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## The Law of Presidential Transitions and the 2000 Election

*Todd J. Zywicki\**

### I. INTRODUCTION

The presidential election of 2000 raised a number of unprecedented legal and political issues. Among those were the issues raised by the Presidential Transition Act of 1963 (the “Act”), a heretofore obscure statute that took on massive importance in both the political framework of the election as well as the practical framework of George W. Bush’s efforts to effectuate a smooth presidential transition.<sup>1</sup> Like so many other issues raised by the election fall-out, the issues raised by the Presidential Transition Act of 1963 presented legal issues of first impression and crucial political questions. Fought against the backdrop of the contentious presidential election and the legal and public relations battles that swirled around it, the issues of the Presidential Transition Act of 1963 took on profound importance. Unlike other issues raised by the election that are likely to prove unique to the 2000 election, the issues surrounding the law of presidential transitions are likely to arise again in the future, especially because the way in which the Act was implemented raises substantial concerns of future mischief.

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1. Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (codified as amended in scattered sections of 3 U.S.C. (1994)) [hereinafter Presidential Transition Act].

The facts surrounding the 2000 presidential election are well known. On the night of the general election, the Republican ticket of George W. Bush and Richard Cheney claimed victory in the presidential election on the basis of a narrow victory in Florida. When combined with the other states claimed by Bush and Cheney, Florida's electoral votes gave them 271 votes, one more than necessary to claim the White House. Democratic rivals Albert Gore and Joseph Lieberman refused to concede the election and instead contested the Bush victory in Florida, initiated litigation, and requested recounts of various ballots in Florida. As a result of the narrowness of the Bush lead and the complexity of the litigation and recount issues, the election's final outcome remained in the balance for several weeks. The election was not finally settled until early December, when the Supreme Court ruled in favor of Bush in the case of *Bush v. Gore*.<sup>2</sup> The next day Gore conceded the election to Bush.

In most presidential elections, the outcome of the election is known the day after the general election. The President-elect has only seventy-three days from the election date in November and the President's inauguration on January 20 of the following year to appoint senior policy analysts, prepare a budget for presentation to Congress, and begin making legislative priorities.<sup>3</sup> Given the massive scope of the transition responsibilities and the relatively short time frame to conduct those activities, every day during the transition period is crucial. In fact, it usually takes several months into the President's term to complete the "transition" and to fill all of the necessary personnel appointments.

Before 1963, presidential transitions primarily were staffed by volunteers and funded by the political party of the incoming President.<sup>4</sup> In order to ease the difficulties of conducting a presidential transition, Congress enacted the Act. The Act provides a variety of resources for office space, staff compensation, communications services, and printing and postage costs associated to be made available for the presidential transition (collectively, the "transition resources" or "transition funds").<sup>5</sup> The General Services Administration

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

3. See Review & Outlook, Editorial, *The Politics of Transition*, WALL ST. J., Dec. 6, 2000, at A22, available at 2000 WL-WSJ 26619058.

4. See Stephanie Smith, *Presidential Transitions 1960-2001*, CRS REPORT FOR CONGRESS (Nov. 7, 2000).

5. Presidential Transition Act, *supra* note 1, § 3(a).

(“GSA”) is the federal agency assigned to administering the funds and office space allocated for the presidential transition. For fiscal year 2001, the GSA was authorized a total of \$7.1 million for the upcoming transition: \$1.83 million for the outgoing Clinton administration; and a total of approximately \$5.3 million for the incoming administration, including \$1 million appropriated under the 2000 amendments contained in the Presidential Transition Act of 2000. The Administrator of the GSA (the “Administrator”) is the individual responsible for dispersing the money appropriated for the transition as well as executing the responsibilities of fitting the office for operation. The President appoints the GSA Administrator.

Following the certification of Florida’s electoral votes in November 2000, George W. Bush and Richard Cheney requested that the Administrator, Clinton appointee David J. Barram, order the release of the resources allocated to be made available for the incoming administration, including the office space allocated to the transition as well as the funds appropriated for the transition. Under the terms of the statute, the Administrator is instructed to release the transition resources upon the request of the “President-elect.”<sup>6</sup> The “President-elect” and “Vice-President-elect” are defined by the Act as “such persons as are the apparent successful candidates for the office of President and Vice President, respectively, as ascertained by the Administrator following the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2.”<sup>7</sup> The phrase “apparent successful candidates” is not defined in the Act.

The Administrator refused to release the funds to any incoming administration on the ground that he was unable to ascertain an “apparent successful candidate” in the election. In fact, the Administrator took no action to release the funds or the office space until after Al Gore conceded the election on December 13. Throughout this period, the Administrator refused to articulate any specific standard that he would use to make the determination. During this period he offered at least three different and mutually contradictory interpretations of the Act to justify his inaction. Initially he indicated that he would release the transition resources as soon as a candidate was certified as having received a majority of electoral votes in the

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6. *Id.*

7. *Id.* § 3(c).

election, stating that he would release the transition funds and the keys to the transition office “to whichever candidate garnered the necessary 270 electoral votes after Florida’s outcome was certified.”<sup>8</sup> In the face of the Florida recount imbroglio and under political pressure from the White House, he quickly amended his position. Although he refused to articulate any express standard, he later suggested he would consider two other criteria as especially important. These two criteria were: (1) a concession by one of the candidates,<sup>9</sup> and/or (2) a resolution of all election contests and all election-related litigation.<sup>10</sup> At the same time he apparently repudiated his earlier position that the certification of an electoral college winner was even a relevant criterion. He provided no explanation as to why he considered those two factors to be especially relevant or why the certification of an electoral college winner would not be relevant. Nor did he ever declare whether these two criteria were disjunctive or conjunctive, or whether one was more important than the other. In fact, the Administrator vacillated throughout the entire post-election period, referring to the need for a concession at some times, the need for a resolution to election contests at other times, and a need for *both* a concession and a resolution to election contests at still other times. To the extent that a resolution of election controversies was required, he never stated whether this necessitated a *final*

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8. George Archibald, *White House Puts Transition on Hold: Agencies Told to Await Definite Winner*, WASH. TIMES, Nov. 22, 2000, at A3, available at 2000 WL 4170334 [hereinafter Archibald, *White House Puts Transition on Hold*]; see also George Archibald, *Bush Won't Get Keys to Transition Office Yet*, WASH. TIMES, Nov. 20, 2000, at A1, available at 2000 WL 4170176 [hereinafter Archibald, *Bush Won't Get Keys*] (announcing that the offices were ready and that he was ready to turn over the keys to the president-elect).

9. Archibald, *Bush Won't Get Keys*, *supra* note 8.

10. On November 27, the GSA released a statement that the election results were still not clear, despite the Florida vote certification. See George Archibald, *House Leaders Seek Reasons for Denial of Transition Funds*, WASH. TIMES, Nov. 30, 2000, at A1. The statement read, “Today, both sides are continuing with their stated plans to seek legal remedies with respect to this election so the outcome remains unclear and unapparent.” *Id.*; see also Esther Schrader, *Transition Agency All Dressed Up, Nowhere to Go*, PITTSBURGH POST-GAZETTE, Nov. 10, 2000, at A10, available at 2000 WL 27783932 (quoting GSA Deputy Administrator Thurman Davis, “We’ll make the call on handing over the offices whenever the determination is made on who is going to be president. If we get lawsuits, we cannot know who the winner is. We won’t know. We’ll just have to wait.”); George Archibald, *Congress Attempts to Speed Transition: Money Would Go to Both Candidates*, WASH. TIMES, Dec. 5, 2000, at A8, available at 2000 WL 4171257 [hereinafter Archibald, *Congress Attempts to Speed Transition*]; Associated Press, *Transition Funds Remain in Limbo*, CHI. TRIB., Nov. 27, 2000, at 13 (quoting GSA spokeswoman Beth Newburger, “As long as both sides are still going to court, and both sides say they are, we believe that the outcome remains unclear.”).

resolution or whether he was empowered to use his judgment to declare the contests effectively concluded.<sup>11</sup>

Finally, in the waning days of the controversy he adopted a third position, that he was actually *forbidden* by the Act from releasing the transition resources in a “close” election while the final results remained in doubt.<sup>12</sup> He made no attempt to square this position with his previous positions.<sup>13</sup> To the extent that any consistency could be gleaned from these multiple twists and turns, it appears that the Administrator believed that he had the sole discretion to interpret the terms of the Act and the conditions under which the Act’s release of funds was triggered, and that he could make the factual determinations required by the Act according to his plenary and unreviewable subjective assessment of the facts of the situation.

Finally, on December 12, the Supreme Court put an end to all further election-related litigation in Florida in *Bush v. Gore*. Still, the Administrator refused to act, stating that he awaited a concession speech by Vice-President Al Gore.<sup>14</sup> Following Gore’s concession in a nationally-televised speech, on December 13 the Administrator finally released the transition funds and turned over the keys to the transition offices to George W. Bush and Richard Cheney.<sup>15</sup> Even at this point the Administrator still never articulated why he waited for an express concession rather than simply acting after the Supreme Court’s ruling that resolved the relevant litigation. This substantially delayed Bush’s transition, including the initiation of the appointments process and background checks on potential appointees.<sup>16</sup>

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11. As will be shown *infra* this distinction is crucial, as the Administrator’s refusal to recognize Bush as the President-elect on the facts of the 2000 election appears to have been based on a fundamental misunderstanding of the law governing presidential elections.

12. *House Legislators Debate Allocation of Transition Funds*, CONGRESS DAILY, Dec. 4, 2000, available at 2000 WL 27012859 (statement of GSA that “Congress made it perfectly clear that if there is ‘any question’ of who the winner is ‘in a close contest,’ then the GSA should not declare a winner”).

13. See *Hearing Before the House Comm. on Gov’t Reform, Subcomm. on Gov’t Mgmt., Info., and Tech., and the U.S. House of Representatives* (Dec. 4, 2000) (statement of David J. Barram, Administrator of General Services) [hereinafter Barram Testimony].

14. See Kirsten Danis, *Bush Bounding into Winner’s Circle—Ready to Head for D.C. with Olive Branch for Al*, N.Y. POST, Dec. 14, 2000, at 4, available at 2000 WL 30249971; see also R.A. Dyer, *Bush-Cheney Transition Team Shifts into High Gear*, FORT WORTH STAR-TELEGRAM, Dec. 14, 2000, at 27, available at 2000 WL 28294001.

15. See Associated Press, *Officials Release Funding to Bush*, DENV. POST, Dec. 14, 2000, at A21, available at 2000 WL 25837300.

16. See *Welcome to 1600 Pennsylvania Ave., Mr. Bush*, WASH. TIMES, Dec. 20, 2000,

The effect of this delay placed a heavy burden on the Bush-Cheney transition team. On one hand, they could have deferred their transition efforts indefinitely, until the Administrator decided to release the funds. On the other hand, they could rely solely on private funding for their transition, a result that the framers of the Act specifically sought to avoid.<sup>17</sup> In the end, they chose the latter option, although they erected substantial safeguards to prevent conflicts of interest and the appearance of impropriety.<sup>18</sup> Either way, the Administrator's denial of the transition resources heavily prejudiced the Bush transition efforts, cutting the official transition period in half and forcing Bush to rely for several weeks on purely private funds to effect his transition.

This essay argues that under the facts of the 2000 presidential election, the Administrator had *no* statutory authority to withhold the transition resources and that, as a result, the prejudice imposed upon the Bush transition effort was wholly unjustified.<sup>19</sup> This essay will explore the language, intent, and policy goals of the Act, concluding that under the facts of the 2000 presidential election, the Administrator was required to release the transition resources once Bush received a majority of pledged and certified electoral college votes. Although the Act vests the Administrator with some discretion, this discretion is limited to making a narrow finding of fact and is heavily circumscribed by the history and language of the Act. The discretion accorded by the Act is far narrower than that seized by the Administrator in the 2000 election. Moreover, this essay will show that the basis claimed by the Administrator to justify his interpretation of the statute rested on a fundamental misunderstanding of the statute and the legislative history. The Administrator acted lawlessly and irresponsibly throughout the entire dispute, prejudicing the Bush-Cheney transition and harming the country as a result.

The essay addresses the various arguments advanced by the Administrator to justify his refusal to release the transition resources to Bush prior to Al Gore's concession on December 13. Part II reviews the Administrator's initial justification that the language of the Act is

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at A18.

17. See *infra* notes 183–186 and accompanying text.

18. See *infra* note 186.

19. See *infra* notes 176–186 and accompanying text (describing harm to Bush transition, including delay in beginning transition and creating need to rely on private funds to fund transition activities).

ambiguous and his implicit assertion of authority to render an authoritative legal interpretation of the Act that provided him with discretion to refuse to release the transition resources to Bush. A close reading of the Act's language shows it to be unambiguous in its terms, at least on the facts of the 2000 election. Part II will further show that even if the Act is thought to be ambiguous, the Administrator acted improperly in his interpretation of the Act. Part III reviews the legislative history and the political context of the Act. The legislative history reinforces the plain language reading of the Act, and the historical context of the Act also provides important context for understanding the debates over the Act. Part IV reviews the specific legislative history relied on by the Administrator to deny the release of the transition resources to Bush, and shows that the Administrator's understanding of this legislative history was flawed. Part V reviews the policies of the Act and demonstrates that requiring the Administrator to release the funds as soon as Bush received a majority of pledged and certified electoral votes was more consistent with the policies of the Act than allowing the Administrator untrammelled discretion to withhold the funds until he is subjectively satisfied that the apparent winner could be recognized. Part VI of the essay briefly discusses proposals for reforming the Act to prevent another debacle like that of the 2000 election. Part VII concludes.

## II. THE SCOPE OF THE ADMINISTRATOR'S DISCRETION

The Administrator's initial position was that the language of the Act was ambiguous and that he was therefore empowered to exercise discretion in construing the Act's terms. Although the Administrator never formally articulated a justification for his authority, his position presumably was rooted in the logic of the so-called *Chevron* doctrine.<sup>20</sup> Assuming that this doctrine was the basis for his claimed authority, this Part of the essay shows that the Administrator's acts were not protected by *Chevron*; nor is it even clear that *Chevron* would even apply to this case. Under *Chevron*, if a statute is unambiguous, then it is to be applied according to its terms and no discretion is owed to the agency asserting authority. This essay shows that the Act is unambiguous, at least in relevant part and as it relates to this case. But even if the statutory language is ambiguous, the Ad-

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20. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

administrator's interpretation should be reviewed under the less-deferential standard of review of *Skidmore v. Swift & Co.*,<sup>21</sup> rather than *Chevron*. Under the *Skidmore* standard, the Administrator's decisions were entitled to very little deference at all. Finally, even if *Chevron* does apply to this situation, the Administrator's refusal to release the transition resources once Bush received a majority of pledged and certified electoral college votes represented an unreasonable interpretation of the statute and was thus not protected by any discretion that he may have otherwise been allowed to exercise.

Under *Chevron*, a court must apply a two-step process to determine the determination of whether a court should defer to an agency's interpretation of a statute.<sup>22</sup> Under the first step of the *Chevron* analysis, a court must determine whether Congress intended to delegate law-making authority to the administrative agency claiming the power to regulate. Resolving this first prong will require the court to resolve two additional intertwined issues. Initially, the court must determine whether the language of the statute unambiguously resolves the question; if so, then Congress can be understood to have already exercised its law-making authority. If the statute is ambiguous, the court must determine whether Congress intended for the agency to fill the ambiguity by delegating law-making authority to that agency, or whether Congress intended for the gap to be filled by judicial interpretation, looking to agency interpretations for persuasive (not binding) guidance as to the meaning of the statute.

Under the second step of *Chevron*, if there is ambiguity in the statute and it is evident that Congress intended for the agency to issue an authoritative interpretation of the statute, then the court should defer to any reasonable, authoritative interpretation of the statute's command. However, the second prong in the *Chevron* analysis is relevant only if the statutory language is found to be ambiguous or that Congress intended to delegate authority to the administrative agent to engage in law-making activity.

This Part will apply the *Chevron* analysis to determine whether the Administrator acted appropriately in refusing to release the transition funds to Bush-Cheney once it secured a majority of pledged and certified electoral votes. As will be shown, under the plain lan-

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21. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

22. *Chevron*, 467 U.S. at 842-43.

guage of the Act, the Administrator was required as a matter of law to release the transition resources once Bush received a majority of certified electoral college votes. Furthermore, even if it is believed that the Administrator was not compelled as a matter of law, on the facts of the 2000 election there was no reasonable basis for the Administrator to refuse to release the transition resources to Bush. Even if it is believed that the Act is ambiguous and that therefore the Administrator held some discretion, the discretion intended for the Administrator to exercise is limited to making a narrow factual finding, not sweeping legal interpretations. Finally, it will be shown that given the legal and factual determinations made here, along with the absence of formal procedures to guide his decision-making, the Administrator's actions should be governed under the less-deferential *Skidmore* standard, rather than *Chevron*.

