainment for much of November 2020 was not.

To overturn Biden's victory in 2020, Donald Trump would have needed to reverse the results of several states he lost, none of which were decided by the sort of razor-thin margin that separated Bush and Gore in Florida twenty years earlier.[117] Waiting until nearly three weeks after election day to conclude that Biden was the election's apparently successful presidential candidate would have required undue optimism in largely meritless Trump-backed litigation, an unjustifiably dim view of the willingness of lawmakers and government institutions to resist undemocratic plots, or some combination of both. It also would have contravened the PTA's purposes: facilitating "orderly" transfers of power, and preventing "disruption[s]" capable of "produc[ing] results detrimental to the safety and well-being" of the United States.[118]

None of the foregoing suggests Murphy used "reasoned decisionmaking" to wait until November 23 to make the decision to ascertain Biden as the election's "apparent[ly]" successful presidential candidate.[119] The problem, which gets at the

---

113 For "recent presidential transitions" besides those after the 2000 and 2020 elections, "GSA identified the winner immediately following the election." *The Elements of Presidential Transitions: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Reform*, 116th Cong. 4–5 (2020) [hereinafter Stier Statement] (written statement of Max Stier, president and CEO, Partnership for Public Service).

114 *See* 3 U.S.C. § 6 (2018). Professor Todd Zywicki detailed the series of events Gore would have needed to occur for Bush's win in Florida to have been reversed. *See* Zywicki, *supra* note 40, at 1585–90.

115 *2000 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, [hereinafter ELECTIONS ATLAS 2000] https://uselectionatlas.org/RESULTS/national.php?year=2000&f=0&off=0&elect=0 [https://perma.cc/H3ZF-X4J2] (last visited June19, 2021).

116 *See* Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam).

117 *Compare* ELECTIONS ATLAS 2020, *supra* note 71 (showing the 2020 presidential election results), *with* ELECTIONS ATLAS 2000, *supra* note 115 (showing the 2000 presidential election results).

118 3 U.S.C. § 102 note (PTA) § 2 (2018).

119 Judulang v. Holder, 565 U.S. 42, 53 (2011); § 102 note (PTA) § 3(c).

same fundamental issue discussed earlier in connection with the APA's committed-to-agency-discretion exception, is that the PTA furnishes no standards or criteria—or, more to the point, no "relevant factors"—to assess whether a delayed ascertainment is "arbitrary [or] capricious."[120] Of course, prolonged delays are at odds with the PTA's purpose of promoting "orderly" transfers of power.[121] And no, the statute and its legislative history, taken together, do not manifest an intention to allow the GSA Administrator to put the transition process on pause based on de minimis uncertainty about the election's ultimate outcome.[122] But the PTA nonetheless leaves the ascertainment to the GSA Administrator without any instruction about how it is to be made.[123]

On this view, Murphy's delay was not arbitrary or capricious because its timing reflected her judgment, "based on the law and available facts" and, in the absence of statutory direction, of when Biden became the election's apparent winner.[124] No provision of the PTA casts doubt on—let alone categorically forbids—Murphy's apparent interpretation that the ascertainment could not be made until November 23 because not until then was the election outcome sufficiently conclusive.[125] Whether a federal court hearing Biden's case would take this view—that the absence of statutory direction militates against a determination that the delayed ascertainment was arbitrary or capricious—or the one explained in the preceding paragraphs—that Murphy's delayed ascertainment was arbitrary or capricious in spite of the PTA's lack of direction—is hard to say. But the plausibility of the former view demonstrates that a ruling in Biden's favor would have been a far less likely proposition than it may have appeared on November 23, when Murphy finally, in satisfaction of a chorus of calls to act, made the ascertainment.[126]

---

120 5 U.S.C. § 706(2)(A) (2018); Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

121 3 U.S.C. § 102 note (PTA) § 2 (2018).

122 *See supra* subpart I.B.

123 *See* § 102 note (PTA) § 3(c).

124 Ascertainment Letter, *supra* note 3, at 1. Defending Murphy's delay, a former GSA official argued that Murphy "follow[ed] a law that grants authority while offering no guidelines for exercising it." Beth W. Newburger, *Emily Murphy Was Right Not to Recognize Biden's Win Until Now*, WASH. POST (Nov. 24, 2020), https://www.washingtonpost.com/outlook/2020/11/24/emily-murphy-gsa-transition-biden/ [https://perma.cc/7LFQ-A7Y6].

125 *See* § 102 note (PTA).

126 *See, e.g.*, *164 New York Business Leaders Urge the Trump Administration to Move Forward with Transition*, N.Y. TIMES, https://int.nyt.com/data/documenttools/business-leaders-letter-trump-transition/cfb231ee1058dc58/full.pdf

The purpose of this review of Biden's hypothetical APA claim was essentially twofold. First, it sought to provide an authoritative reference point for legal analysis of future post-election ascertainment delays—scenarios this Note has argued are likely to arise with increasing frequency.[127] Second, without offering a comprehensive assessment of every doctrine or question a court would consider, it sought more specifically to demonstrate the major substantive hurdles a president-elect would face in pursuing litigation over a withheld ascertainment. As for Murphy's delay in particular, Biden's claim likely would have failed for two basic reasons: (1) uncertainty on the key merits question whether the withheld ascertainment was "arbitrary or capricious" within the meaning of the APA and (2) other preliminary stumbling blocks such as the APA's "committed to agency discretion" exception.[128]

Note that in addition to the substantive hurdles discussed in this Part, any legal challenge to a delayed ascertainment would face a huge practical hurdle: the pace of judicial review. Absent a fast-track judicial review procedure, no litigation could be resolved quickly enough for a transition team to avoid losing critical time leading up to inauguration day.[129]

## III
## A CALL FOR INDEPENDENCE IN THE ASCERTAINMENT

### A. The Rationale for Independence

There is good reason to doubt that Joe Biden would have been successful had he pursued a legal challenge to Murphy's decision to delay making the "ascertain[ment]" until about three weeks after election day.[130] Yet the delay following the 2020 election does give renewed urgency to the question of whether the ascertainment's current structure under the PTA is the right one. Murphy herself invited amendments to the PTA in her ascertainment letter to Biden.[131] In this Part, the

---

[https://perma.cc/K48B-AFXG] (last visited Jan. 9, 2021) (statement signed by 164 business executives calling for Murphy to make the ascertainment "immediately").

127 *See supra* notes 70–71 and accompanying text.

128 5 U.S.C. §§ 701(a)(2), 704, 706(2)(A) (2018).

129 *See, e.g.*, P'SHIP FOR PUB. SERV.: CTR. FOR PRESIDENTIAL TRANSITION, TOP 15 COSTS OF DELAYING THE PRESIDENTIAL TRANSITION 1, 2 (2020), https://presidential-transition.org/wp-content/uploads/sites/6/2020/11/Top-15-Costs-of-Delaying-the-Presidential-Transition1.pdf [https://perma.cc/PX6E-FFSX] (stating that "[e]very day that is lost in a transition can never be made up").

130 *See supra* Part II; 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

131 Ascertainment Letter, *supra* note 3, at 1.

Note will present its argument for change: the ascertainment should be an independent decision insulated from political pressure exerted by the President. The Note will first lay the theoretical groundwork for independence and then explore reform proposals in the next Part.

Before turning to theory, it is worth pausing to spell out precisely what this Note is calling for. It is not proposing to reform either the structure of the GSA or the laws governing the office of its Administrator with an eye toward greater independence.[132] Nor is the Note articulating any sort of broader resistance to presidential influence in the GSA's decision making.[133] Instead, it is making the far narrower claim that a single task the GSA Administrator performs—the PTA-governed ascertainment—should be an independent determination shielded from political pressure brought to bear by the President. This argument chiefly relies on a theory used to justify the Federal Reserve's independent structure.

In a 2016 article commending the Fed for its response to the 2008 financial crisis, Professors Neil Buchanan and Michael Dorf defended the Fed's structural independence amid demands for "auditing" or "ending" the Fed based on various procedural and substantive critiques.[134] They argued in sup-

---

132 With respect to the GSA itself, administrative law contains no consensus on the definition of "independent agency," but the GSA would not qualify under any fair understanding of that term. *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 42–44 (2d. ed. 2018); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 824–26 (2013) (presenting a chart showing the GSA has zero of seven identified indicia of independence). As for the office of GSA Administrator, one conceivable avenue for reform would be directed toward the Administrator's lack of protection by a statutory for-cause removal provision, which is often viewed as the leading indicator of agency independence. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 16 n.1 (2010). Granting such protection to the Administrator as a way of addressing the risk of political sabotage tied to the ascertainment would run into constitutional problems. *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021). It also would seem a solution disproportionate to the problem, a major structural change to cure only a minor structural defect in the Administrator's expansive remit. *See* 41 C.F.R. § 105-53.112 (2020).

133 In fact, it is sympathetic to the argument then-Professor Elena Kagan made in an influential law review article. Documenting the emergence of a "presidential administration" era, Professor Kagan argued that presidential influence over agency action serves the indispensable administrative values of public accountability and regulatory effectiveness. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2331 (2001).