#### A. Plain Language

Section 3 of the Presidential Transition Act of 1963 authorizes the Administrator, upon request, to provide to the President and Vice-President-elect "necessary services and facilities" to effectuate the transition of the President-elect to become President.<sup>23</sup> The debate centered on the statutory definition provided in subsection (c) of the Act, which provides:

The terms "President-elect" and "Vice-President elect" as used in this Act shall mean such persons as are the *apparent successful candidates* for the office of President and Vice President, respectively, as ascertained by the Administrator following the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2.<sup>24</sup>

The crucial question to be resolved in implementing the Act, therefore, is when does a candidate qualify as the "apparent" winner of the election, so as to be designated as the "President-elect" under the statute.

##### 1. *Legal significance of a certified electoral college majority*

The Act does not define the phrase "apparent successful candidates," but the plain language of the statute and standard principles

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23. Presidential Transition Act, *supra* note 1, § 3(a).

24. *Id.* § 3(c) (emphasis added).

of statutory construction provide some evidence of the statute's meaning. For instance, the term "apparent" is defined in Webster's Dictionary as "appearing (but not necessarily) real or true,"<sup>25</sup> and therefore its use in the statute indicates a distinction between the "apparent" and "real" winners of the election. The use of the term *apparent* successful candidate makes it evident that the recipient of the funds need not be the officially designated, *actually* successful candidate, and since its enactment the Act has never been construed to require that the apparent successful candidate prove that he is the actual successful candidate.

In fact, the Act contemplates and permits payment of obligations incurred as early as the day after the general election if an apparent successful candidate can be identified.<sup>26</sup> The actual successful candidate, of course, could not be identified until the final counting of the electoral college ballots in January. Clearly then, the statutory language indicates that the use of the term "apparent" means something distinct from the "actual" or official winning candidate.

The Administrator presumably believed that the relevant terms in the Act were ambiguous, giving him discretion to refuse to declare Bush the apparent winner. But read in context, the term is not sufficiently ambiguous to support the Administrator's proffered reading of the statute. In the interpretation of a statute, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>27</sup> If Congress has expressed its intent unambiguously, "the inquiry is at an end" and the agency interpretation must yield to the statute.<sup>28</sup>

Statutory language must not be read in isolation, but in the overall context of the statute. As the Supreme Court recently observed in *FDA v. Brown & Williamson*, "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into an harmonious whole.'"<sup>29</sup> Thus, it is

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25. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (2d college ed., David B. Guralnik et al. eds., 1982). Other definitions of "apparent" arguably suggest a tighter link between what is real and what is perceived, as *Webster's* offers as alternatives "readily seen; visible" and "readily understood or perceived; evident." *Id.* But these definitions still distinguish between perception and underlying reality.

26. Presidential Transition Act, *supra* note 1, § 3(b).

27. *Chevron*, 467 U.S. at 842-43.

28. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

29. *Id.* at 133 (citations omitted).

not enough to simply ask whether *any* ambiguity in the statute exists. Rather, the proper inquiry is whether the statutory language, read in context and assuming a reasonable connection between the language and purposes of the statute, produces an unambiguous result.<sup>30</sup>

The relevant question in this situation is whether under the plain language of the statute the GSA Administrator was required to name Bush “President-elect” under the Act once he secured a majority of certified electors in the election. Following the certification of the Florida popular vote on November 26, 2000, by the Florida Secretary of State in favor of Bush-Cheney, the Governor of Florida executed and forwarded to the National Archives the Certificate of Ascertainment designating the Bush-Cheney slate of electors as Florida’s electors.<sup>31</sup> When combined with the certified and pledged electors of other states, this guaranteed Bush-Cheney 271 electoral votes, a number sufficient to have them elected President and Vice-President, respectively.

By using the term “apparent” Congress recognized the possibility that some contingency might intervene that caused a situation where the “apparent winning candidate” did not, in fact, turn out to be the *actual* winning candidate. This could be for any number of reasons, including the death of the President-elect during the transition period,<sup>32</sup> electoral fraud overturning an election,<sup>33</sup> resignation of a candidate,<sup>34</sup> ballot recounts that change the result after the initial

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30. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 23 (1997) (“A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”).

31. See <http://www.nara.gov/fedreg/elctcoll/2000certa.html> (reproducing Certificates of Attainment in PDF format).

32. In 1873, Georgia’s electors were pledged to Horace Greeley, who died between the day of the election and the day the Electors met to cast their votes. Despite Greeley’s passing, three Georgia electors persisted in voting for him. There was an objection to the counting of these electoral votes on this basis, and eventually the votes were disallowed. See 3 ASHER C. HINDS, *HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* § 1967, at 270 (1907).

33. In the 1877 election, conflicting electoral certificates were presented from Florida, requiring a determination of which slate of electors would be counted. See *id.* § 1971, at 274–76.

34. In an analogous situation, in 1972, Senator Thomas Eagleton resigned as the Vice-Presidential nominee for the Democratic Party following the convention. See Kevin J. Coleman et al., *Presidential Elections in the United States: A Primer*, CRS REPORT FOR CONGRESS, at CRS-46 (April 17, 2000).

general election,<sup>35</sup> or a “faithless” elector who violates his pledge and votes for a candidate different from the one for whom he promised to vote.<sup>36</sup> The drafters of the Act specifically considered the possibility of faithless electors and the fact that faithless electors could upset the final recognition of the apparent winner as the actual winner. Acknowledging that this was a possibility in every presidential election, the drafters of the Act nonetheless agreed that this possibility would not provide a basis for refusing to recognize the pledged electors in ascertaining an apparent winner.<sup>37</sup> Any of these contingencies could occur in any presidential election, and, in fact, have actually occurred in prior elections. However, there is no reason to believe that the possibility that they may arise again should interfere with making the designation of an apparent successful candidate when one can be identified.

The plain language of the Act also clearly limits the Administrator’s discretion in naming the President-elect. Thus, the plain language of the Act forecloses the Administrator from naming Ralph Nader of the Green Party or Harry Browne of the Libertarian Party as the “apparent successful candidate.” Although one could imagine scenarios where one of these candidates ended up winning an electoral college majority when the balloting actually occurred, the Administrator clearly could not name either of them as the apparent successful candidate. The reason is clear—even though either could conceivably win the election, neither held an electoral college majority following the popular election.

Thus, although the Act may hold some ambiguities in ascertaining the apparent winner, it is not so radically indeterminate so as to support any reading offered by the Administrator. The Administrator did not have discretion to name Ralph Nader the apparent winning candidate; nor did he have discretion to refuse to name George W. Bush the President-elect once Bush received a majority of certified electoral votes. At that point, Bush became the apparent winner,

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35. See discussion *infra* notes 110–125 (describing Hawaii during 1960 election).

36. There have been seven faithless electors in the last century, in 1948, 1956, 1960, 1968, 1972, 1976, and 1988. In 1988, a Democratic Elector from West Virginia voted for Lloyd Bentsen for President and Michael Dukakis for Vice-President, rather than the other way around. See Thomas H. Neale, *The Electoral College: How It Works in Contemporary Presidential Elections*, CRS REPORT FOR CONGRESS, at CRS-4 (July 21, 1999); see also NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 98–101 (rev. ed. 1981).

37. See 107 CONG. REC. 13,349 (1963) (dialog between Mr. Haley and Mr. Fascell).

notwithstanding the fact that factors could intervene that might later prevent him from being the actual winner of the election. A candidate could fall ill on the night of the election, raising doubts about whether the candidate might survive until the electoral college met to formally elect him President. Nonetheless, it would be senseless to argue that this happenstance excused the Administrator from naming that candidate the President-elect under the statute. Whatever the ambiguity that may exist in the Act, the Act clearly compels the Administrator to name an apparent winner when one candidate has secured an electoral college majority.

Despite the plain language of the statute, the Administrator refused to release the transition resources until the results were clear, and maintained that the results would not be clear until all contests relating to the Florida election were resolved. As the foregoing discussion has indicated, this is a mistaken interpretation of the Act. This interpretation confuses the statutory requirement that there be an “apparent” winning candidate with a non-statutory concern that the apparent winner may not, in fact, turn out to be the “official” winner when the remaining issues are resolved. The Act requires only that the Administrator be sufficiently satisfied that one of the candidates is the *apparent* winning candidate, *not* that he is certain to be the *actual* winning candidate. As noted, contingencies are always possible such that there is no way to guarantee that the apparent winner will turn out to be the actual winner. Once Governor George W. Bush received a sufficient number of electoral votes no question remained that he was, in fact, the *apparent* winning candidate for purposes of the statute, even though he may have eventually turned out to be the losing candidate, and not the actual winning candidate in the election.

## *2. Identification of an “apparent” winner on the facts of the 2000 election*

Because Bush held a certified electoral college majority, the Administrator’s refusal to Act must have been based on his belief that the ascertainment of the “apparent” winner required a probabilistic evaluation of the likelihood that the apparent winner would turn out to be the actual winner in the end. Had the Administrator carefully conducted such an assessment, however, it would have been obvious that once Governor Jeb Bush of Florida filed the state’s Certificate of Ascertainment in George W. Bush’s favor, it would have been virtu-

ally impossible for Gore to win the election. Although Gore could have won his court cases and perhaps even won a recount in Florida, there was effectively no possible way for him to seize Florida's electoral votes. He would have still faced numerous hurdles in order to have Florida's twenty-five electoral votes counted in his favor. Indeed, these hurdles were so numerous and daunting as to make it virtually impossible for Gore to have won. As one Democratic Congressman observed on December 5, "[I]f you put money on [Al Gore's] chances right now, you'd probably want points."<sup>38</sup> The belief by some (including the Administrator) that Gore's litigation could upset Bush's victory as a legal matter seems to be based on a blatant misunderstanding of law governing presidential elections. Even if Gore won the litigation, he would have still almost certainly lost the election.

On November 26, Governor Jeb Bush executed and filed Florida's Certificate of Ascertainment on behalf of George W. Bush. Even if Gore had prevailed in a recount some time in December, this would not have displaced the original certificate; it only would have created the possibility of two different certificates. However, Jeb Bush could have simply refused to file the second certificate, or the Republican-controlled Florida state legislature could have ordered that the first certificate be recognized or awarded the state's electoral votes to Bush. Moreover, depending on the date a second certificate would have been filed, the state legislature could have reasonably decided not to file the second certificate if it fell outside of the "safe harbor" date for filing certificates. Thus, even if Gore had won the litigation and also won a subsequent ballot recount, there is substantial question about whether Florida would have even filed a second certificate.

Even if a second certificate had been filed on behalf of Gore, this would have simply raised the question of which of the two certificates should be counted in tabulating the electoral college votes. Based on congressional precedent, when confronted with two conflicting Certificates of Ascertainment, Congress must decide which one to recognize.<sup>39</sup> Because the Republicans held a majority in the

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38. Vincent Morris, *Dem Front Shows Cracks; Congress Bigs Ask Patience As Some Lose Faith*, N.Y. POST, Dec. 5, 2000, at 7, available at 2000 WL 30249067 (quoting Democratic Representative Jim Moran).

39. See *infra* notes 123-125 and accompanying text (discussing resolution of dispute over competing slates of electors from Hawaii during 1960 election). As discussed *infra*, in

House, the House presumably would have voted to count the Bush electors. In the Senate, the vote would presumably have been fifty-to-fifty, with Gore as incumbent Vice-President breaking the tie as presiding officer in the Senate. But where the House and Senate choose to recognize different slates, the law provides that the state legislature of the state itself chooses which certificate to recognize.<sup>40</sup> Because Republicans controlled both houses of the Florida legislature, this rule would have obviously led to a recognition of the Bush electors. Thus, if Congress had been required to decide between two competing slates of electors, Bush would almost certainly have won the dispute.

But Gore confronted yet another obstacle. Republicans would have had a sound basis for refusing to seat Democratic Senator-designee Jean Carnahan of Missouri. Carnahan's husband, Mel Carnahan, died in a plane crash just weeks before the Senate election. Despite this, Missouri voters "elected" him to the United States Senate. This was interpreted as a vacancy by the Governor of Missouri, who filled the seat by naming Mel Carnahan's widow, Jean Carnahan, to the seat. However, Republicans could have challenged Jean Carnahan from taking the seat on several grounds. First, there were irregularities in the St. Louis voting precincts on election night that cast doubt on the results of the election. Second, it is likely that Missouri's election failed to comply with the Constitution, which provides that "No Person shall be a Senator . . . who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."<sup>41</sup> The "winning" candidate, Mel Carnahan, was deceased at the time of the election, meaning that he could not have been an "inhabitant" of the state of Missouri when he was elected. Thus, he could not have served as a Senator when elected, likely rendering the votes for him invalid, just as they would have been had, say, Donald Duck or some other fictional character received the greatest number of votes. A vote for an invalid candidate is tantamount to no vote at all, and typically such votes are considered "spoiled" or "undervote" ballots. Invalid ballots are simply not counted, thus making the candidate who received the greatest number of valid votes the winner.

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1960, the dispute was mooted by Nixon's request that the Kennedy electors be recognized, an unlikely scenario for the 2000 election.

40. 3 U.S.C. § 15 (1994).

41. U.S. CONST. art. I, § 3.

Thus, because Mel Carnahan was not a valid Senate candidate, Missouri confronted no Senate vacancy for the Governor of the state to fill.

Under the Constitution, each house of Congress is “the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>42</sup> The combination of vote-fraud allegations and the constitutional violation in the manner in which Mel Carnahan was elected would have been sufficient to allow the Republicans to refuse to seat Jean Carnahan as a Senator.<sup>43</sup> At the very least, it would have justified refusing to seat her temporarily, until the matter could be resolved. This would have given the Republicans a fifty to forty-nine majority in the Senate when it came time to determine which of two competing slates of electors to recognize.<sup>44</sup>

Taking these factors together, there was no plausible way for Gore to win the election once Florida’s electoral votes were certified for Bush on November 26. More fundamentally, the results of the Florida litigation were largely irrelevant to the eventual outcome of the election. At best, Gore could have precipitated a floor fight between two competing slates of electors, a fight that he almost certainly would have lost. Thus, there was no reasonable basis for the Administrator to believe that the outcome of the *election* depended on the outcome of the *litigation*. Evidently, he simply misunderstood the law of presidential elections.<sup>45</sup> Thus, even had the Admin-

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42. U.S. CONST. art. I, § 5.

43. If Jean Carnahan had sought to be elected to the Senate, she could have run as a write-in candidate. Write-in candidacies are the traditional mechanism for a candidate to compete in an election if the candidate is unable to gain access to the election ballot for any reason. In fact, Strom Thurmond won election to the United States Senate in 1954 after a write-in campaign in South Carolina. See Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 194 n.142 (1991).

44. It is not clear whether the Democrats could have responded by walking out and preventing a quorum or through some other mechanism that would have prevented the counting of the votes until Jean Carnahan was seated.

45. To be sure, Mr. Barram is not the only one who has committed the error of believing that the outcome of the Florida litigation would have affected the outcome of the election itself. Distinguished constitutional law scholars Jack M. Balkin & Sanford Levinson, for instance, have written that the Supreme Court’s decision in *Bush v. Gore* “handed” the election to Bush. Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 174 (2001). As shown in the text, Bush effectively held the legal entitlement to the White House after Governor Jeb Bush certified the first slate of presidential electors in his favor. The Supreme Court’s decision in *Bush v. Gore*, therefore, affected only the *political* calculus of whether Gore could induce Bush to concede, notwithstanding the fact that Bush would have been able to claim

istrator believed that he possessed the power to conduct an assessment of the probable end-result of the election, there remained little doubt as a legal matter that Bush in fact would eventually prevail as the winner of the election. Bush could have lost in only the most unlikely of circumstances. First, Gore would have had to win the litigation—which he actually lost in the United States Supreme Court. Second, he would have had to win the ballot recount—which independent media recounts after the election concluded was highly uncertain.<sup>46</sup> Third, he would have had to convince the state of Florida to file a second Certificate of Ascertainment in light of a successful recount. Finally, he would have had to win the floor contest in Congress over the recognition of the Gore slate rather than the Bush slate, which would have required either a Bush concession or a change of heart by the Republican-controlled Florida state legislature. All four of these were necessary conditions for Gore to prevail in the election; had any of them failed, then Gore could not win the election. Moreover, on few of these issues did Gore have a greater than infinitesimal chance of prevailing, much less prevailing on all four counts.<sup>47</sup> In short, just as the Act prohibits the Administrator

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victory in the electoral college. In fact, this reality was confirmed by Ron Klain, the general counsel of the Gore recount team. In a public question and answer period at the Federalist Society's National Lawyers Conference in November 2001, the author asked Klain what the "end-game" was to the Gore strategy. Mr. Klain acknowledged that the litigation would not have affected Congress's power to recognize the Bush certificate and that the end-game strategy for the Gore team was political, not legal. Gore hoped that if he won the recount he sought, Bush would concede the election notwithstanding his legal advantages. There is no evidence or reason to believe that Gore was correct in this supposition. Balkin and Levinson, of course, are not the only academics who could be identified as committing the error of believing that Gore would have won the election had he won a court-ordered recount in Florida, although they have been among the most outspoken expositors of that position.

46. According to independent media recounts, if Gore had won the litigation and received a recount of the counties requested in his litigation, he would have still lost the election by approximately 225 to 493 votes. If a statewide recount of all ballots had been conducted, a request that was not part of Gore's requested remedy, then Gore may have been able to win the state, depending on the ballot standards used. See Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush, But Study Finds Gore Might Have Won Statewide Tally of All Uncounted Ballots*, WASH. POST, Nov. 12, 2001, at A1, available at 2001 WL 29762038. Thus, even had Gore won his litigation it is doubtful that he would have won the election.

47. At the risk of belaboring the point, it is worthwhile to conduct a thought experiment regarding Gore's chances in the days preceding the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). At that time, one might generously assign Gore a 50% likelihood of prevailing in the litigation and a 50% likelihood of winning a recount (subsequent events, of course, have shown that both of these figures probably overestimated his chances). Assuming he prevailed on both of these issues, one could again generously assign a probably of 75% to the possibility that a second certificate would be filed. Finally, Gore's odds of winning a floor

from considering such long-shot possibilities as that of a faithless elector, he was equally unjustified in considering the long-shot possibility that Gore might actually win the election here.

### *B. The Scope of the Administrator's Discretion*

Even if the language of the statute is ambiguous in this context, the Administrator still lacked authority to interpret the Act as he did. The Act requires the Administrator to release the transition resources as soon as the apparent successful candidate can be identified. The Act vests some discretion in the Administrator to determine whether a candidate qualifies as the apparent successful candidate. But the scope of the Administrator's discretion under the Act is narrowly circumscribed. Moreover, the scope of the Administrator's limited discretion does not protect the Administrator's decision to refuse the release of the transition resources to a candidate who holds a certified majority of electoral college votes.

### *I. Under Chevron*

Even if the statute is ambiguous, it must still be determined that Congress intended to delegate law-making authority to the administrative agency. Although the *Chevron* doctrine is primarily a constitutional doctrine relating to the separation of powers between the branches of the federal government,<sup>48</sup> the Supreme Court has also noted that the doctrine is supported by the policy rationale that agencies usually have greater expertise as to the subject regulated than does Congress or the courts.<sup>49</sup> Although it is not necessary for such an agency to have particular expertise in the subject matter

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fight in Congress could not possibility have exceeded 25%, for the reasons stated in the text. So Gore's overall odds at that time were roughly  $(.5 \times .5 \times .75 \times .25)$ ; or, about 4.7%. In retrospect, of course, this certainly overstates his chances, but even *ex ante* these odds are fairly insignificant.

48. See *In re Appletree Mkts., Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) ("The *Chevron* doctrine is based upon separation of powers . . .").

49. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986); see also *United States v. LaBonte*, 520 U.S. 751, 778 (1997) (Breyer, J., dissenting) (noting that Court will tend to grant greater interpretive "leeway" when the issue falls within the agency's policy-related expertise); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (noting that basis for deference is greater where the asserted regulatory power falls within agency's particular expertise).

delegated to it, in determining whether Congress intended a delegation it is relevant to inquire whether the agency has expertise in the subject matter.<sup>50</sup> It is certainly possible that Congress might intend to delegate authority to an agency to issue regulatory decisions in an area where it has no particular expertise. Nonetheless, one would expect that if Congress intended such an unusual action, it would make its delegation exceedingly clear.<sup>51</sup> In a situation where the agency that has purportedly received the delegation lacks any expertise with respect to the issue in question, one would expect Congress to be very explicit about why it was making such a delegation.

The Act provides no evidence that Congress intended to delegate broad decision-making authority to the Administrator; in fact, all logic and evidence points in the opposite direction. The Administrator of the GSA would be a curious choice to make the determination as to the who was the President-elect of the United States for purposes of the Act. The responsibilities of the GSA are to handle the purchasing of office supplies for the government and to print government publications.<sup>52</sup> GSA Administrator David Barram was an executive at Apple Computer and Hewlett-Packard before President Clinton appointed him to run the GSA.<sup>53</sup> There is little in Barram's background prior to entering government or his experience as Administrator of the GSA to suggest that he would be appropriately qualified to make the important legal and factual determinations required by the Act. Indeed, his terrible misunderstanding of the law governing presidential elections illustrates his lack of expertise and unsuitability for the delegation supposedly made by the Act. Given the GSA's function and the Administrator's expertise, it is far more plausible to believe that Congress might defer to the Administrator the discretion to choose between the ordering of No. 1 lead versus No. 2 lead pencils than it is to believe that Congress intended for the

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50. See *United States v. Haggard Apparel Co.*, 526 U.S. 380, 394 (1999); *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984).

51. *Accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

52. See Charles W. Holmes, *Transition: Agency That Facilitates Transfer of Power is Caught in Middle*, ATLANTA J. & CONST., Nov. 29, 2000, at 8A, available at 2000 WL 5488950 (“The GSA is an agency that normally spends its time managing the nuts and bolts of governing: leasing office space, printing publications, ordering light bulbs and managing computer systems. It seldom gets the kind of attention now being turned on it.”).

53. *Id.*

Administrator to determine the “President-elect” of the United States.<sup>54</sup>

The Administrator’s obvious lack of expertise suggests that Congress did not intend to make a general delegation of law-making power to the GSA administrator. Under the terms and structure of the Act, the Administrator serves as a largely ministerial officer for purposes of executing the terms of the Act. The discretion afforded to the Administrator is to make the *factual* determination of whether a candidate is the apparent winner of the election.<sup>55</sup> This narrow factual finding provides no basis for the Administrator to freelance with respect to rewriting the legal standard or for an arbitrary assessment of the factors that he subjectively believes to be important. The Act implies a bright-line legal standard that should be applied according to objectively determinable facts that the Administrator may consider in reaching his conclusion. Moreover, it provides a test that can be implemented by reference to objective facts and provides a basis for ensuring that the Administrator’s conclusion be reasonably justified by reference to those facts. It provides no basis for the Administrator’s belief that it allows him to indulge his subjective assessments as to the legal standard to apply or the facts to consider. Once the Administrator makes the factual determination of one of the candidates as the apparent winner, he is instructed to release the transition funds to that candidate upon request. The Administrator has narrow discretion to make the factual determination of “who is the apparent winner in order to perform the ministerial functions under this act.”<sup>56</sup> His discretion under the statute is limited to this narrow factual finding; there is no evidence that Congress intended a more general delegation to the Administrator. Thus, if *Chevron* governs the interpretation of the Act, then there is still no reason to believe that the Administrator was acting within the scope of delegated power.

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54. In a different context, *Brown & Williamson* expressly instructs courts to apply their “common sense” to the question to determine whether Congress may have intended a particular delegation where it will have especially significant economic and political magnitude. See *Brown & Williamson*, 529 U.S. at 133.

55. See 109 CONG. REC. 13,348 (1963) (statement of Mr. Fascell).

56. *Id.*

## 2. Under Skidmore

Given the lack of expertise of the GSA in making the determination in question here and the slapdash procedures used to make the decision, it is thus doubtful that Congress intended to make a *Chevron*-style delegation of authority to the Administrator in this case to render an authoritative legal interpretation of the Act. Instead, the Administrator's actions should be reviewed under the less-deferential *Skidmore* standard of review,<sup>57</sup> which was recently reiterated by the Supreme Court in *United States v. Mead Corp.*<sup>58</sup> There the Court held that *Chevron* deference is owed only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>59</sup> Otherwise, *Skidmore* controls.

In discerning congressional intent to delegate law-making authority under *Chevron*, a court will examine, among other factors, the rule-making processes used by the agency to articulate its regulation. The case for deference is stronger where the final decision is rendered by some sort of formal and deliberative process reached after compliance with the notice-and-comment rules of the APA.<sup>60</sup> Because *Chevron* essentially grants the executive power to engage in interstitial rulemaking within the ambiguities of the statute,<sup>61</sup> such regulations are usually promulgated according to the formalities generally associated with lawmaking activity, such as notice and comment and due process. As the Court stated in *Mead*, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>62</sup> Where such formalities are absent, by contrast, *Skidmore* applies.

The Supreme Court has been more troubled when the policy is articulated through opinions derived through processes other than

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57. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

58. 533 U.S. 218, 121 S. Ct. 2164 (2001).

59. *Id.* at 2171.

60. See *Christensen v. Harris County*, 529 U.S. 576, 586 (2000).

61. See *In re Appletree Mkts., Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) ("Executive rulemaking is actually interstitial legislation . . .").

62. *Mead*, 121 S. Ct. at 2172.

notice-and-comment and formal rule-making, although it has upheld decisions made through this process.<sup>63</sup> Here, even such a watered-down form of due process was absent. Congress, it is suggested, would not be likely to delegate law-making authority to an agency that could then exercise that powerful authority without the safeguards of notice-and-hearing and other protections. Where the Administrator makes a summary interpretation of the statute without any sort of formal rule-making or regulatory procedures, as he did here, little deference is owed.<sup>64</sup> The *Skidmore* doctrine applies in such situations rather than the *Chevron* doctrine, meaning that the agency pronouncement is treated as having only persuasive authority rather than binding authority.<sup>65</sup> Just as it is inappropriate to second-guess a legitimate delegation of law-making power from Congress to an agency, it is equally inappropriate to *create* such a delegation where Congress intended no such delegation.<sup>66</sup>

Here, the Administrator's interpretation of the Act is largely unpersuasive and would not be likely to be acceptable were it reviewed in court. Under *Skidmore*, therefore, deference to the Administrator

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63. *Christensen*, 529 U.S. at 587. ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); see also *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995).

64. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–58 (1991) (stating that interpretive guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (stating that interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers").

65. See *Mead*, 121 S. Ct. at 2175; *Christensen*, 529 U.S. at 586–87.

66. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 42 (1990) ("Which interpretations, then, should be recognized as carrying the force of law, and as therefore binding on the courts and the public? The answer is simple: only those that Congress intended to have the force of law. . . . [T]he key question in each case is whether Congress delegated the authority to issue interpretations with the force of law *in this format*."); *id.* at 44 ("For the critical situation in which Congress has not indicated its delegatory intent, the court cannot simply assume that a 'gap' in the substantive meaning of a statute automatically establishes a delegation whereunder any reasonable agency interpretation will bind the courts. This approach wrongly throws the armor of limited review around all interpretations, regardless of the formats in which they are expressed."); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.").

is inappropriate. As Justice Jackson observed in *Skidmore*, “[t]he weight [given to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>67</sup> The nondeliberative, indeed bizarre, nature of the Administrator’s decision-making process in this case, its lack of grounding in the statute’s language and history, and the shoddiness of the Administrator’s decision-making process all suggest that a court would give little weight to the Administrator’s interpretation.<sup>68</sup> And because of its persuasive rather than constitutional grounding, the presence of agency expertise is even more important for *Skidmore* deference than for *Chevron*—an expertise that is manifestly absent in this case.<sup>69</sup> Indeed, *Skidmore* contemplates at least a modicum of deliberation, expertise, and due process, none of which was present in the Administrator’s decision. It is difficult to believe that Congress intended to constitutionally delegate to the Administrator the authority to interpret a statute of high national importance without any articulated standard as well as the power to willy-nilly revise any standard that he did announce, yet provide no opportunity for the affected parties to contest the Administrator’s decision. Nor is this a detailed regulatory scheme where the Administrator has any sort of expertise.<sup>70</sup> In such cases, not only is *Chevron* deference not owed, but even *Skidmore* deference should be rejected.<sup>71</sup>

*C. The Administrator’s Construction of the Statute  
Was Unreasonable*

Even if the statute is ambiguous and it is believed that the Ad-

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67. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

68. See *Christensen*, 529 U.S. at 586.

69. See *Skidmore*, 323 U.S. at 139 (noting that the source of *Skidmore* deference is based on an agency’s “specialized experience and [the] broader investigations and information” available to the agency).

70. Cf. *Mead*, 121 S. Ct. at 2175 (“There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case . . .”).

71. See Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1136 (2001) (“*Skidmore* advises a sliding scale of deference, or ‘respect,’ based on its factors of agency expertise, consistency, contemporaneous, and thoroughness of consideration.”).

ministrator was delegated the authority to interpret the Act, any such interpretation must still be reasonable to be binding. The recognition of the narrow scope of the Administrator's discretion to make a narrow factual finding of whether a candidate can be ascertained as having an electoral college majority is the only one consistent with the language, structure, and policies of the Act. The Act clearly contemplates that there will be minimal discretion vested in the Administrator to make the determination as to when one candidate has become the apparent winning candidate. Once that determination is made, the Act relegates the Administrator to a wholly ministerial role. Given the predominantly ministerial role envisioned for the Administrator under the statute, it is absurd to think that Congress vested broad discretion in the Administrator to make an unconstrained determination of when an apparent winning candidate has been identified. Rather, Congress clearly contemplated that the determination would be narrow and constrained by objective facts, most obviously whether any candidate has earned a sufficient number of electoral votes to become President.

The Act's emphasis on speed and continuity further indicates that the transition was expected to begin as soon as an apparent winner was identified, even though further contingencies or developments might later render this judgment erroneous as to the actual winner.<sup>72</sup> Allowing the Administrator to determine according to his own time-table when he is subjectively satisfied that a candidate has qualified as the President-elect threatens substantial delay of transition activities and essentially gives the Administrator the primary role in determining the success or failure of the new administration's transition and first year in office. It is simply not a logical or reasonable statutory scheme to believe that Congress intended to vest such powerful discretion and authority in a minor ministerial agent. Professor Jonathan Turley testified to Congress that empowering the Administrator of the GSA to make the determination as to the apparent winner is a "bizarre choice."<sup>73</sup> Although accurate, this cri-

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72. The policies of the Act are discussed in greater detail *infra* at Part V.

73. *Transitioning to a New Administration: Can the Next President Be Ready?: Hearing Before the House Comm. on Gov't Reform, Subcomm. on Gov't Mgmt., Info., and Tech.* (Dec. 4, 2000) (statement of Jonathon Turley) available at <http://www.house.gov/reform/gmit/hearings/2000hearings/001204.Transition/001204jt.htm> [hereinafter Turley Testimony] (calling the Administrator of the GSA a "bizarre choice to make any designation of an apparent winner in a presidential election").

tique misses the point. Providing this power to the GSA Administrator *would* be a bizarre choice if determining the actual winner required any substantial degree of judgment or expertise. But as the Act is written and as the authors of the Act understood, identifying the apparent winner requires little discretion or expertise. There is nothing in the statute to suggest that the Administrator has been delegated the unreviewable discretion to hold up the disbursement of the transition funds based on his subjective evaluation about the eventual outcome of the election when there is no substantial evidence to support this delay.

It is not a reasonable construction of the Act to interpret it in such a manner as to vest such broad, unreviewable discretion in the Administrator. It is generally assumed that Congress does not intend to draft illogical or irrational legislation.<sup>74</sup> Reading the Act so as to vest broad, unreviewable discretion in the Administrator would constitute exactly such an utter irrationality. It is implausible to believe that Congress meant for a ministerial officer such as the General Services Administrator to wield such potentially vast power. After all, the Administrator's duties are to handle the purchasing of office supplies and printing governmental publications. This is undoubtedly a vast and important responsibility, but there is little reason to believe that it qualifies the GSA Administrator to make a discretionary legal judgment as to the meaning of the term "President-elect" under the Act or to make an unfettered subjective assessment of the facts of the situation. One might expect with equal plausibility that Congress would vest the Secretary of HUD with the power to order military air strikes on Iraq. In both cases, the particular expertise of the government official claiming the power in question is simply inconsistent with the responsibility claimed under the statute. One could imagine Congress making such a peculiar delegation of power, but if so, one would expect that Congress would act unambiguously and explain why it chose such a strange course. Here, by contrast, Congress

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74. See *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."); *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("We will only look beyond the plain language of a statute at extrinsic materials to determine the congressional intent if: (1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent.").

spoke ambiguously at best and in fact seems to have spoken strongly in the opposite direction. That such a construction of the statute is necessary to reach such an absurd results indicates that the construction is incorrect. It is the proffered construction of the statute, not the statute itself, that generates this irrational result. The statute certainly does not command this absurd result.

A far more sensible construction of the statute is that Congress intended for the Administrator to act as a ministerial officer under the statute with limited discretionary power. Indeed, if Congress had intended for the Administrator to wield so much discretion, it almost certainly would have taken steps to ensure that the discretion was not exercised in an arbitrary or irrational way. For instance, Congress could have provided some mechanism for review of the Administrator's discretion, such as by appeal to a court, or it could have vested the discretion in a more senior governmental official with more relevant expertise, such as the Attorney General. Congress also could have vested the exercise of such discretion in an independent commission or some other body empowered to make the decision free of partisan political influences. Alternatively, Congress might have established specific factors for the Administrator to consider so as to channel his discretion, such as whether one candidate has conceded or whether recounts are still ongoing. Congress also presumably would have required the Administrator to create some written record of the factors he actually considered in exercising his discretion and an explanation for how he reached his conclusion.