134 Buchanan & Dorf, *supra* note 15, at 2–5, 5–6, 8–11. While administrative law lacks a uniform definition for agency independence, see *supra* note 132, the term undoubtedly suits the Fed, whose structural features include for-cause re-

port of this structure on several grounds, but all of them operated from the premise that technocratic expertise alone does not suffice as a justification for independence.[135] If it did, Professors Buchanan and Dorf suggest, that justification would have no workable limiting principle across administrative agencies' myriad policymaking arenas.[136] So while managing the Fed does require intricate knowledge of economics in general and monetary policy in particular, the same could be said of the complex subject matter overseen by agencies that are generally not considered independent, such as the Environmental Protection Agency, or even—more relevant here—the General Services Administration.[137]

In Professor Buchanan and Dorf's view, what makes the Fed different—what gives it the "something extra" required to justify independence—is the capacity for politicians, most notably the President, to "self-deal" by using the Fed's control of monetary policy as a tool to distort the political process.[138] Analogizing to the typical rationale for independence in the judiciary, they argued that the President, seeking political gains in the short term, could harm the nation's economic well-being over the long term with politically self-serving monetary policy.[139] In doing so, the President—whether trying to win reelection after a first term or keep her political party in office after a second term—could entrench herself in power and stave off political change.[140]

---

moval protection and lengthy (fourteen years), staggered terms for members of its Board of Governors. 12 U.S.C. §§ 241, 242 (2018).

135 Buchanan & Dorf, *supra* note 15, at 63–64.

136 *See id.*

137 *See id.* at 67; 41 C.F.R. § 105-53.112 (2020) (describing among the GSA's functions the provision of services and establishment of "Governmentwide" policies for matters including contracting, procurement, transportation, data processing, information security, and property management, use, and disposal).

138 *See* Buchanan & Dorf, *supra* note 15 at 69–70. Professors Buchanan and Dorf conceded that "self-dealing" can be seen as a risk for "anything the government does." *Id.* at 70. But they argued that the self-dealing risks tied to monetary-policy management should be treated as "different in kind" from other risks of self-dealing because of the possibility of "*catastrophic* harm." *Id.* at 71.

139 *See id.* at 64, 69.

140 *Id.* at 69–70. In a much briefer treatment of this topic, Professors Cass Sunstein and Lawrence Lessig similarly argued that agency independence from presidential control can be justified by "special institutional considerations"—in the Fed's case, the potential for manipulation of the money supply for political ends. Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1, 107–08 (1994). An important unifying theme for Professors Buchanan and Dorf, and Sunstein and Lessig is particularity: the Fed should be independent because it is "special" in ways other agencies are not. *Id.*; Buchanan & Dorf, *supra* note 15, at 68–69.

When Professors Buchanan and Dorf expounded their argument for Fed independence, the traditional worry about subjecting the Fed to closer presidential oversight—unduly loose monetary policy, with interest-rate adjustments synced to the election cycle—was not as salient due to the political support for austerity measures at the time.[141] Professors Buchanan and Dorf's argument accounted for this unconventional policy preference by drawing on a theory of First Amendment jurisprudence to defend the Fed's independent structure even in an "age of austerity."[142]

In particular, Professor Vincent Blasi has argued that courts, when crafting First Amendment doctrines and deciding related cases, should adopt a "pathological perspective" to ensure the amendment's protections can "do maximum service" during times—that is, during pathological periods—when there is low tolerance for political dissent and the expression of unorthodox views.[143] Transporting this theory to the Central Bank context, Professors Buchanan and Dorf argued that Fed independence can be justified even amid a push for austerity because over the long run political support could fade for tight credit and correspondingly rise for loose credit—at which point the temptation to goose the economy for electoral benefit by increasing the money supply could arise.[144] Fed independence was thus warranted because, despite the vogue for monetary austerity at the time, the potential remained for the politically motivated prescription of loose monetary policy to the detriment of the nation's long-term economic welfare.[145]

---

141 *See* Buchanan & Dorf, *supra* note 15 at 73. There likewise were calls, amid significant price rises, for monetary tightening during the first year of Biden's presidency. *See, e.g.*, Greg Ip, *Jerome Powell Will Face a Very Different Economy in a Second Term*, WALL ST. J. (Nov. 22, 2021), https://www.wsj.com/articles/jerome-powell-will-face-an-utterly-different-economy-in-a-second-term-11637590207 [PERMA] (arguing that "interest rates may need to rise a lot").

142 *See* Buchanan & Dorf, *supra* note 15, at 73–76.