In fact, Congress provided for *none* of these options. There are no procedural constraints on the exercise of the Administrator's discretion, such as appeals. There are no substantive constraints in the Act, such as an identification of the factors the Administrator should consider in reaching his decision. In the 2000 election, the Administrator vacillated among a number of different theories and explanations for his action, or more precisely, his inaction. Testifying before Congress almost a full month after election night he still expressly refused to articulate how and when he would reach his conclusion or what factors he would consider, stating "I don't want to predict how I will select an apparent winner."<sup>75</sup> It is inconceivable that Congress intended this ministerial officer to exercise unreviewable, unconstrained discretion of the sort he claimed during the 2000 election.

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75. Archibald, *Congress Attempts to Speed Transition*, *supra* note 10, at A8.

If Congress had intended this, it almost certainly would have placed some substantive and/or procedural limits on the Administrator's discretion. That Congress did not provide for some reasonable constraint on the Administrator's discretion—or *any* constraint for that matter—indicates that it did not intend to grant plenary, unreviewable discretion as claimed by the Administrator.

Given the absence of such constraints, it is far more plausible that Congress did *not* intend for him to possess such broad discretion. Congress plainly intended for the Administrator's discretion to be very narrow and limited to the predicate factual determination of the apparent successful candidate. Although in some cases it might be difficult to ascertain the apparent winner, where one candidate has a certified majority it is not. Instead, the Administrator claimed that the absence of guidance from Congress empowered him to exercise his unfettered, subjective judgment as to when he was sufficiently persuaded that an apparent winner could be identified.<sup>76</sup> This is an astounding claim. It is far more plausible that Congress did not provide guidance for his decision or review of his decision because it believed that the decision would be a mechanical decision controlled by objective facts, such as whether a candidate could claim a certified electoral majority. Congress's failure to expressly limit his discretion makes sense only in the context of its manifest intent to provide the Administrator with minimal discretion and that this decision should be reached through objective, easily-verifiable criteria.

The claim that the Act grants the Administrator plenary authority to make a subjective determination as to when he believes the apparent winner is ascertainable raises further concerns. In the context of the 2000 election, there is strong evidence that the Administrator's decision was heavily influenced by political pressures emanating from

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76. See Sergio Bustos, *Bush Seeks Transition Donations*, ARIZ. REPUBLIC, Nov. 28, 2000, at A1, available at 2000 WL 8087405 (statement of GSA spokeswoman Vicki Reath); William M. Welch, *Democrats Anticipate End to Contest: Party Standing by Gore, but Some See Appeal as Last Chance*, USA TODAY, Dec. 5, 2000, at 8A, available at 2000 WL 5797265 (statement by David Barram that Act does not allow him to designate a President-elect "when 'it is not apparent to me who the winner is'" (emphasis added)); George Archibald, *Donors Fill Gap As Fight Drags on: Bush Team Raises Over \$6.4 Million*, WASH. TIMES, Dec. 4, 2000, at A10, available at 2000 WL 4171186 (statement of White House spokesman Jake Siewart that GSA Administrator should not declare a President-elect "if there's any doubt *in the mind of the administrator*" (emphasis added)); Barram Testimony, *supra* note 13 (asserting that the Act "gives no explicit criteria or deadlines for making [the] ascertainment" of a President-elect, thus leaving the decision up to the GSA Administrator).

the Clinton White House that instructed the Administrator—a political appointee—to refrain from declaring Bush the apparent winner.<sup>77</sup> The White House denied exerting such pressure. On November 9, the day after the election, the Administrator held a televised press conference to announce that the transition offices were ready for occupancy, and that he was ready to release the \$5.3 million in presidential transition funds and the keys to the transition offices “to whichever candidate garnered the necessary 270 electoral votes after Florida’s outcome was certified.”<sup>78</sup> “But,” GSA officials later admitted, “as the Florida muddle unfolded, the Clinton-Gore administration stepped in to halt the start of any transition.”<sup>79</sup> Once Gore began legal challenges in Florida, “the White House stepped in to oversee and supervise Mr. Barram, a Clinton appointee.”<sup>80</sup> Within days of the election, it was announced that “Barram alone will not make the decision,” but would do so only after consulting with the White House.<sup>81</sup> On November 13, White House Chief of Staff John Podesta promulgated a memorandum ordering that transition planning be put “on hold” and that no transition assistance should be given to either candidate until the Florida controversy was definitively resolved.<sup>82</sup> Podesta’s directive was issued the day before Florida Secretary of State Katherine Harris was to certify Florida’s recounted returns.<sup>83</sup> It appears that the instructions to await the resolution of the Gore legal challenges in Florida emanated from the White House.<sup>84</sup> The Administrator’s final position that he lacked the au-

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77. See James Toedtman, *No Keys to Kingdom: Clinton Won’t Give Bush Office, \$5.3M for Transition*, NEWSDAY, Nov. 28, 2000, at A05 (noting that GSA Administrator was “taking his cue from White House Chief of Staff John Podesta”).

78. Archibald, *White House Puts Transition on Hold*, *supra* note 8, at A3; see also Archibald, *Bush Won’t Get Keys*, *supra* note 8, at A1 (announcing that the offices were ready and that he was ready to turn over the keys to the president-elect).

79. Archibald, *Bush Won’t Get Keys*, *supra* note 8.

80. Archibald, *White House Puts Transition on Hold*, *supra* note 8.

81. See Bob Davis, *New President-Elect’s Transition Team May Find GSA Director Holds the Keys*, WALL ST. J., Nov. 20, 2000, at A12, available at 2000 WL-WSJ 26617405 (“Mr. Barram, of course, was appointed to his post by the White House, and he won’t be deciding about the transition keys by himself. White House Cabinet Secretary Thurgood Marshall Jr., son of the late Supreme Court justice and a former Gore aide, has already instructed the GSA and cabinet heads to notify White House Chief of Staff John Podesta before making a decision on the transition.”).

82. See Archibald, *White House Puts Transition on Hold*, *supra* note 8.

83. *Id.*

84. *Id.*

thority to release the funds in a “close” election also tracks the eventual position taken by the White House on the issue.<sup>85</sup> The White House denied that this congruence of opinion was the result of political pressure.<sup>86</sup> Given the nature and timing of the Administrator’s vacillations, it is difficult to believe that the White House applied no political pressure on the Administrator.

Even if it is believed, somewhat incredibly, that the Administrator was not influenced by political pressures from the White House during the 2000 election, his belief that the Act allowed him to exercise unfettered discretion and his refusal to articulate any legal standard or to specifically identify which facts will be relevant in making the determination raises the clear possibility that in future elections the Administrator will be improperly influenced by political considerations. In a situation such as the 2000 election where the opposition party controls the White House, this raises the concern that the release of the transition resources will be held up so as to undermine the success of the new party’s transition to power. The Act provides no mechanism to force the Administrator to act or to review his decision not to act.

Given the alternative possible constructions of the statute, the only one that makes sense is that Congress did *not* intend to vest broad discretion in the Administrator. Rather, Congress intended that he would be governed by bright-line rules, such as whether one of the candidates had a majority of pledged and certified electors. Moreover, as noted, this construction fits more closely with the plain language of the statute and its clear legislative intent. It is illogical to believe that Congress vested this anonymous ministerial officer with the unconstrained, unreviewable discretion to determine the “President-elect” for purposes of the Act’s terms. Indeed, the Administra-

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85. Jake Siewert, Press Briefing, M2 PRESSWIRE, Nov. 29, 2000, available at 2000 WL 29589210 (“I think the legislative history makes pretty clear that if there’s any doubt in the mind of the GSA Administrator, that they [sic] should not move forward and no money should be expended.”). This legal position is highly suspect. See discussion *infra* Part IV.

86. The White House claimed that the similarity of opinion was to be expected because the compelling persuasiveness of the legislative history made it difficult to reach any other conclusion. See Susan Carroll & Tom Collins, *White House Meddling in Transition*, Kolbe Says, TUCSON CITIZEN, Nov. 29, 2000, at 13A, available at 2000 WL 27444840 (quoting White House spokesman, “This has been portrayed in the media in large sense as some sort of decision that we’ve made here [at the White House]. In reality, there’s a law governing this. I think anyone who is familiar with transitions . . . can take a look at that law and see what it says for themselves.”).

tor's actions during the 2000 election demonstrate the unsuitability of allowing this minor official to exercise the crucial powers claimed under the Act. The Administrator refused to articulate a definitive legal interpretation of the Act or to state what factual criteria he would use in reaching his decision. When he did actually provide some evidence of his subjective decision-making, he vacillated among several different standards, none of which seemed to have any grounding in the text, intent, or policies of the statute. He seized on legally-irrelevant factors, such as the lack of a concession, to justify his refusal to declare an apparent winner, while simultaneously ignoring the primary, if not exclusive, factor that the Act instructed him to consider: whether a certified electoral college majority could be identified. When he finally made up his mind, it was based on an *ex post facto* and *ad hoc* judgment that he was finally persuaded that he could ascertain an apparent winner according to his unstated legal and factual standards. When not relying upon the rationale of a lack of a concession, he pointed to the one factor that Congress was most obvious in excluding, namely the continuation of legal proceedings and ballot recounts that might eventually overturn the designation of an apparent winner.

If Congress had intended to vest this discretion in the Administrator, it almost certainly would have required that the Administrator articulate the legal and factual standards he would apply and would have provided some mechanisms for guiding and reviewing his discretion. Instead, the Administrator claimed the power to make up the legal and factual standard as his subjective assessment of the situation changed. The absurdity of the Administrator's construction of the statute and the bizarre belief that his erratic actions were consistent with the statute's mandates indicate the unreasonableness of his interpretation. Given the choice between an absurd construction of the statute and one that fits with the language, intent, and policies of the statute, it is presumed that Congress meant to enact the statute in a way that actually makes sense.

### III. HISTORICAL AND LEGISLATIVE CONTEXT OF THE ACT

The Administrator also argued that the legislative history of the Act supported his interpretation that he was not required to release the transition funds to Bush despite his having gained a majority of certified electoral votes. Indeed, in the waning days of the election controversy he argued that he was *forbidden* from releasing the tran-

sition resources to Bush while the election remained a “close” election. He based his claim on some snippets of legislative history drawn from the floor debates on the Act. In reviewing this legislative history, however, the Administrator pulled the statements in question out of their proper legislative and historical context. When read in context, it is evident that the Administrator is mistaken about the significance of the legislative history on which he relied.

Because of the Administrator’s heavy reliance on legislative history, this Part will explore the general historical and legislative context of the Act, showing that when read in its totality the legislative history supports the interpretation of the Act that has been advanced in this essay. A review of the legislative history will also reveal that the factors on which the Administrator actually relied, namely the need for a concession by one of the candidates or an end to all litigation in the case, are plainly excluded by the legislative and historical context of the Act. Part IV of this essay then examines in greater detail the specific excerpts from the legislative history relied upon by the Administrator. It will be shown that the slivers of legislative history relied on by the Administrator were taken out of context. Once they are understood in their historical and legislative contexts, it will be seen that they fail to support the interpretation advanced by the Administrator.

#### *A. Legislative History*

The crucial distinction between the apparent and actual successful candidate is evident in the legislative discussion surrounding the enactment of the Act. The legislative history of the Act is quite summary, and little of it deals with the issues raised by the 2000 election.<sup>87</sup> Nonetheless, there is some legislative history available in the form of floor statements during debates over the Act. Floor exchanges are a disfavored form of legislative history, but they are valuable in amplifying the plain language of the statute, especially where, as here, there is no helpful committee report.<sup>88</sup> One floor exchange during the debate is especially illuminating, and so it is reproduced

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87. See H.R. REP. NO. 88-301 (1963); S. REP. NO. 88-448 (1963); H.R. CONF. REP. NO. 88-1148 (1964). Most of the committee report concerns issues of campaign financing, rather than transition issues.

88. See *Begier v. IRS*, 496 U.S. 53, 64 n.5 (1990) (noting that absent a committee report courts will generally treat statements of floor manager as tantamount to committee report).

here at length:

Mr. HALEY. I wish the gentleman in charge of handling the bill at this time would give to the members of the committee a little explanation of when under the terms of this bill a person becomes the President or Vice-President-elect.

I notice that these funds can be used immediately after the general election in November. But how would this situation work, for instance, if the President or, at least, before the determination of the votes in the electoral college, suppose that some person was, say, three or four votes shy? How would this Administrator determine who was in a position to expend these funds?

The reason I ask this is because in my humble opinion a person does not become the President or President-elect until after the Congress has had an opportunity to examine the ballots cast in the electoral college. Only at that point when that determination has been made by the House of Representatives does a man become the President-elect.

Mr. FASCELL. I would say to my distinguished colleague . . . that the gentleman is absolutely right in a technical sense with respect to the determination of the election of the President and the Vice President. . . .

[The relevant statutory language was then quoted]

This act and the Administrator could in no way, in any way, affect the election of the successful candidate. The only decision the Administrator can make is who the successful candidate—*apparent successful candidate*—for the purposes of this particular act in order to make the services provided by this act available to them. And, if there is any doubt in his mind and if he cannot or does not designate the *apparently* successful candidate, then the act is inoperative. He cannot do anything. There will be no services provided and no money expended.<sup>89</sup>

This colloquy amplifies the plain language of the Act—that the relevant determination to be made by the Administrator is solely to determine whether one candidate is the “apparent” successful candidate, *not* whether that candidate is guaranteed to be the *actual* suc-

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89. 109 CONG. REC. 13,349 (1963) (emphasis added).

cessful candidate after the Congress counts the ballots in the electoral college. It is also evident that the inquiry is intended to be made in light of whether a candidate has a majority of certified and pledged electoral votes. If a candidate lacked sufficient electoral votes—such as being “three or four votes shy” of an electoral college majority—then no apparent winner could be recognized until the election was actually resolved in the electoral college or House of Representatives.

But this hypothetical situation was not the case in the 2000 election. In that election, after Florida certified its electoral results Bush in fact had a sufficient number of pledged and certified electoral votes to be elected President. Thus, even though one could imagine situations where it might be difficult or impossible for the Administrator to identify the apparent successful candidate, this case is not one of them. Absent an adequate number of electoral votes there is no apparent successful candidate; but where one candidate has a sufficient number of electoral votes to be elected President, then that individual is the apparent winning candidate. Neither case is difficult.

#### *B. Historical Context: The 1960 Election*

Congress believed that the inquiry to determine the apparent winner of the election generally would be routine and would be amenable to resolution by objective facts of the type presented in the 2000 election. Congressman Haley and Congressman Fascell recognized that some cases may arise where the Administrator will be unable to designate an apparently successful candidate, although Congressman Fascell deemed this “an unlikely proposition.”<sup>90</sup> Indeed, the historical setting and political context of the 1963 Act provides important context for understanding the bright-line nature of the Congressional inquiry. Congressman Fascell observed:

I do not see any great big problem in the Administrator of the General Services Administration being unduly involved in the matter of determining who is the *apparent* winner in order to perform the ministerial functions under this act. . . . The gentleman previously pointed out in the last election [the 1960 presidential election] we had one that was as close as we would want to have an

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90. *Id.*

election and nobody had any trouble in deciding who was the *apparent* winner.<sup>91</sup>

Understanding how the Act would have applied to the facts of the 1960 election helps to illuminate the distinction drawn between the actual and apparent winners of the election. In turn, understanding this history indicates how the authors of the Act intended the Act to apply in a situation like the 2000 election. The 1960 election was an extremely close and highly contested election, almost identical to the 2000 election. In fact, the final winner of the 1960 election could not be predicted confidently for several weeks after the election date. Nonetheless, Fascell observes that despite the closeness of the election and the questions raised about who might prevail as the *actual* winner, it was not difficult to determine that Kennedy was the *apparent* winner. Given that the Act was enacted against the backdrop of the Nixon-Kennedy election, it is important to understand the facts of that election. Understanding how the Act would have applied to those facts helps to illuminate the distinction the Act draws between the “apparent” winner and the actual winner. In turn, that history will help to explain how the Act should have been applied to the 2000 presidential election.

### *1. General history of the 1960 election*

Legend has long held that there were credible allegations that John F. Kennedy “stole” the 1960 presidential election through massive voter fraud in several states and that despite the belief that Kennedy had stolen the election, Nixon refused to challenge Kennedy’s victory and stepped aside “for the good of the country.” This legend is false. Indeed, it was not for some time after the election that one could confidently say that Kennedy would actually win the electoral college. The final outcomes in several states remained in doubt for quite some time pending the final resolution of recounts and Republican-initiated litigation.<sup>92</sup> Litigation and recounts proceeded apace in several states and the final results of the election

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91. *Id.* at 13,348 (emphasis added).

92. This is not to say that Nixon necessarily organized or inspired the litigation and recount efforts. He claimed that he had no role in it, but historians have concluded otherwise. See Gerald Posner, *The Fallacy of Nixon’s Graceful Exit*, SALON.COM (Nov. 10, 2000), at <http://www.salon.com/politics/feature/2000/11/10/nixon/print.html>.

were not established for several weeks after the election. Nonetheless, this did not detract from the fact that Kennedy could have been determined to be the apparent winner.