143 Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985). Professor Blasi argued that because the First Amendment "should be targeted for the worst of times," courts should adopt the pathological perspective even in "normal times" so that First Amendment doctrines are prepared to "blunt or delay the impact of some pathological pressures, keep a pathology in certain bounds, or stimulate the regenerative forces that permit a political community to work its way out of a pathological period." *Id.* at 450, 458–59.

144 *See* Buchanan & Dorf, *supra* note 15, at 73.

145 *See id.* at 75–76.

B. Application to the Ascertainment

The argument Professors Buchanan and Dorf made in defense of Fed independence is well-suited to the "ascertain[ment]" assigned to the GSA Administrator under the PTA.[146] In a closely contested election, subject-matter expertise—in particular, expertise in interpreting vote returns and election-litigation developments—could be helpful for making the ascertainment. But just as technocratic proficiency did not suffice to justify Fed independence, it cannot justify insulating the ascertainment from political pressure exerted by the President.[147] Were that the case, the same justification would apply to numerous tasks performed by both the GSA Administrator and the heads of many other Executive Branch agencies. A justification other than technocratic expertise is needed for independence in the ascertainment, then. There must be "something extra."[148]

Here is a rough first cut at what that something extra might be: like the justification for Fed independence, the justification for independence here is the risk that an outgoing administration will use the ascertainment as a lever for "self-dealing" by distorting the political process.[149] That justification only goes so far, though. There are plenty of actions an outgoing administration can take in its final weeks in power to distort the political process by sabotaging the incoming administration. To take one example, the issuance of "midnight regulations" just before an outgoing administration leaves office can hamper an incoming one's regulatory agenda by forcing it to spend valuable time and resources rolling back policy choices with which it disagrees.[150] Is withholding the ascertainment for political purposes different from this and similar politically harmful actions in a way that gives the ascertainment the "something extra" needed to warrant independence?

The biggest difference is that a politically motivated ascertainment delay not only frustrates an incoming administration's ability to govern when it is *in power*, but also actively

---

146 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

147 *See supra* subpart III.A.

148 *See id.*

149 *See id.*

150 *See generally* Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 164–65 (2009) (describing the issuance of midnight regulations by several presidential administrations). *E.g.*, Isaac Arnsdorf et al., *Tracking the Trump Administration's "Midnight Regulations,"* PROPUBLICA (Nov. 25, 2020), https://projects.propublica.org/trump-midnight-regulations/ [https://perma.cc/7DS9-4H48].

obstructs the incoming administration's transition *to power*. That is to say, a delayed ascertainment, apart from impeding an incoming administration's post-transition agenda for governance once the President takes office, like any number of policy choices an administration can make on its way out the door, undermines the transition itself. And to stay with the aforementioned example, unlike an outgoing administration engaging in midnight rulemaking to finalize a regulatory program, purposefully obstructing the transition by delaying the ascertainment for purely political reasons and eventual electoral benefit is never a defensible policy choice among reasonable alternatives. It is a consciously destructive anti-policy move; it flies in the face of the PTA's purpose and amounts to "raw politics" or "pure partisanship."[151] By contrast, midnight regulations at least plausibly purport to advance some regulatory objective.[152]

To understand how an ascertainment delay can distort the political process, recall that the GSA Administrator is a political appointee removable at will by the President and subject to the President's "direction and control."[153] In this era of extreme and upward-spiraling political polarization,[154] we can safely assume that a President whose successor (whether after one or two terms) is of the other major political party will be motivated to boost her own party's political outlook by weaken-

---

151 The PTA's purpose is to "promote the orderly transfer of the executive power" with respect to the transition to a new administration. 3 U.S.C. § 102 note (PTA) § 2 (2018). Professor Kathryn Watts used the terms "raw politics" and "pure partisanship" in arguing that agencies should be permitted to openly rely on political influences as "valid" reasons when explaining decisions (specifically, rulemaking decisions) for purposes of the Administrative Procedure Act's "arbitrary [or] capricious" judicial review standard. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8–9, 56 (2009); 5 U.S.C. § 706(2)(A) (2018). Professor Watts acknowledged that there is an "inherent[ly] fuzz[y]" line between legitimate and illegitimate political influences and that attempting to divide the two was a difficult endeavor that could not be "summed up with a precise test." *Id.* at 56. Proceeding nevertheless, Professor Watts deemed legitimate those political influences that "seek to implement policy considerations or value judgments tied in some sense to the statutory scheme being implemented" and illegitimate those "driven by pure partisanship or raw politics." *Id.* Professor Watts's classificatory scheme can be repurposed to help determine whether independence in the PTA's ascertainment is justified. Delaying the ascertainment solely for political reasons would be a decision based on "raw politics" or "pure partisanship" that is not tied in "[any] sense" to the PTA and its underlying purpose. *See id.*

152 *See* Brito & De Rugy, *supra* note 150, at 165 (asserting that "[v]irtually every modern president has made some significant regulatory change in the final days" of her administration).

153 40 U.S.C. § 302(a) (2018).

154 *See* EZRA KLEIN, WHY WE'RE POLARIZED 135–37 (2020).

ing the incoming administration's capacity to effectively govern. One way this could happen is if the new administration gets set off on the wrong foot because it is deprived of the resources it needs for an efficient transition to power.[155] And the GSA Administrator has the power to cause such a deprivation by withholding the ascertainment.[156] Note the precise nature of the political damage here: a withheld ascertainment causes damage to the *actual transition*, which undercuts the incoming administration's capacity for effective governance *after the transition*.

This kind of political sabotage through administrative foot-dragging could be particularly harmful given its timing. A President's political capital is generally believed to peak during her first 100 days in office.[157] But if the President cannot capitalize on that period because her transition to power was impaired by a lack of sufficient funds or other assistance required for preparatory activities, her political standing could suffer greatly for any number of reasons, such as the inability to make good on campaign promises, a haphazard effectuation of a policy platform, or damaging confirmation battles for poorly vetted nominees to coveted Executive Branch positions.[158] It is easy to envision the damage snowballing as the new President's first term progresses, with other political actors becoming increasingly less supportive of her agenda. The ultimate cost, of course, would be a poor showing in the next presidential election, resulting in a transfer of power back to a President of the party whose last leader in office oversaw the ascertainment

---

155 Delayed transitions can be costly for a number of reasons; the nonpartisan Center for Presidential Transition listed fifteen for Biden's transition in 2020–21, including the inability to cooperate with government agencies leading the COVID-19 response, a lack of support for prospective agency heads and Cabinet members from current agency career officials and transition directors, and the absence of timely information from briefing materials. *See* TOP 15 COSTS OF DELAYING THE PRESIDENTIAL TRANSITION, *supra* note 129.

156 *See* 3 U.S.C. § 102 note (PTA) § 3(c) (2018).

157 *See, e.g.*, Casey Byrne Knudsen Dominguez, *Is It a Honeymoon? An Empirical Investigation of the President's First Hundred Days*, 32 CONG. & PRESIDENCY: J. CAP. STUD. 63, 64 (2005) (finding that presidents "win more votes on legislation they favor" during their first 100 days in office, and that the effect is pronounced in times of divided government).

158 Max Stier, the president of the Partnership for Public Service, which oversees the nonpartisan Center for Presidential Transition, explained that if preparations for "tak[ing] over the functions of governance" are "[m]anaged poorly," the consequences can include "delays in staffing key positions, strategic errors in policy rollout and communication and, at worst, difficulty responding to pressing national security and domestic challenges." Stier Statement, *supra* note 113, at 2.

delay that initially set in motion the incumbent's cascading political downfall.

Perhaps this chain of events strikes you as unrealistic or speculative. Sure, one might say, there were suspicions of political influence in the ascertainment after the 2000 and 2020 elections, but those were deviations from the norm of the GSA Administrator promptly ascertaining the "apparent[ly]" successful presidential ticket—exceptions that prove the rule—and it is dubious that any future administration will attempt to bend the ground rules for political contestation in this way.[159] Whether it is more likely that this norm will be restored and reinforced during future presidential transitions or that the deviations will become the new norm is an open question. This Note, for one, has argued that the latter is more likely than the former.[160] But in any event, the answer does not meaningfully affect its argument for independence. How is that so?

Remember that Professors Buchanan and Dorf defended the Fed's independent structure even amid calls for austerity because, by adopting Professor Blasi's "pathological perspective" theory, they realized that it remained possible in the long term for political actors to seek electoral benefit through excessively loose monetary policy.[161] The same rationale can justify independence in the ascertainment even if it is not used for political sabotage the next time an outgoing President transfers power to a President of the opposing political party. It remains true that a departing administration, if—more realistically, *when*—it has the will and foresight to do so, can use the ascertainment to inflict serious political harm on the incoming one and obtain a downstream electoral benefit as a result. To borrow Professor Blasi's terminology, making the ascertainment an independent decision now, without knowing for sure whether outgoing administrations will resist the temptation to exploit it for electoral advantage in the future, could be understood as a means of girding the federal government's transition machinery in "normal times"—or, perhaps more accurately, "uncertain times"—for the possibility of ascertainment-wrought political sabotage in the "worst of times."[162]

In truth, this framing probably undersells the risk. The GSA's handling of the ascertainment after the 2020 election underscored the likelihood of a politically expedient delay. An