California, then as now a large and important state, was originally credited to Kennedy, but its thirty-two electoral votes were later awarded to Nixon after absentee ballots were counted.<sup>93</sup> Credible allegations of vote fraud in Illinois and Texas generated Republican litigation and recount efforts in those two states. Kennedy carried Illinois by fewer than 9,000 votes; Republicans alleged that the margin of victory was manufactured by Mayor Richard Daley's Cook County Machine.<sup>94</sup> Similarly, Kennedy carried Texas by just over 40,000 votes, largely as a result of the help of Vice-Presidential candidate Lyndon Johnson, who was a Texas Senator.<sup>95</sup> David Greenberg observes that "many states besides Texas and Illinois could have gone either way."<sup>96</sup> A Republican spokesman announced that the party had received many complaints alleging fraud, bribes, and other irregularities in several states, mostly from Illinois, Texas, North Carolina, South Carolina, Michigan, and New Jersey.<sup>97</sup>

Republican Party National Chairman Thruston Morton asked for recounts in eleven states within three days after the election.<sup>98</sup> Nixon aides also did personal field checks of votes in eight of those states, looking for evidence of fraud and election irregularity that could be used to reverse the results in those states.<sup>99</sup> Another aide encouraged the creation of a Nixon Recount Committee in Chicago.<sup>100</sup> Reporter Earl Mazo of the *New York Herald Tribune* reported on a series of fraud-related issues that were picked-up by other reporters and

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93. *Id.*

94. See David Greenberg, *Was Nixon Robbed? The Legend of the Stolen 1960 Presidential Election*, SLATE (Oct. 16, 2000), available at <http://slate.msn.com/HistoryLesson/00-10-16/HistoryLesson.asp>. In fact, rumors about fraud in Illinois circulated even before election day.

95. Posner, *supra* note 92. Republicans charged that Democratic-controlled election boards consistently invalidated Republican ballots with slight defects while counting Democratic ballots with identical defects. See PEIRCE & LONGLEY, *supra* note 36, at 68–69.

96. Greenberg, *supra* note 94.

97. PEIRCE & LONGLEY, *supra* note 36, at 68.

98. The effort was spearheaded by Republican Party Chairman Senator Thruston Morton, telegramming officials in Delaware, Illinois, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Nevada, Pennsylvania, South Carolina, and Texas, and urging recount efforts. See Greenberg, *supra* note 94.

99. *Id.*

100. *Id.*

served to fuel the recount and litigation fires.

Recounts actually proceeded in several states. In New Jersey, the Republican Party secured court orders for recounts in five counties and did not cease the recount effort until December 1.<sup>101</sup> Kennedy was certified the state's winner by 22,091 votes. In Texas, the Republican Party sued to overturn the results, securing a federal court injunction to delay certification of the vote until its petition for a recount of 1.25 million ballots could be heard. However, the federal district judge later dismissed the injunction and the suit for lack of jurisdiction.<sup>102</sup>

Illinois was even more hotly contested. Morton flew to Chicago to confer with Illinois Republican leaders on recount strategy, "while party Treasurer Meade Alcorn announced Nixon would win the state."<sup>103</sup> "The Cook County Republican chairman alleged that 100,000 fraudulent votes had swung Illinois to Kennedy through 'systematic' looting of votes in twelve [Chicago] wards and parts of two others."<sup>104</sup> One precinct, virtually deserted because of highway demolition activity, reported seventy-nine votes for Kennedy and three for Nixon, even though there were less than fifty registered voters in the precinct on election day.<sup>105</sup> Kennedy won the state by 9,000 votes, but carried Cook County by an astonishing margin of 450,000 votes.<sup>106</sup> The Illinois recount of 863 precincts was not completed until December 9, during which Nixon gained 943 votes. Still losing after the recount, the Illinois Republicans unsuccessfully petitioned the State Board of Elections for relief. The national party did not cease its efforts in Illinois until December 19, when the electoral college voted Kennedy as the new president.<sup>107</sup> Following the election, three people were sent to jail for election-related crimes in Cook County and 677 others were indicted before being acquitted by Judge John M. Karns, "a Daley crony."<sup>108</sup>

Had Nixon succeeded in reversing Kennedy's Illinois victory, he would have still been four votes shy of an electoral college major-

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101. *Id.*

102. *Id.*

103. *Id.*

104. PEIRCE & LONGLEY, *supra* note 36, at 68.

105. *Id.*

106. Greenberg, *supra* note 94.

107. *Id.*

108. *Id.*

ity.<sup>109</sup> At that point, however, it was thought that southern electors might bolt the Kennedy ticket and withhold votes from the Kennedy-Johnson ticket, thus throwing the election into the House of Representatives. This scenario was made more plausible by the so-called southern unpledged elector movement, discussed below.

## 2. *Hawaii*

In Hawaii, the results were even more dramatic and were not resolved until long after the election. Given the factual similarities between Hawaii in 1960 and Florida in 2000, the facts of Hawaii's situation bear further review.<sup>110</sup> Following the election, Hawaii originally certified Nixon the winner of the state by a mere 141 votes (92,505 for Nixon and 92,364 for Kennedy).<sup>111</sup> Democratic Party leaders immediately decided to contest the results. As was later reported, "National results were close enough and Republican recount demands elsewhere strong enough that they considered it possible Hawaii's three votes might even decide the election."<sup>112</sup> The Democrats alleged a number of flaws in the election that they believed would overturn the 141 vote margin. They filed suit in Hawaii Circuit Court, charging voting irregularities in 198 of Hawaii's 240 precincts.<sup>113</sup> This included an allegation that although some ballots for Kennedy were counted, the poll officials failed to record them on the tally sheet.<sup>114</sup> The Democrats also alleged that some ballots were counted for Nixon despite defects in the marking of the ballots by the voters.<sup>115</sup> They also argued that there were 235 more votes

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109. PEIRCE & LONGLEY, *supra* note 36, at 69.

110. Hawaii's situation in 1960 is also important in that it provides the primary congressional precedent for congressional procedures for resolving disputes over two competing Certificates of Ascertainment. See *supra* notes 38–47 and accompanying text (describing possibility of congressional battle over competing Certificates of Ascertainment).

111. See A.A. Smyser, *How Kennedy Won 1960 Recount in Hawaii*, HONOLULU STAR-BULL., June 8, 1963, at 5.

112. *Id.* If Nixon had been able to hold Hawaii and overturn the result in Illinois, then he would have needed only one more electoral college vote to prevail, which could easily have come from the unpledged southern electors. See *infra* notes 126–137 and accompanying text.

113. Drew McKillips, *Democrats File Recount Suit; Cite Irregularities*, HONOLULU ADVERTISER, Nov. 23, 1960, at A1.

114. *Id.*; see also Drew McKillips, *Judge Indicates Partial Recount to Be Ordered*, HONOLULU ADVERTISER, Dec. 13, 1960, at A1 (describing affidavit that this error under-recorded Kennedy's total by 45 votes).

115. McKillips, *Judge Indicates Partial Recount*, *supra* note 114 (describing affidavit from poll watcher alleging that between seven and nine Nixon ballots were marked with a

counted in the presidential contest than were actually cast, and that 1,283 ballots were entirely unaccounted for in the total tabulation.<sup>116</sup>

The presiding judge in the case, Circuit Judge Ronald B. Jamieson, ordered a recount in thirty-seven of Hawaii's precincts, or a total of 32,273 votes.<sup>117</sup> However, it was impossible to complete the recount in time to meet the deadline of December 19, when the presidential electors were to meet and cast their votes. Thus, when Hawaii's electors met on December 19, they certified their three electoral votes for Nixon and Lodge on the basis of the certified 141 vote margin they held as of November 28, 1960 when Hawaii's popular vote was initially certified.<sup>118</sup> Finding the recount going against them, on December 23 a Democratic Party "specimen" or sample ballot was found in the ballot bag with all of the proper ballots. The Republicans argued that this evidenced Democratic efforts to commit election fraud, and the Republicans demanded that the entire state presidential election be declared void.<sup>119</sup> The FBI, the U.S. Attorney's Office, and the State Attorney General's office launched an investigation of the incident to determine whether fraud occurred as a result of the sample ballot.<sup>120</sup>

Nonetheless, the recount continued and Kennedy slowly ate into Nixon's lead. Finally, on December 30 the recount was completed

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double "X" in violation of state law).

116. McKillips, *Democrats File Recount Suit*, *supra* note 113. In yet another eerie parallel to the 2000 presidential election, there were also great concerns in Hawaii that so many voters spoiled their ballots during the 1960 election. As Robert G. Dodge, the lawyer in charge of the Democratic recount litigation in Hawaii in 1960, observed at the time, "This rather staggering number of voters who disenfranchised themselves shows that we should clarify not only the form of the ballot, but also liberalize the manner in which we vote." Charles Turner, *2,342 Ballots Are Ruled Invalid—But Kennedy Legal Isle Winner*, HONOLULU ADVERTISER, Dec. 29, 1960, at A1. In one precinct on Kauai, there were 58 invalid ballots out of 950 votes cast, or one invalid vote for every 16.5 voters in the precinct, a ratio that the presiding judge deemed an "amazing number" of rejected ballots. See *Recount Ordered in 7 More Precincts*, HONOLULU STAR-BULLETIN, Dec. 16, 1960, at 1B.

117. McKillips, *Judge Indicates Partial Recount*, *supra* note 114, at page A1. Eventually, the recount was extended to an additional seven more precincts, and finally a recount of all precincts was ordered. See Smyser, *supra* note 111.

118. See 107 CONG. REC. 289 (1961) (reproducing first certified slate of electors from state of Hawaii from December 19, 1960). Hawaii's Democratic electors transmitted a second certificate of ascertainment on the same date, but it was believed to be without legal effect as the Acting Governor had certified the Republican certificate. See Smyser, *supra* note 111.

119. Drew McKillips, *"Specimen" Revealed by Recount*, HONOLULU ADVERTISER, Dec. 23, 1960, at A1.

120. *Id.*

and the court ruled that Kennedy had carried Hawaii by 115 votes.<sup>121</sup> On January 4, 1961 the new Governor of Hawaii transmitted a second Certificate of Ascertainment on behalf of the state, reporting that as a result of the lawsuit and recounts, Hawaii's electoral votes were to be recorded for Kennedy rather than Nixon.<sup>122</sup>

Congress convened on January 6, 1961, to count the electoral votes. Ironically, Nixon, as Vice-President, was the presiding officer over the vote counting process.<sup>123</sup> When it came time to report Hawaii's votes, Nixon asked for unanimous consent that the Kennedy electors be counted.<sup>124</sup> In so doing, Nixon averted a confrontation on the floor of the House. Hawaii's Democratic Senator Oren E. Long and its Democratic Representative Daniel K. Inouye were prepared to object to the count if the Nixon certificate were counted rather than the Kennedy certificate.<sup>125</sup>

### *3. Southern unpledged elector movement*

Further complicating the 1960 presidential election, as well as the context for interpreting the debates over the Act in 1963, was the so-called "unpledged elector movement" that blossomed in the American South during the 1950s and 1960s. The southern unpledged elector movement grew out of the 1948 Dixiecrat movement, which generated over one million votes and thirty-nine electoral votes for Strom Thurmond, then the South Carolina Governor.

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121. See *Lum v. Bush*, Civ. No. 7029 (Haw. 1st Cir. Ct. Dec. 30, 1960), reproduced at 107 CONG. REC. 290 (1961).

122. 107 CONG. REC. 290.

123. The same was true for Vice-President Gore in the 2000 election.

124. 107 CONG. REC. 290. Nixon specified that this was done "[i]n order not to delay the further count of the electoral vote . . . [and] without the intent of establishing a precedent." *Id.*; see also DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES ch. 10, § 3.5 (1977).

125. As one news story reported the events:

Long and Inouye came to the joint session carrying folders of documents to support their pro-Kennedy arguments, and Hawaii's Republican Senator Hiram L. Fong said he wouldn't dispute the Kennedy vote.

When the joint session convened, Inouye seated himself in front of a microphone, opened his folder and motioned to his colleagues that he was prepared to present his objection.

When Nixon came to Hawaii in the state-by-state roll call, Long also opened his folder containing the Kennedy certificate and showed the impressive document to his fellow Senators.

*Kennedy Is Proclaimed President by Congress*, HONOLULU STAR-BULL., Jan. 6, 1961, at 1-A.

Animated by opposition to the national Democratic Party's position on integration, the Dixiecrats stormed out of the 1948 Democratic Convention, determined to run their own segregationist candidate.<sup>126</sup> Although Thurmond had little chance of winning, the South hoped that he could deny Harry S. Truman an electoral college majority, thereby throwing the election into the House of Representatives. In the House, loyal Democrats would have controlled twenty-one delegations, Republicans twenty, and the Dixiecrats four, thereby giving them controlling influence over the outcome and enabling them to extract concessions in exchange for supporting a candidate. Truman's electoral college majority headed off this scenario, but he carried California by only 8,933 votes and Ohio by 3,554 votes. Had he lost those two states to Dewey, the race would have been thrown into the House of Representatives, just as the Dixiecrats hoped.<sup>127</sup>

The subsequent election of conservative Dwight Eisenhower to the White House in 1952 temporarily quelled the southern political movement, but the nomination of Northeastern Catholic Kennedy in 1960 triggered concern in the Democratic Party in the South.<sup>128</sup> Rather than running their own candidate, as they had done in 1948, in 1960 the southern states formed the so-called southern unpledged elector movement.<sup>129</sup> The cornerstone of the movement was the fact that the Constitution places no specific limits on the candidate for whom an elector may vote; unless state law otherwise instructs, an elector remains free to vote his conscience. Most states have long required electors to vote for the candidate for whom they are pledged, and award their electoral votes to the candidate who receives the largest number of electoral votes in their state. Even if electors are not formally constrained by state law, however, they almost invariably vote for the candidate for whom they are pledged, except for the rare circumstance of a faithless elector.<sup>130</sup>

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126. PEIRCE & LONGLEY, *supra* note 36, at 59–63.

127. Truman also carried Illinois by only 16,807 votes. Had he lost Illinois, Ohio, and California—a swing of only 24,294 votes total, Dewey would have won an outright electoral college majority. *Id.* at 62.

128. Kennedy's nomination of southerner Lyndon Johnson of Texas as his running-mate likely averted a wholesale defection of the southern states from the Kennedy column, thereby salvaging the election for Kennedy. *Id.* at 64.

129. *Id.* at 65.

130. See *supra* note 36 and accompanying text (discussing faithless electors).

During the 1960 election, however, electors in Mississippi and Alabama specifically sought election as *unpledged* electors, thereby retaining the right to vote their preferences, rather than pledging themselves to a specific candidate. In Alabama the ballots listed only the names of the individual electors for the various parties, and made no mention of the actual presidential candidates, Kennedy and Nixon.<sup>131</sup> There had been stiff competition in Alabama to determine who would be placed on the ballot as Democratic electors—those pledged to support the party’s national nominee or unpledged electors opposed to the national policies of the party. A primary and runoff in the spring had resulted in selection of six unpledged and five Democratic loyalist electoral candidates. Mississippi elected eight unpledged electors.<sup>132</sup> Most of the remaining southern states voted for Nixon.

On December 10, 1960, Alabaman’s six unpledged electors met and announced that they would cast their votes “for an outstanding Southern Democrat who sympathizes with our peculiar problems in the South.”<sup>133</sup> They also announced, “our position remains fluid so that we can cooperate with other unpledged electors for the preservation of racial and national integrity,” and lashed out at those Southern Democrats who continued to support Kennedy.<sup>134</sup> On December 12 the Alabama unpledged electors met with Mississippi’s unpledged electors and agreed to throw their unpledged elector support to Senator Byrd of Virginia. They also drafted a joint statement calling on presidential electors from other states to bolt to Byrd, in the hope that enough electoral votes might be withheld from Kennedy to deprive him an electoral college majority and thereby throw the dispute into the House of Representatives. Once the election was in the House, the southerners hoped that all southern delegations would vote for Byrd and Republicans would join them in order to ensure Kennedy’s defeat.<sup>135</sup>

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131. PEIRCE & LONGLEY, *supra* note 36, at 284–85 (showing Alabama ballot).

132. *Id.* at 69.

133. *Id.*

134. *Id.*

135. The new House party lineup had twenty-three states controlled by northern and border state Democrats, seventeen controlled by Republicans, and six controlled by Deep South Democrats. Four delegations were evenly split between the parties. *Id.* at 69. As noted above, the Republicans held out their own hopes that the Southern Democrats would throw their support to Nixon.

In the end, the Alabama and Mississippi unpledged electors failed to peel-off any other Democrats from the Kennedy ticket. The only additional Byrd vote they picked-up was from one Henry D. Irwin, a faithless Nixon elector from Oklahoma. In the days after the election, Irwin had telegraphed all Republican electors with a plan. Noting that there were insufficient Republican electoral votes to deny Kennedy the election, Irwin suggested that the Republicans abandon Nixon and join forces with southern Democratic electors to elect Byrd as President with Barry Goldwater as Vice President.<sup>136</sup> Irwin received many replies, several of them favorable, but they stated that they had a moral obligation to vote for Nixon. Irwin subsequently asked the Republican National Committee members and state chairman to free Republican electors from their obligations to vote for Nixon, but he had little success.

Although the southern unpledged electors failed to tip the balance in the 1960 election, their impact was significant. Moreover, as will be explained below, this long-forgotten incident cast a long shadow over both the debates and drafting of the Presidential Transition Act in 1963.<sup>137</sup>

### *C. Implications of Legislative and Political History*

Testifying before Congress on December 4, 2000, David Barram, the Administrator of the GSA, described the 2000 election as an “unprecedented, incredibly close, and intensely contested election, with legal action being pursued by both sides.”<sup>138</sup> The historical context described above belies this statement. The 1960 election—the election conducted immediately prior to the Act’s passage—was extraordinarily close and litigation and recounts continued for weeks after the election. California and Hawaii both switched columns for the candidates, and Hawaii’s recount was not completed until January 4, 1961. Investigations of vote fraud in several large states persevered into mid-December, threatening to overturn the results in those states. The combination of unpledged and faithless electors that eventually generated fifteen electoral votes for Harry Byrd threatened to upset Kennedy’s electoral college majority and actually

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136. *Id.* at 70. In the electoral college, Irwin voted Byrd for President and Goldwater for Vice President. The southern unpledged electors voted for Strom Thurmond as Vice President.

137. See discussion *infra* Part IV.

138. Barram Testimony, *supra* note 13.

undid his popular majority.

Despite all of this uncertainty about who might eventually be the actual winner of the 1960 election, Congressman Fascell stated (without objection) to the House that there was no problem ascertaining the “apparent winner.”<sup>139</sup> The only scenario that fits with this historical context is that the drafters of the Act recognized the possibility that in some elections the apparent winner conceivably could turn out not to be the actual winner. Thus, even though Kennedy had some important state victories overturned (in California), Nixon actually lost a state that was *certified* to him (Hawaii), and still others states remained in doubt for weeks after the election, this does not change the fact that Kennedy was easily ascertainable as the apparent winner long before there could be any confidence that he was going to be the actual winner of the election. A standard rooted in a bureaucrat’s subjective intuition of the various possible scenarios that may have developed is not consistent with this history. The only coherent understanding must be that Kennedy was able to claim a certified electoral college majority notwithstanding the independent electors. Despite the real threat that the electoral college majority might later be overturned, that did not make it difficult to ascertain Kennedy as the apparent winner.

This turbulent history casts substantial doubt specifically on the position taken by the Administrator in the 2000 presidential election. Recall that he originally articulated two factual explanations for his purported inability to recognize George W. Bush as the President-elect for purposes of the Act.<sup>140</sup> First, he argued that he could not recognize an apparent winner until all of the outstanding litigation associated with the election was completed. Second, he stated that he would not recognize a President-elect until either Bush or Gore conceded the election. Both of these rationales are inconsistent with what actually occurred in the 1960 election that shaped the views of the Act’s drafters on this point. Whatever factors the Administrator relied upon in making his decision, it is clear that the two that he articulated were uniquely poor choices in that they had been squarely considered and rejected by the authors of the Act.

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139. See *supra* note 89 and accompanying text.

140. See *supra* notes 9–10 and accompanying text. The Administrator later announced a third factor, which will be discussed *infra* Part IV.

*1. Resolution of uncertainty*

First, given the historical backdrop of the 1960 election, it is absurd to believe that when the drafters wrote the Act in 1963 that they intended that it would prevent the Administrator from ascertaining an apparent winner until all litigation and recounts were complete. As just described, litigation and recounts continued following the 1960 election throughout December and even into January 1961 before all of the electoral votes were finally settled. Pivotal states such as New Jersey, Illinois, and Texas were still deciding election-related litigation up to and beyond the time when the Electors were to meet to cast their ballots. Had Illinois's election results been reversed, then there would have been great uncertainty about the eventual result of the election, especially when combined with the unpredictability spawned by the Hawaii recount and the southern unpledged elector movement. Given this context, it is simply implausible that the drafters of the Act believed that an apparent winner could not be ascertained while litigation and election contests were still being conducted. If so, it certainly would not have been as easy to determine the apparent winner as Fascell stated that it was.

The Administrator's argument that he could not ascertain a winner until all litigation was complete is troubling in that it allows the losing candidate or losing party to extend the period of election uncertainty indefinitely simply by filing lawsuits and recount requests throughout the country. Indeed, just by bringing legal action or seeking a recount in California, Texas, and New York, a candidate could place almost any election into doubt. Simply by keeping litigation ongoing, a sore loser candidate or party could dramatically undermine the transition efforts of the winning candidate by indefinitely postponing the declaration of a President-elect under the Act. Third-party and fringe candidates would seemingly have drastic ability to disrupt the recognition of a President-elect in a timely manner. There is no reason to believe that Congress intended for this to occur. Indeed, it is evident that Congress meant for the transition to begin as soon as possible after the election. The Act's emphasis on speed and bright-line rules for ascertaining the apparent winner indicates that Congress did not intend for this declaration to be held hostage to a possible sore loser candidate seeking to delay the victor's transition. It is unlikely that the drafters of the Act intended a result so counter-productive to the Act's policies.

Alternatively, the Administrator will be required to estimate the

likely results of all the ongoing litigation in order to determine the degree to which it raises the possibility of overturning the election results.<sup>141</sup> This too is an improbable interpretation. There is simply no reason to believe that Congress intended for the GSA Administrator to be in this position, nor is there any reason to believe that the GSA Administrator will have the competence or expertise to make such an evaluation. As noted, David Barram was an executive for Apple Computer and Hewlett-Packard before taking over at GSA. There is little in his background to suggest that he was qualified to make the determination required by the Act. Moreover, the ascertainment of the apparent winner is a largely ministerial function, not a free-ranging inquiry into the likelihood of one candidate or the other prevailing on the merits of various litigation being conducted throughout the country at any one time. Thus, it is even less plausible to believe that Congress meant for the President-elect's transition to be held hostage by the subjective assessments of the GSA Administrator as to the merits of the various lawsuits that might be pending for months after the election.

Indeed, as discussed above, had Barram conducted an inquiry about the likelihood that the litigation might overturn the result of the election, he would have soon recognized that this was unlikely. Barram's belief that the results of the litigation might actually affect the results of the election demonstrates more his unsuitability for exercising the discretion he claimed to possess than it demonstrates the propriety of withholding a decision until the final resolution of litigation. As noted above, Gore had no conceivable possibility of prevailing as the winning candidate in the election once the state of Florida initially certified its electoral votes to Bush. Thus, had the Administrator actually made an informed and reasoned evaluation of the situation, it would have been obvious that Bush would have been the prevailing candidate in the end. Given the virtual impossibility of a Gore victory in the election, the Administrator was simply mistaken in believing that the outcome of the Florida litigation could have actually affected the outcome of the election. Thus, even if the Admin-

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141. See Turley Testimony, *supra* note 73 (“Congress was aware that controversies could clearly continue until six days before the voting of the electoral college. Congress was further aware that challenges to the results could occur in any state. It chose not to wait for the period for controversies to be concluded in authorizing the release of transition funds and support. Yet, under Mr. Barram’s interpretation, the Administrator must make a personal judgment as to the merits of litigation that could affect any critical state.”).

istrator was waiting for a resolution of all *relevant* uncertainty regarding the outcome of the election, he still should have recognized Bush as the apparent winner once Florida's electoral votes were certified for him. The probability that Gore might actually win the election was thus comparable to the other scenarios described above that might intervene between the election and the electoral college vote, such as recounts or faithless electors who upset an election. Indeed, one is tempted to observe that it is precisely to avoid errors like this that administrative discretion is usually provided only to officers who actually have expertise in the subject area relevant to the delegation. This is also why it is to be assumed that in general Congress would have desired to insulate ministerial officers such as the Administrator of the GSA from the political pressures that surely influenced his decision-making in this situation.

## 2. *Need for a concession*

It is true that Nixon, unlike Gore, conceded early on in the 1960 election, but there is no reason to believe that the Act's authors thought that this difference would constitute a legally-relevant distinction under the Act. There is nothing in either the legislative history of the Act or the Act itself to imply that the lack of a concession would be relevant in any way to the triggering of the Act. Obviously, if one candidate *did* concede an election, this would be relevant to determining an apparent winner. But the *absence* of a concession cannot be a valid basis for refusing to act. The failure to concede an election is simply too prone to manipulation and strategic behavior to be a reliable factor on which to rely in administering the Act.

Nor is it a plausible interpretation to believe that one candidate must concede before an apparent winner can be ascertained. Using this standard would be even more troubling than the "end of litigation" standard as far as carrying out the purposes of the Act. Under this standard, a losing candidate could simply refuse to concede the election until the electoral college met. During that period it would be impossible to declare an apparent winner. Congress certainly could not have intended such an irrational application of the Act.

A concession has no legally binding effect in an election, nor should it have any legal effect for application of the Act. Assume, for instance, that after Nixon conceded the 1960 election Republican

operatives succeeded in overturning enough electoral votes to win the election for him.<sup>142</sup> In fact it is argued that Nixon purposely conceded on one hand but implicitly endorsed the contest efforts on the other, simply so that he could attempt to overturn the election results without being perceived as a sore loser if he was unsuccessful, thereby preserving his future political viability.<sup>143</sup> Did the concession mean that Nixon could not be the President-elect (or President, for that matter), or that Nixon's concession had the constitutional consequence of making Kennedy President? Of course not. What if the election were thrown into the House of Representatives? Would Nixon have been ineligible to be named President-elect? What if Nixon conceded, but Byrd did not? The election results exist in an objective reality independent of whether a candidate subjectively concedes the election under the Act; the status of President-elect similarly exists in a reality independent of a candidate's concession. But again, the reality as to who is the *actual* winner is different from the Act's inquiry as to which candidate is the *apparent* winner.

Similarly, assume that Al Gore had carried through with his election-night plan to concede, only to learn the next day that he might win (or might have won) the Presidency. The concession would have had no legal effect whatsoever. For instance, there was important litigation being conducted in Florida where, for political reasons, Al Gore was *not* a party, just as Nixon was not a party to the 1960 election litigation. This litigation was being conducted solely in the name of Florida voters and the Florida Democratic Party—just as the efforts on behalf of Nixon were conducted in the name of the RNC and various state actors.<sup>144</sup> However, it is obvious that Gore, like Nixon in 1960, knew of the litigation, did nothing to deter it, and

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142. Such success could include: overturning the Illinois and Texas results on the basis of fraud, winning the New Jersey recount, or peeling off a sufficient number of unpledged or faithless southern Democratic electors.

143. See Posner, *supra* note 92; Greenberg, *supra* note 94. In fact, as Posner and Greenberg observe, Nixon played this dual strategy flawlessly, as he was able to probe for opportunities to contest the election results, but at the same time preserve the now well-varnished legend of selflessness that Posner and Greenberg set out to discredit. In fact, the revisionist history that Nixon had conceded nobly in 1960 helped him avoid the sore loser label and thereby paved the way for his eventual ascension to the presidency in 1968.

144. For instance, Gore was not formally a party to litigation that challenged the validity of certain absentee military ballots because of the negative political implications that would result from taking such a position. Nonetheless, Gore did nothing to deter this litigation and obviously would have accepted the results if the litigation had resulted in the disqualification of these ballots.

would have accepted the results had they benefited him. In short, the notion of waiting for a candidate to concede the election is not only inconsistent with the purposes of the Act, but it proposes a standard that simply makes no sense within the context of the Act.

In fact, Gore did concede to Bush late on election night, only to retract it that same night. What if he had waited a week before retracting it? What if he conceded privately to Bush but not publicly? What if he intended to concede but was incapacitated for some reason and unable to do so? What if he had conceded both privately to Bush and publicly, only to retract it? Would Bush have been the President-elect under the Act for that week, only to lose the designation when Gore recanted? Indeed, was Bush eligible for the transition resources during the brief period between Gore's early-morning concession and subsequent retraction? Although these questions may seem fanciful, they point up the absurdity of relying on a concession by one of the candidates to identify an apparent winner. Surely Congress did not intend that the statute's designation of the President-elect would be controlled by the losing candidate's decision of whether and when to concede the election. Waiting for a concession is simply too imprecise and too subjective of a standard to be consistent with the statute. Congress must have meant for some more objective criteria to guide the determination.

Thus, the available legislative history reinforces the plain language of the statute in concluding that the designation of Florida's electors by the Florida Governor made Bush the "apparent winning candidate" of the election by giving him 271 certified and pledged electors. At that time it was certainly possible to imagine numerous scenarios that might result in Bush not being the actual winning candidate, just as there were contingencies that may have resulted in Nixon overtaking Kennedy in the 1960 election. For instance, some electors could conceivably turn out to be faithless electors, breaking their pledges to vote for Bush and thereby throwing the election into Congress or giving a majority of electoral votes to Al Gore. Ballot recounts or post-election litigation might result in Bush losing electoral votes that were previously pledged or certified to him, as Nixon did with Hawaii in 1960. Recounts or absentee ballots could throw states back into play that were thought to be resolved. Nonetheless, these contingencies did not change the fact that Bush was the *apparent* winning candidate when he secured a majority of pledged and certified electoral votes, even though he may not have eventually

turned out to be the *actual* winning candidate of the election. Similarly, it is possible that Kennedy's 1960 victory may have been overturned in the face of allegations of vote fraud in Illinois and elsewhere. Nonetheless, Kennedy was the apparent successful candidate the day after the 1960 election and George W. Bush was the apparent successful candidate from the time Florida certified its electoral votes in his favor.

#### IV. THE ADMINISTRATOR'S RELIANCE ON THE LEGISLATIVE HISTORY

In the closing weeks of the election controversy, the Administrator adopted a third position. He argued that he actually had no discretion to release the transition funds, and that in fact, the legislative history of the Act instructed him not to release the transition funds in a "close" election, which he interpreted as applying to the 2000 election. He believed that while the litigation and recounts in Florida were still pending, he had discretion to withhold the transition resources. He rested his case on a few isolated clips of legislative history. As this part of the essay indicates, his reliance on this legislative history is misplaced. When placed in the larger historical and legislative context, it is evident that the Administrator misinterpreted the meaning of these legislative snippets. In fact, once the statements are placed in their proper context, it is apparent that their true meaning is consistent with the argument advanced in this essay.

Testifying before Congress in early December, Administrator David Barram stated:

The Presidential Transition Act of 1963 makes it my responsibility to "ascertain" the "apparent successful candidates" for President and Vice President before the funds, services and facilities authorized by the Act become available to the Transition Team. While the Act gives no explicit criteria or deadlines for making this ascertainment, as the legislative history demonstrates, Congress made it perfectly clear that if there is "any question" of who the winner is "in a close contest" this determination should not be made.<sup>145</sup>

He rested his interpretation of Congressional intent on three excerpts from the floor debates on the bill. Here is his argument in full:

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145. Barram Testimony, *supra* note 13.

As Representative Fascell explained during the 1963 discussion of the bill, “in a close contest, the Administrator simply would not make the decision.” 109 CONG. REC. 12238 (July 25, 1963). Representative Fascell went on to explain that “[t]here is nothing in the act that requires the Administrator to make a decision which is [sic] in his own judgment he could not make. If he could not determine the apparent successful candidate, he would not authorize the expenditure of funds to anyone; and he should not,” *id.*, “[i]n the whole history of the United States there have only been three close such situations. It is an unlikely proposition, but if it were to happen, if the Administrator had any question in his mind, he simply would not make any designation in order to make the services available as provided by the Act. If as an intelligent human being and he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress.” *Id.* at 13349.<sup>146</sup>

The Administrator’s reliance on these shards of legislative history was misplaced. He failed to take account of the specific legislative and historical context in which the statements were uttered, and thus simply misinterprets their significance. Each of these statements must be considered in turn.

#### *A. The Problem of “Close” Electoral Contests*

The first two statements by Congressman Fascell both occur in a discrete colloquy with Congressman H.R. Gross and will be treated together. Gross asked Fascell, “We apparently have a situation growing up in certain States of the Union whereby there may be independent electors. Does not the gentleman think that those designated as President and Vice President by the present Administrator of General Services would be given psychological and other advantages by designating them as President and Vice President?”<sup>147</sup> To this query Fascell provided the reply quoted by the Administrator in his testimony, “I do not think so, because if they were unable at that time to determine the successful candidates, this act would not be operative. Therefore, in a close contest, the Administrator simply would not make the decision.”

It is clear in this context that Fascell was *not* referring to the type of “close contest” that prevailed in the 2000 election. Instead, he re-

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146. *Id.* at n.1.

147. 109 CONG. REC. 13,348 (1963) (statement of Mr. Gross).

ferred to the type of close contest that suggested by the *1960 election*, where the presence of southern unpledged electors might raise questions about whether a candidate actually held a certified electoral college majority, even if his party appeared to hold an electoral college majority.<sup>148</sup> It is clear that Fascell and Gross were *not* talking about the possibility that subsequent litigation, recounts, or other post-election activity might have the result of undoing an electoral college majority in a “close” election. Rather, they emphasized protecting the prerogatives of unpledged electors to exercise their independent judgment.