---

159 3 U.S.C. § 102 note (PTA) § 3(c) (2018).
160 *See supra* notes 70–71 and accompanying text.
161 *See supra* subpart III.A.
162 *See supra* note 145 and accompanying text.

outgoing administration taking advantage of that possibility after a future election would feel more like canny, if devious, political strategy than a drastic escalation of partisan hostility. It may well happen, in other words, even if we do not enter the "worst of times."[163]

## IV
## REFORMING THE ASCERTAINMENT

In the previous Part, this Note presented its case for why the ascertainment should be an independent determination walled off from political pressure exerted by the President. Now it will consider possibilities for introducing that independence through reform. There are many potential options and variations thereof; as Justice Kagan has explained, "[d]iverse problems of government demand diverse solutions."[164] Not every possibility will be explored in detail here.[165] Two of the

---

163 *See id.*

164 Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2236 (2020) (Kagan, J., concurring in judgment on severability and dissenting in part). To wit: a proposal for reforming the ascertainment was included in the Protecting Our Democracy Act introduced in the House of Representatives in September 2021. H.R. 5314, 117th Cong. §§ 1101–02 (2021). Titled the Efficient Transition Act of 2021, it proposes adding to section 3(c) of the PTA a requirement that the GSA Administrator make the ascertainment "as soon as practicable" after the election and provides that if she does not do so within five days after the election "each eligible candidate for President and Vice President" will be considered the "apparent successful candidates" for section 3(c) purposes until the Administrator makes the ascertainment or the House and Senate certify the election results—whichever happens earlier. *Id.* It additionally requires the Administrator to prescribe regulations establishing "standards and procedures" for her to follow when making the ascertainment in connection with future elections. *Id.* § 1102(b).

165 In addition to the two changes evaluated in this Part, consider one possibility that is not animated by the same independence justification: requiring the GSA Administrator to promptly both submit to the election's "apparent[ly] successful" vice-presidential and presidential candidates, and post on the GSA's public "transition directory" a detailed explanation of (a) why the ascertainment has been made; and (b) for cases in which an ascertainment has not been made within a week of election day, why the ascertainment has not been made and what factors will guide the eventual decision to make it. *See* 3 U.S.C. § 102 note (PTA) § 3(a)(9), (c) (2018). Requiring a detailed explanation—a requirement whose specifics could be spelled out in the PTA itself or a regulation—would not mark a radical break from current practice. Most recently, Murphy wrote a letter to Joe Biden explaining her decision to make the ascertainment after the 2020 election. Ascertainment Letter, *supra* note 3. But to stick with that example, Murphy's explanation lacked important details, offering as a rationale "recent developments involving legal challenges and certifications of election results." *Id.* at 1. Left unspecified was which court cases or vote certifications drove Murphy to make the ascertainment when she did. Mandating more clarity about these and similar specifics in subsequent elections would improve the ascertainment process by making it less opaque and less amenable to vague, ambiguous justifications for delay. Of the possible drawbacks to this idea, one obvious one is that the GSA Administrator

most obvious changes would be to alter the language of the PTA's ascertainment provision and to assign the ascertainment to a body or official other than the GSA Administrator. This Note settles on the latter as the best option. It explains that the first option, with the exception of one variation, does not comport with this Note's call for independence in the ascertainment and is practically unlikely to produce its intended effect. The second option is more congruent with the goal of making the ascertainment an independent decision, but it presents other problems.

### A. Altering the Ascertainment Standard

Section 3(c) of the PTA provides that the GSA Administrator is to "ascertain[ ]" the "apparent successful candidates" for Vice President and President.[166] An avenue for reform would be to alter the phrase "apparent successful candidates" to require less certainty of election victory before the Administrator can make the ascertainment. As one expert on presidential transitions recently put it, the standard should be a "low bar."[167] Consider the following possibility: the "candidates for the office of President and Vice President, respectively, that are significantly more likely than not to be successful."[168] The basic idea would be to permit the GSA Administrator to make the ascertainment earlier in the election day–inauguration day interregnum, with less confidence about the election's ultimate outcome than is currently needed to ascertain the "apparent[ly]" successful candidates.[169] Substituting a statutory standard that ostensibly allows the GSA Administrator to harbor more doubt when she makes the ascertainment would

---

could easily exclude from the detailed explanation any mention of instruction from or political pressure brought to bear by the White House. But imposing a detailed explanation requirement would make it more difficult for the GSA to hide any substantial political influence. Whereas under the current version of the PTA the Administrator can get away with tersely proffering unspecific rationales and omitting any recognition of improper partisan meddling, an explanation requirement of the sort contemplated in this footnote would demand that the Administrator thoroughly document verifiable supporting facts—for example, the resolution of litigation over the validity of an outcome-determinative number of ballots in a particular swing state. At the very least, requiring a detailed explanation would inject more transparency into the ascertainment process by enabling the public to better understand why the Administrator did (or did not yet) make it.