Representative Gross then criticized the Act for failing to make an explicit exception for this particular situation, as he believed that the Act compels the Administrator to designate an apparent winner notwithstanding the fact that many electors might actually be unpledged electors. Gross observed that the Act makes no exception for a situation where unpledged electors hold the potentially deciding votes in an election, and that the Act says “that the Administrator *shall* do thus and so. . . . It says he *shall* make the determination, does it not?”<sup>149</sup> Gross was concerned that the Act provided a mandatory requirement that the Administrator designate a President-elect, and in so doing infringed on the rights of independent electors. To this criticism Fascell provided the second comment relied upon by the Administrator: “There is nothing in the act that *requires* the Administrator to make a decision which in his own judgment he could not make. If he could not determine the apparent successful candidate, he would not authorize the expenditure of funds to anyone; and he should not.”<sup>150</sup> Read in context, this colloquy clearly indicates if a candidate cannot be confidently said to have an electoral college majority *because some of his party’s electors are actually unpledged electors*, then the Administrator should not designate an apparent successful candidate.

Gross then complained that even if the designation of a President-elect is not compelled in such a situation, the Act vests discretion in the Administrator to anoint a President-elect, even if so doing would be premature under the facts because of the presence of unpledged electors. Moreover, Gross was concerned that the Adminis-

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148. See *supra* notes 126–37 and accompanying text.

149. 109 CONG. REC. 13,348 (statement of Mr. Gross) (emphasis added).

150. *Id.* (statement of Mr. Fascell) (emphasis added).

trator would intentionally use this power in an improper manner to recognize a President-elect and thereby undermine the independence of the unpledged electors. In response to Fascell's admonition that the statute does not compel the Administrator to ascertain an apparent winner under these circumstances, Gross objected, "Well, it could be whoever he thought was the apparent winner; is that not correct?"<sup>151</sup> To which Fascell responded, "It could be—yes."<sup>152</sup> In response Gross further objected, "Yes. Of course, that is all the authority he needs—whoever *he thinks* is the apparent winner—that is all—*without waiting for the college of electors to meet and cast the official ballots as provided for in the Constitution.*"<sup>153</sup> In response to this interrogation by Gross, Fascell objected:

I do not see any great big problem in the Administrator of the General Services Administration being unduly involved in the matter of determining who is the apparent winner in order to perform the ministerial functions under this act. . . . The gentleman previously pointed out in the last election [1960] we had one that was as close as we would want to have an election and nobody had any trouble in deciding who was the apparent winner.<sup>154</sup>

The import of this exchange may need some elaboration, as it again relies on an understanding of historical context. Gross was a leading Taft-Goldwater Republican in the 1950s and 1960s. It is likely that he sought to protect the prerogative of unpledged electors both on principle as well as political advantage.<sup>155</sup> He did not appear to be concerned that an Administrator would misuse the power in a close election to designate either the Democratic or Republican candidate. What he was more likely concerned about was *intra-party* debate, primarily the intra-Democratic Party debate over the status of unpledged electors. To be more concrete, he was probably concerned about the upcoming 1964 election, where it was conceivable that a growing number of southern states would elect unpledged

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151. *Id.*

152. *Id.*

153. *Id.* (emphasis added).

154. *Id.*

155. The emphasis here is on political considerations, but this should not be read to denigrate the role of principle in Congressman Gross's thinking. Contemporaries recognized Gross as a sincere believer in federalism and strict construction of the Constitution; thus, he would have been inclined to support the constitutional prerogatives of electoral college voters to vote their consciences.

electors rather than Kennedy electors. Kennedy was not assassinated until the Fall of 1963, but the debates over the Act took place in July of 1963, thus Kennedy was expected to be the Democratic nominee for reelection in 1964 when these congressional debates took place.<sup>156</sup> At the time the Act was being debated, conservative Barry Goldwater had already been identified as a possible Republican nominee to challenge Kennedy.<sup>157</sup> At the same time, the southern states were embroiled in ongoing controversy with Kennedy over his civil rights policies.<sup>158</sup> Kennedy was thus quite vulnerable in the South, and it would have been reasonable for Republicans to believe that Goldwater might be successful in claiming any unpledged southern electors.<sup>159</sup> As a purely political matter, therefore, conservative Republicans such as Gross would be expected to be quite adamant about protecting the prerogatives of unpledged southern electors. Moreover, if the unpledged elector movement in fact expanded across the South, it was foreseeable that the general election might produce a majority of *Democratic* electors, but *not* necessarily a majority of *Kennedy* electors. In such a situation, Gross was concerned that the GSA Administrator—a political appointee of the incumbent Kennedy administration, of course—would be permitted to recognize the unpledged Democratic Party electors as Kennedy electors and thereby designate Kennedy the apparent winner even though he would lack an electoral college majority. Had the Act been in place in 1960, for instance, the GSA Administrator could have tried to count the unpledged Democratic electors for Kennedy and declared him the President-elect. This is the likely explanation for Gross's repeated concern that the Act allows the GSA Administrator to disig-

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156. In fact, Gross implies that he believes that the real purpose of the Act was to benefit Kennedy. He stated,

Let me ask the gentleman [Fascell] this question which intrigues me in connection with the political aspects of this thing. The last sentence of the report on page 12 reads: Enactment of these proposals—says President John F. Kennedy—will go a long way to improve the political climate. What political climate is being improved by this legislation?

See 109 CONG. REC. 13,348 (statement of Mr. Gross).

157. Goldwater and Nelson Rockefeller of New York were the front-runners for the Republican nomination as early as January 1963. See RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* 452 (1993).

158. See *id.* at 625–26. In fact, in the 1960 election Kennedy had won only thirty-seven percent of the vote in Mississippi against Nixon and the unpledged electoral slate. *Id.* at 355.

159. Recall that under Irwin's rogue 1960 ticket designed to pick up the unpledged southern electors, Byrd was the choice for president and Goldwater for vice president.

nate “*whoever he thinks is the apparent winner*” as the apparent winner. The concern here was not with the *factual* difficulty of ascertaining the apparent winner in a close election, as the GSA Administrator claimed during the 2000 election. The issue was that despite the absence of a certified electoral college majority for Kennedy, the Administrator would allow political considerations to intervene and thereby interpret unpledged electors Kennedy electors.<sup>160</sup>

Gross also obviously feared that the Administrator would have the power to make a wholly subjective recognition of an apparent winner in the election, such as by counting unpledged Democratic electors to be Kennedy electors. It was feared that this would create psychological pressure on the unpledged electors to tow the Democratic party line and follow the Administrator’s lead, thereby rendering their electoral college vote a *fait accompli* and sacrificing their independence. This would also limit their ability to throw their votes to Goldwater or to a Southern Democrat who could deny Kennedy an electoral college majority. Given his concerns, Gross would presumably have been equally appalled at the subjective nature of the decisions made by the Administrator in the 2000 election in refusing to recognize Bush’s certified electoral college majority.

This colloquy also undermines a related argument made by the Clinton administration during the 2000 election. White House spokesman Jake Siewert referred to this legislative history at a press conference, claiming that that it indicated that the Administrator was not permitted to designate an apparent winner in a “close election” because doing so would create a psychological edge for one candidate or the other “in a contested election.”<sup>161</sup> Siewert implied that this would provide a psychological edge in public opinion. This is not a correct interpretation of the legislative statement on which Siewert relies. There is *no* reference in the floor debates to giving a psychological edge in a “contested” election. Read in context, the

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160. In fact, Gross seems to have had particular concerns about Kennedy himself using his power as the incumbent President to use the GSA designation in exactly this way. 109 CONG. REC. 13,348.

161. Siewert, *supra* note 85. Paul Light also defended the refusal of the Administrator to release the transition resources in part on the ground that designating Bush the apparent winner would provide an improper psychological edge. See *Transitioning to a New Administration: Can the Next President be Ready?: Hearing Before the House Comm. on Gov’t Reform, Subcomm. on Gov’t Mgmt., Info., and Tech.* (Dec. 4, 2000) (statement of Paul Light), available at <http://www.house.gov/reform/gmit/hearings/2000hearings/001204.Transition/001204pl.htm> [hereinafter Light Testimony].

floor debates refer to the application of psychological pressure on *unpledged electors*. Again, the entire debate over the designation of an apparent winner under the Act returns to central, verifiable question of whether one candidate has achieved an electoral college majority and the difficulty of determining this when some electors may be nominally Democratic but actually unpledged electors. Thus, neither of the first two excerpts relied upon by the Administrator support his belief that he is not empowered to make a designation in a “close” election.

### *B. Three Such Close Elections*

Consider the Administrator’s final source of purported authority for the discretion to refuse to ascertain an apparent winner in a “close” election such as the 2000 election. In response to a question by Congressman Haley, Fascell observed that there had only been three such close elections, and that:

In the whole history of the United States there have only been three close such situations. It is an unlikely proposition, but if it were to happen, if the administrator had any question in his mind, he simply would not make any designation in order to make the services available as provided by the act. If as an intelligent human being and he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress.<sup>162</sup>

An examination of the “three close such situations” referenced by Fascell indicates that he clearly understood a “close” election to be one in which it was impossible to ascertain a certified electoral college winner. Although he did not identify the three elections to which he refers, he probably meant the elections of 1800, 1824, and 1876.<sup>163</sup> These elections were fundamentally different from the 2000 election, however, in that in each it was impossible to establish a winner until the election was actually resolved in the electoral college or in the House of Representatives. Thus, the focus on these elections in the legislative history actually proves the *opposite* of what the Administrator claimed. They demonstrate that even though the 2000 election was a close election in common parlance, the 2000 election was *not* a “close” election within the understanding of the

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162. 109 CON. REC. 13,349.

163. See Light Testimony, *supra* note 161.

Act's drafters, the type of election where an apparent winner could not be ascertained. An examination of these "three close such" elections indicates that the 2000 election was close in a layman's sense of the term, but *not* in the sense in which the Act's authors used the term. Thus, even though the 1960 or 2000 election might be thought of as a "close" election, they were not "close" in the sense used by the Act because there would be no difficulty in ascertaining an *apparent* winner of the election, even though the identity of the eventual *actual* winner might remain in question for some time. The three "close" presidential elections referred to by Fascell, by contrast, were elections where no apparent winner could be identified because no certified electoral college winner could be identified. Of course, there was no Presidential Transition Act during the time of these elections; nonetheless, Fascell's reference to those elections provides guidance as to what types of elections he considered to be "close" elections for purposes of the Act's definition.

In 1800, for instance, there was an electoral college tie between Thomas Jefferson and Aaron Burr, thus requiring resolution of the election in the House of Representatives.<sup>164</sup> At that time, prior to the enactment the Twelfth Amendment, electors did not vote separately for the President and Vice President, but rather had two votes each, with the candidate receiving the largest number of votes elected President and the second-highest candidate becoming Vice President. To account for this, the Democratic-Republicans should have arranged for one Burr voter to cast his vote for an alternative candidate.<sup>165</sup> Thus, the problem in the election of 1800 was that under the pre-Twelfth Amendment rules there was no way to identify an apparent winner of the 1800 election because neither Jefferson nor Burr could claim a clear victory in the electoral college. As a result, the election was thrown into the House of Representatives, at which point the Federalists almost decided to throw their support to Burr so as to prevent Jefferson from being elected.<sup>166</sup> In the end, Burr refused to promise that he would govern as a Federalist, and thus the

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164. See PEIRCE & LONGLEY, *supra* note 36, at 39–41.

165. Interestingly, the defeated Federalist Party recognized the dilemma, and one elector cast a vote for John Jay, thereby giving John Adams sixty-five votes and Charles Coatesworth Pinckney sixty-four votes. *Id.* at 38–39.

166. The Federalists thought Burr a man of dubious character, but they considered Jefferson to be far more dangerous and radical. In the end, however, they determined Burr's Republicanism to be unshakeable and thereby acceded in Jefferson's election.

Federalist scheme failed and Jefferson was elected.<sup>167</sup>

In the 1824 election, four candidates received substantial electoral votes, thereby preventing any of them from receiving an electoral college majority.<sup>168</sup> Each candidate was essentially a sectional candidate. Andrew Jackson received a plurality of electoral votes (as well as the popular votes that were cast), but not a majority, thereby throwing the election into Congress. Under the Constitution, the top three vote-getters in the electoral college, Jackson, John Quincy Adams, and William H. Crawford, could be considered. Henry Clay, who finished fourth in the electoral college, threw his support to Adams, spawning accusations of a corrupt bargain between the two men to make Adams President and Clay Secretary of State.<sup>169</sup> Clay's support gave Adams twelve of the twenty-four states necessary to carry the election in the House; eventually New York threw its support to Adams as well. After Adams's victory, Clay was in fact named Secretary of State, infuriating the Jacksonians. Again, no apparent winner could be ascertained in the 1824 election because identifying an electoral college winner when no candidate had a certified majority was impossible. The election finally was decided in the House under uncertain conditions.

The election of 1876 raised yet another set of concerns. Contested against the backdrop of Reconstruction, that election contest between Rutherford B. Hayes and Samuel Tilden was riddled with chaos and confusion making it difficult to determine who were the proper electors from the state of Florida. The day after the election, Hayes held a one-vote lead over Tilden in the electoral college. Tilden, in fact, prevailed in the popular vote by about one-quarter of a million votes. Four states submitted double sets of electors, making it impossible to even figure out who were the certified electors.<sup>170</sup>

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167. If the election in the House had been per capita, Burr would have actually defeated Jefferson, 53 to 51. But because the Constitution provides for voting by state (one vote per state) rather than by Representative, Jefferson eventually prevailed. Nonetheless, it took thirty-six ballots before Jefferson could gain a clear majority of states in the House. Finally, on February 17, he was elected by a count of ten states to four. PEIRCE & LONGLEY, *supra* note 36, at 40.

168. They were John Quincy Adams of Massachusetts, Henry Clay of Kentucky, William H. Crawford of Georgia, and Andrew Jackson of Tennessee. *See id.* at 49. John C. Calhoun of South Carolina and De Witt Clinton of New York also had their names put forward but both withdrew before the election. Calhoun ran successfully for vice president instead.

169. *Id.* at 50–51.

170. *See id.* at 52–57.

South Carolina and Florida each certified two sets of electors, one for each candidate. Louisiana, which at the time had two governors and two canvassing boards, certified two sets of electors as well. In Oregon, one of the victorious Republican electors was a postmaster and thus was ineligible under the U.S. Constitution. As a result, the Governor certified the top-polling Democratic elector to replace him. The ineligible Republican resigned as postmaster and was then again elected as an elector. Oregon thus also sent two slates of electors to Washington. Until the legitimate electors from each of these states could be identified, it would have been impossible to name either of the candidates as the apparent winner because they held the balance in the electoral college. Moreover, the House was under Democratic control and the Senate was controlled by Republicans. The issue was not resolved until a special commission was formed to study and resolve the issue.<sup>171</sup> Even then, Tilden backers threatened to filibuster the final count until Hayes agreed to withdraw northern troops from the South, thereby effectively ending Reconstruction. The final result of the election was not announced until 4:00 a.m. on March 2, 1877, and Hayes was inaugurated three days later. Clearly the uncertainty associated with that election fought out in the shadow of Reconstruction is distinguishable from the controversy of the 2000 election.

As these brief summaries indicate, although the 2000 election was “close” in a conventional understanding of the term, it was *not* “close” in the same way as the three elections alluded to by Fascell as situations where it would be difficult to ascertain an apparent winner for purposes of the Act. The 2000 election, by contrast, was comparable to the “close” election of 1960, where the vote was close and multiple challenges to the election raised doubts about whether the certified electoral victory for Kennedy would hold in the end. Thus, even though Fascell expressed concern about the effect of “close” elections on the implementation of the Act, the legislative and historical context indicates that Fascell did *not* consider the 1960 election to be a close election for purposes of the Act because an “apparent” winner was readily ascertainable. Moreover, Paul Light observes

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171. It is likely that Tilden would have succeeded in prevailing in the commission, except that the tie-breaking voter, Supreme Court Judge David Davis, was disqualified from the commission the day before he was appointed because he was elected to the United States Senate by the Illinois state legislature. This allowed for the appointment of a Republican-leaning Justice instead, who cast all tie-breaking votes in Hayes’s favor. *Id.* at 55–56.

that Fascell probably did not include on this list of close elections the election of 1888 in which Grover Cleveland won the popular vote but lost to Benjamin Harrison in the electoral college, even though this would clearly be thought to be “close” in a conventional usage of the term.<sup>172</sup> Comparing the facts of these “three close such” elections of 1800, 1824, and 1888, and contrasting them with the election of 1960, an election “as close as we would want to have,”<sup>173</sup> reveals the distinctions from the 2000 election and strongly indicates that the Administrator’s definition of a “close” election deviates from that of the Act’s sponsors.

The reference to these three “close” elections also illuminates the remainder of Fascell’s observation that if “the administrator had any question in his mind, he simply would not make any designation.”<sup>174</sup> Again, it is clear that Fascell is referring to the ability to ascertain whether a candidate has a certified electoral college majority. If the administrator is unable to make that assessment—such as in the elections of 1800, 1824, or 1876—then he should refrain from doing so “until a decision has been made in the electoral college or in the Congress.”<sup>175</sup> Thus, this out-of-context statement from the legislative history fails to support the Administrator’s interpretation of the Act.