166 § 102 note (PTA) § 3(c).

167 *2020 Election Hearing*, *supra* note 5, at 39:50–40:20 (statement of Max Stier, president and CEO, Partnership for Public Service).

168 A similar proposal took the following form: the person "substantially likely to be the apparent successful candidate." Fite, *supra* note 80.

169 § 102 note (PTA) § 3(c).

seem like a simple and straightforward way to broaden the decision-making window and thereby facilitate the earlier flow of transition resources to incoming administrations.

The biggest problem with this sort of proposal is that it would not result in the kind of independent ascertainment for which this Note has argued.[170] But even setting that aside, it carries practical flaws notwithstanding its intuitive appeal. Its primary effect would be to substitute one vague standard for another without correcting the underlying defect: while the PTA indicates that actual election success is not required for the GSA Administrator to make the ascertainment, left unspecified is how close to actual success a presidential ticket must be—or, stated differently, how likely its eventual victory is.[171] Altering section 3(c)'s language to allow the Administrator to act with less assurance would lead to repeats of the post-2020 election delay. Just as Murphy withheld the ascertainment because she could not ascertain the apparently successful candidates for President and Vice President, future GSA Administrators would be tempted to make the same decision on similar facts, based on a similar rationale, even if—thanks to the new, lower threshold—they putatively would be permitted to make the ascertainment. Neither the verbal formula noted in the prior paragraph nor similar ones would prevent a GSA Administrator from using any major misgivings—whether politically motivated or not—about the election's ultimate outcome to justify a lengthy delay.

One slight variation that is more consonant with this Note's thesis would be to key the ascertainment trigger to objective election benchmarks, such as voting results in states. Professor Todd Zywicki, for example, has emphasized the certification of an electoral vote majority in the Electoral College.[172] The certification of an Electoral College majority is an identifiable marker of election success and a logical guidepost in the period between election day and inauguration day. But tethering the ascertainment to this certification would not facilitate the prompt provision of transition aid; many states are not required to certify their electoral votes until late November or

---

170 *See supra* Part III.

171 *See* § 102 note (PTA) § 3(c).

172 *See 2000 Election Hearing*, *supra* note 50, at 140–41 (written statement of Todd Zywicki, associate professor of law, George Mason University School of Law). Federal law requires states, "as soon as practicable" after election day, to file a "certificate" of "ascertainment" to the Archivist of the United States. 3 U.S.C. § 6 (2018).

early December.[173] Other possibilities for pegging the ascertainment, such as the December day federal law prescribes for the convening of electors in states to cast electoral votes, would similarly push the ascertainment back deep into the post-election transition period.[174]

### B. Assigning the Ascertainment Elsewhere

The PTA currently assigns the "ascertain[ment]" to the GSA Administrator.[175] This Note has argued that the best solution for this problematic arrangement is to make the ascertainment an independent determination shielded from political pressure brought to bear by the President. One way to carry out this call for independence would be to transfer the ascertainment from the GSA Administrator to a different official or body. This reform proposal is attractive for the simple reason that it addresses the ascertainment's core problem: the GSA Administrator's authority under the PTA can be leveraged as a "self-dealing" mechanism through the distortion of the political process.[176] The key question is who should make the ascertainment if not the GSA Administrator. A possibility that can be ruled out straight away is assigning the ascertainment to another political appointee in the Executive Branch (such as a different agency head), which would only change the conduit for self-dealing without addressing the self-dealing concern itself. That leaves assigning the ascertainment to a group of individuals. But what kind of group?

The most obvious candidate, among agencies at least, is the Federal Election Commission ("FEC"). Several factors make the FEC an appealing candidate, in theory, for turning the ascertainment into an independent decision: it is focused on campaign finance law, its six-commissioner membership can include only three of the same political party, commissioners serve staggered six-year terms and have for-cause removal protection, and four votes are required for major actions.[177] In

---

173 *See, e.g.*, Maggie Astor, Keith Collins & Amy Schoenfeld Walker, *Biden Secures Enough Electors to Be President*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/20/us/politics/2020-election-certification-tracker.html [https://perma.cc/X95E-QKW8] (last visited Dec. 26, 2020) (listing the certification deadlines for six states).

174 3 U.S.C. § 7 (2018).

175 *Id.* § 102 note (PTA) § 3(c).

176 *See supra* subpart III.B.