The Administrator’s interpretation of these excerpts from the Act’s legislative history was thus incorrect. He relied on isolated bits of legislative statements uprooted from both their legislative and historical context. When read in context they simply do not support his position. Rather, they reinforce the interpretation advocated here,

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172. See Light Testimony, *supra* note 61. In fact, the elections of 1880, 1884, and 1888 were all decided by single-state margins. See *id.* at 57. In 1884 Cleveland won his first term by prevailing in the state of New York, a state he carried by only 1,149 votes out of 1,167,169 cast. *Id.* at 57. Had Cleveland carried New York in 1888 he would have won that election as well. These close elections suggest yet another interesting parallel to the 1960 election. Traditionally the votes for the Alabama unpledged electors have been credited to Kennedy’s popular vote. But as the earlier discussion of the unpledged electors movement indicated, this allocation is incorrect. A proportional share of Kennedy’s vote should be allocated to Byrd or the unpledged electors themselves. If the Alabama popular vote is reallocated according to the relative proportions that Byrd and Kennedy drew of the Alabama electors, Kennedy’s popular vote in Alabama is reduced (and thus reduced nationwide) by 176,755 votes. Once the nationwide numbers are recalculated, the effect of recognizing these votes for Byrd instead of Kennedy is to make Nixon the nationwide popular vote winner by 58,181 votes. *Id.* at 67.

173. 109 CONG. REC. 13,348 (1963)

174. *Id.* at 13,349.

175. *Id.*

namely that the Act required the Administrator to recognize Bush as the president-elect.

## V. FUNCTIONAL ANALYSIS

A functional analysis of the Act's policies confirms the conclusions of this essay. First, the purpose of the Act is to provide for an orderly and speedy transition of power from one administration to the next. Second, the Act designates such transition activities to be of a governmental function, and thus provides resources so that the expenses are borne by the public, rather than by private individuals. Reviewing each of these policies in turn indicates that the transition resources should have been released immediately to the Bush-Cheney transition team and that the Administrator abused his power by refusing to do so at that time.

### A. *Promoting an Orderly and Speedy Transition*

The primary purpose of the Act is "to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President."<sup>176</sup> The Act arose from a bipartisan study conducted during the Kennedy administration, which recognized the importance of an orderly transition period that would ensure that the new administration could "hit the ground running" and be ready to govern from the first day in office.<sup>177</sup> The Act states:

The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign. *Any 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. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize *any disruption*.<sup>178</sup>

Disruption or delay in effectuating a transfer of power to the ap-

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176. Presidential Transition Act, *supra* note 1, § 2.

177. See Smith, *supra* note 4, at CRS-9.

178. Presidential Transition Act, *supra* note 1, § 2 (emphasis added).

parent successful candidates would threaten the national interest. A failure to provide adequate resources to enable a smooth and speedy transition during the short period between the general election and the inauguration substantially handicaps a new President's ability to govern and pursue policy objectives during the first year of his term. As John Sununu, former Chief of Staff to President Bush, testified to Congress in early December, "A one-month delay now will be reflected in a six-month or one-year delay in getting things really started."<sup>179</sup> Indeed, news reports in November and December of 2000 indicated that this concern helped to produce economic jitters that eventually blossomed into a recession. The failed nomination of Linda Chavez to serve as Secretary of the Department of Labor was also attributed in part to the shortened transition period and the inability to fully investigate her background. Other news stories raised concerns about the effect of the election uncertainty on foreign affairs and military obligations. It is exactly this sort of national harm and loss of public confidence that the Act seeks to avoid through its early identification of a President-elect and its provisions for a smooth transition.

This policy also explains the Act's decision to allow the release of transition resources to the "apparent" successful candidate, rather than awaiting an official announcement of a winner. Congress's fears are a one-way street—the country will undoubtedly be harmed by delay in releasing the transition resources, but there will be minimal harm from releasing the resources to the apparent successful candidate. Money can be replaced; time cannot. Given the brief period of time between the election and the inauguration, every day is crucial. Thus, it is equally crucial that transition resources be made available as soon as an apparent successful candidate is identified. Congress recognized delaying the transition would create irremediable harm to the country. This delay is even more damaging when the apparent successful candidate is from the non-incumbent political party, thereby making it impossible to maintain continuity by retaining the incumbent President's officials and priorities. As the sitting Vice President, Al Gore retained all of the resources of office to effectuate his transition, including offices, a residence, and staff.<sup>180</sup> In addition,

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179. Michael M. Phillips, *Election 2000: GSA Says Presidential Victor Isn't Clear*, WALL ST. J., Dec. 5, 2000, at A14, available at 2000 WL-WSJ 26618876.

180. See Editorial, *supra* note 3. As the *New York Times* reported on November 28, 2000:

the Act appropriates money to outgoing Vice-Presidents.

In contrast to the substantial harm caused by a delay in releasing the funds, releasing the funds prematurely will have little countervailing harm, even if it turns out that the apparent winner is not the actual winner. It will not change the identity of the eventual official winning candidate. From a purely financial perspective, one would expect that many of the expenses associated with setting up a transition office would be incurred regardless of the candidate who prevailed, meaning that many expenses themselves will not be wasted. A prompt release of transition resources to the apparent successful candidates, Bush and Cheney, is the only understanding of the Administrator's duties that is consistent with the policy goals of the Act.

The need for quick action also rebuts the Administrator's belief that he should wait for a concession or resolution of litigation before declaring an apparent winner. First, relying on these factors inherently creates substantial delay and uncertainty, undermining the speediness and effectiveness of the transition. Second, these factors open the door to politically-motivated delay in declaring an apparent winner, as happened during the 2000 election.<sup>181</sup> Finally, because of the vagueness and subjectiveness of these factors and the absence of any effective mechanism for review—i.e., how much certainty is enough?—they are prone to easy manipulation, making it difficult to constrain the Administrator from making wholly partisan judgments.

It is possible that the candidate initially identified as the apparent winner may later have to yield that designation to a different candidate sometime between election day and the inauguration, but this eventuality would have little negative impact on the policies animating the Act. While some of the money allocated for the transition will have been spent, many of the expenses of the transition will have been incurred regardless of which candidate spent the funds, such as expenses for heat, plumbing, office supplies, support staff, office

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Until January 20 [Gore] has plenty of office space in the Old Executive Office Building, across the street from the White House, an office in the West Wing; a spacious Vice Presidential residence at the Naval Observatory, where he and his aides have been mapping their strategy. Moreover, Mr. Gore has access to daily intelligence briefings and aides who are already cleared to receive classified material.

Fred Thompson, Editorial, *Hand over the Keys: Transition Needs to Begin*, WASH. TIMES, Dec. 5, 2000, at A17, available at 2000 WL 4171290 (citing N.Y. TIMES, Nov. 28, 2000).

181. See *supra* notes 77–86 and accompanying text (describing political pressures placed on the Administrator).

equipment, moving expenses and the like. The transition period for the new President-elect would have been shortened as well, but this would also be the case if as during the 2000 election, the Administrator refuses to recognize either candidate as the apparent winner. Thus, a reversal in identifying the apparent winner will have little negative effect on the policies of the Act, and certainly far less effect than a decision to delay the decision as occurred in this case.

A problem with the Act is that it makes no express provision for what happens if the Administrator recognizes the apparent winning candidate only to have this candidate later turn out not to be the actual winning candidate. However, the failure to make provision for what happens in this situation does not justify a refusal to follow the requirements of the Act to pay out the money in a timely manner.

#### *B. The Need for Integrity and Public Confidence*

The history of the Act indicates a second policy goal that suggests the need for a prompt release of transition resources and thus a swift recognition of an apparent winner. Prior to the Act, transitions were funded by the political parties and by private donors. An express purpose of the Act was to replace that system with a system of government-supported presidential transitions. Congress clearly understood the transition to a new administration to be of a governmental or quasi-governmental nature, which should be funded by the federal government, rather than by political parties or private donors.<sup>182</sup> Equally important, the sponsors of the Act believed that private financing of transitions raised the perception of special interest influence over the transition process, providing some interests with undue influence even as the new administration established policies and priorities. As Congressman Rosenthal observed on the floor of the House, "If someone is going to come forward and help pay what we now recognize is a cost of government, which is actually what it is, during the transitional period, that person may feel inclined to think that he is entitled to special consideration from the government."<sup>183</sup> One purpose of the Act was to allay these fears:

[W]e should here and now say by the passing of this bill . . . that from now on the government will assume its responsibility and

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182. See 109 CONG. REC. 13,346 (1963) (statement of Mr. Rosenthal); *id.* at 13,347 (statement of Mr. Monagan).

183. *Id.* at 13,346.

shall pay the cost for the orderly transition of government. If we do this . . . we can prevent any special group or any special interests from anxiously coming forward to help pay government expense.

. . . [I]t is my opinion that this is the most significant reason, and I think a singular and important reason why this bill should be enacted.<sup>184</sup>

Congressman Fascell expressed these goals even more forcefully:

I think the political climate can be very, very much improved by not having the President-elect and the Vice-President-elect of these United States calling on his friends and others who might be interested to pay the costs of him assuming office in this, the greatest country in the world. It just does not seem proper and necessary to have them going around begging for money to pay for the cost of what ought to be legitimate costs of Government . . . .<sup>185</sup>

The Act plainly intends to relieve an incoming administration from being saddled with a choice between having to beg for money from private individuals on the one hand and seeing their transition undermined by lack of resources on the other. In fact, news reports at the time indicated that the Bush-Cheney transition team confronted that choice. Unable to gain access to the funds designated by the federal government to effectuate a transition, the Bush-Cheney transition team was forced to turn to private donors for money to fund their transition. It appears that in so doing they complied punctiliously with all ethical and legal rules governing the acceptance of such contributions.<sup>186</sup>

Despite their efforts to prevent actual conflicts of interest, there are additional problems that are simply inherent in being forced to rely solely on private funding of transitions, and for which such safeguards will be unavailing. The drafters of the Act were concerned about the perception of impropriety occasioned by the reliance on private funds for a transition as well as believing that it is simply improper to require private financing of a public governmental func-

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184. *Id.*

185. *Id.* at 13,348.

186. It should be noted that the Bush-Cheney team took substantial steps to negate the concerns expressed by the authors of the Act. For instance, they prohibited corporations from contributing and limited contributions to \$5,000 per donor. There seems to be no question that they complied with all ethical and legal rules governing the acceptance of contributions for transition purposes.

tion. These concerns of perception and unfairness are inherent in relying solely on private financing of transitions, which is exactly why the Act provides governmental funding of transition efforts. Thus, again, the policies of the Act compel the conclusion that the funds should have been released to the Bush-Cheney transition team as soon as they became the apparent successful candidates so that they could effectuate their transition appropriately.

It is evident that the policies animating the Act—the need for a smooth and speedy transition untainted by special-interest influence—would be satisfied only by releasing transition resources as soon as a candidate can be identified as having earned a majority of electoral votes. This suggests that if the Administrator has discretion under the Act, the policies of the Act indicate that it is appropriate to err on the side of releasing the funds too early rather than too late.

#### VI. PROPOSALS FOR REFORM

The problems that arose with the Presidential Transition Act during the 2000 election were primarily the result of lawless action by the GSA Administrator in refusing to abide by the plain language and congressional intent of the Act, as well as political pressures imposed by the White House seeking to gain an advantage for Al Gore and to frustrate the Bush-Cheney transition. Regardless of the reasons for his lawless and obstinate behavior, by refusing to abide by the law, the Administrator substantially prejudiced the Bush transition efforts, forcing them to rely exclusively on private fund-raising for several weeks and substantially reducing the time they had to coordinate their transition efforts. In light of the costs that this one mid-level bureaucrat was able to impose on the country during the 2000 election, it is appropriate to consider whether Congress should amend the Act.

In considering amendments to the Act, it should be recognized that the problems that happened during the 2000 election resulted not from any defects in the Act itself, but resulted from the lawless and irresponsible behavior of the GSA Administrator in refusing to carry out the Act's mandate. The Act is plain on its face and context eliminates any possible ambiguity. Once Bush claimed a certified majority of electoral votes, he should have been declared the President-elect and been tendered the transition resources. Given the implausibility of a Gore victory at that point, on the facts of the situation there was no reasonable basis for withholding the transition re-

sources from Bush. Unfortunately, the act provides no mechanism for an aggrieved party to force the Administrator to carry out his statutory duties under the Act, and certainly no mechanism that could be effective within the short time limits of the transition period.

To prevent this opportunism in the future, the Act could be amended to define the term "apparent successful candidate" to make explicit what is already implicit in the Act, namely that the apparent winner should be declared as soon as one candidate has a majority of certified and pledged electors. It is not clear that this would be an improvement over the current law (correctly implemented, of course). Substituting this language might imply that this is the exclusive way of ascertaining the apparent winner. One could imagine scenarios where the apparent winner could be easily ascertained, even if he lacks an electoral college majority. Nonetheless, the Administrator's lawless actions in the 2000 election are likely to be cited by future Administrators confronted with similar situations. Thus, the need to reclarify the statute may be sufficiently pressing to necessitate explicit language regarding the legal relevance of an electoral college majority.

The Act should also be amended to provide for the situation where the apparent winner does not turn out to be the actual winner in the end. Election contests rarely overturn the initial, certified winner. Nonetheless if this were to happen in a particular presidential election, additional money should be appropriated to the final apparent winner if the identity of the apparent winner changes before the election results are final.

Where the outcome is sufficiently in doubt, Congress could also provide that transition funds could be released to both candidates pending final resolution of the outcome of the case. This option is not available under current law because the Act permits payment to only one candidate (the apparent winner) and gives the Administrator no discretion to release funds to a candidate who is not the apparent winner, even though that candidate might later turn out to be the actual winner of the election.

If Congress wants to amend the statute to make the determination of an apparent winner more of a matter of discretion of a government official, then the Administrator of the GSA is not the appropriate party to make this determination. At the very least the power to ascertain an apparent winner should be vested in a more

senior official, preferably one with some degree of expertise to make such a determination, such as the Attorney General. Under current law, the utter absurdity of vesting this power in an official of such minor standing and so unsuited to make the determination indicates that Congress did not intend for it to be anything other than a routine decision governed by a bright-line rule. If Congress intends for the decision to be more difficult or discretionary than current law implies, then it should vest the power in a more suitable official.

Although an improvement over the current regime, the Attorney General is still a political appointee; thus this solution would not wholly eliminate the political influences that noticeably influenced the Administrator's decision. If Congress pursues this course, it may be more appropriate to create an independent commission to make the determination of when an apparent winner can be identified.<sup>187</sup> This might insulate such a commission from some more blatant forms of partisan influence but would still be inferior to a bright-line statutory command that removed the possibility of politically-motivated decision making.

Because any of these solutions would leave the potential for arbitrary or politically-motivated action, Congress should also allow for the expedited appeal to federal court of any decision made under the Act by a party who unsuccessfully requests a release of the transition resources. Alternatively, Congress could limit the trigger for review to a request by a party who has attained a majority of certified and pledged presidential electors. Limiting the opportunity for review to this more narrow class of cases would head off premature or strategic requests for access to the transition resources while maintaining the Act's current focus on the accomplishment of an electoral college majority as the crucial basis for determining the apparent winner.

Regardless of what Congress chooses to do, it is crucial that it do something to prevent a disastrous recurrence of the 2000 election where one minor ministerial officer of the executive branch claimed the authority to withhold the transition resources for well over a month, thereby slicing the President-elect's transition time in half. Not only did this power grab lack any legal basis, but it was exercised in an arbitrary and politically-motivated way. In so doing, it prejudiced the presidential transition and created the exact the problems that the Act was intended to alleviate, such as delaying the transition

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187. I offer no suggestions as to how such a commission might be composed.

and forcing a reliance solely on private fundraising. Congress must do something to ensure that such a situation never materializes again.

## VII. CONCLUSION

The presidential election of 2000 raised a number of unprecedented legal issues. Many of those issues were evanescent and are unlikely to arise in the future, even in an election as close and contentious as this one. The problem of the interpretation and administration of the Presidential Transition Act, however, is almost certain to arise again. The ability of the incumbent administration to manipulate the Act for political purpose and to thereby undermine the transition efforts of a rival party is certain to tempt future administrations. The Act originally intended that the determination of a President-elect be a relatively simple matter, one to be ascertained solely by examining whether one candidate had earned an electoral college majority. As the sponsor of the Act observed, the 1960 election—one at least as close, contentious, and uncertain as the 2000 election—presented no problems in ascertaining an apparent winner. Nonetheless, the Administrator of GSA, inspired in large part by political pressures emanating from the White House, refused to recognize an apparent winner until after the Supreme Court ruled in favor of George Bush and after Al Gore conceded the election. In so doing, the Administrator violated the Act's language and intent and undermined its policies as well, harming the Bush transition and the country as a whole in the process.

Although the Administrator's actions clearly violated the Act, the Bush-Cheney transition team had little recourse to rectify the violation. My hope is that this article will provide an authoritative interpretation of the Act, its history, and policies, and useful suggestions for reform to avoid similar problems in the future.