177 52 U.S.C. § 30106(a)(1), (a)(2), (c) (2018); FEC v. NRA Pol. Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993); *Mission and History*, FED. ELECTION COMM'N, https://www.fec.gov/about/mission-and-history/ [https://perma.cc/3ARM-JGS8] (last visited Jan. 5, 2021).

reality, the agency's recent track record suggests it would be a poor choice to take on the ascertainment. A 2019 Brennan Center report described the FEC as "dysfunctional" and "perpetually gridlocked," focusing in particular on how vote deadlocks have thwarted the initiation of enforcement actions and the issuance of regulations and advisory opinions.[178] In a December 2020 statement welcoming the Senate's confirmation of three commissioners, incumbent commissioner Ellen Weintraub noted that March 2017 was the last time the FEC had all six commissioners and that since September 2019 a four-member quorum for enforcement actions had been in place for just twenty-eight days.[179] All of that said, there does appear to be at least some momentum for structurally reforming the FEC. H.R. 1, the expansive democracy reform bill that passed in the House of Representatives in March 2021 (but whose companion Senate legislation subsequently failed to secure passage), contains provisions that, among other measures, would reduce the FEC's membership from six to five commissioners, permit only two commissioners of the same political party, and require a majority vote for major actions.[180] A reformed FEC may be the least bad option for handling the ascertainment.[181]

Another possibility would be to appoint a committee to make the ascertainment.[182] The committee could be biparti-

---

178 DANIEL I. WEINER, FIXING THE FEC: AN AGENDA FOR REFORM 1, 3–5 (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Fixing_FEC.pdf [https://perma.cc/XF92-BDG7].

179 Statement of Commissioner Ellen L. Weintraub on the Senate's Votes to Restore the Federal Election Commission to Full Strength (Dec. 9, 2020), https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf [https://perma.cc/9GB3-9RE7]. More recently, in view of the FEC's continuing impotence as a vigorous enforcer of campaign finance laws, Democratic commissioners have resorted to extreme procedural tactics, leaving cases open and preventing the commission from defending itself against lawsuits. *See* Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html [https://perma.cc/TL26-A5ND].

180 For the People Act of 2021, H.R. 1, 117th Cong. § 6002(a)(1)- (2) (2021).

181 The Congressional Research Service counted seventeen federal agencies or departments with significant roles in campaign or election support or regulation. R. SAM GARRETT, CONG. RSCH. SERV., FEDERAL ROLE IN U.S. CAMPAIGNS AND ELECTIONS: AN OVERVIEW 17–19 (2018), https://fas.org/sgp/crs/misc/R45302.pdf [https://perma.cc/S44T-MJBB]. Among them, one non-FEC agency to which the ascertainment conceivably could be transferred is the Election Assistance Commission ("EAC"), which focuses on election administration. 52 U.S.C. § 20922 (2018). But the EAC may pose some of the same practical hurdles as the FEC; the agencies share similar structures. *See id.* §§ 20923(a)(1) & (b)(2), 20928.

182 *See, e.g.*, Zywicki, *supra* note 40, at 1639, 1639 n.187 (proposing the creation of an "independent commission" without taking a position on its composition).

san or nonpartisan in character; either way, multi-party input into the vetting process for its membership would be crucial. For example, H.R. 1 proposed the convening of a "Blue Ribbon Advisory Panel" that includes both major-party representatives and political independents to make recommendations to the President for FEC commissioner appointments.[183]

## CONCLUSION

This Note has argued that the "ascertain[ment]" assigned to the GSA Administrator under the Presidential Transition Act of 1963 should be an independent determination insulated from political pressure exerted by the President.[184] In doing so, it relied on a theory of independence used to justify the Federal Reserve's structural independence. The Note briefly explored possibilities for reforming the PTA, but it also undertook an analysis of a hypothetical case that could have arisen under the PTA as presently constructed: an APA challenge to the GSA Administrator's withholding of the ascertainment after the 2020 election on the ground that it was "arbitrary or capricious." The Note ultimately concluded that such a challenge is unlikely to have succeeded.

While there will not be another presidential election until 2024, the issue this Note has addressed is and will remain pivotal to leadership of the Executive Branch specifically and the functioning of the federal government more generally. Politically motivated ascertainment delays are a grave threat to a core premise of our representative democracy—the peaceful transfer of power between presidential administrations. Such delays, this Note has argued, are likely to occur with increasing frequency due to the precedent set after the 2020 election. Accordingly, though the Note used the 2020-election aftermath as a contextual backdrop, its approach is decidedly forward-looking.

183 For the People Act of 2021, H.R. 1, 117th Cong. § 6002(c)(3)(B)(i)-(ii) (2021).
184 3 U.S.C. § 102 note (PTA) § 3(c) (2018).