

**TRANSITIONING TO A NEW ADMINISTRATION:
CAN THE NEXT PRESIDENT BE READY?**

HEARING
BEFORE THE
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY
OF THE
COMMITTEE ON
GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

DECEMBER 4, 2000

Serial No. 106-279

Printed for the use of the Committee on Government Reform



Available via the World Wide Web: <http://www.gpo.gov/congress/house>
<http://www.house.gov/reform>

U.S. GOVERNMENT PRINTING OFFICE

75-062 PDF

WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON GOVERNMENT REFORM

DAN BURTON, Indiana, *Chairman*

BENJAMIN A. GILMAN, New York	HENRY A. WAXMAN, California
CONSTANCE A. MORELLA, Maryland	TOM LANTOS, California
CHRISTOPHER SHAYS, Connecticut	ROBERT E. WISE, JR., West Virginia
ILEANA ROS-LEHTINEN, Florida	MAJOR R. OWENS, New York
JOHN M. McHUGH, New York	EDOLPHUS TOWNS, New York
STEPHEN HORN, California	PAUL E. KANJORSKI, Pennsylvania
JOHN L. MICA, Florida	PATSY T. MINK, Hawaii
THOMAS M. DAVIS, Virginia	CAROLYN B. MALONEY, New York
DAVID M. McINTOSH, Indiana	ELEANOR HOLMES NORTON, Washington, DC
MARK E. SOUDER, Indiana	CHAKA FATTAH, Pennsylvania
JOE SCARBOROUGH, Florida	ELIJAH E. CUMMINGS, Maryland
STEVEN C. LATOURETTE, Ohio	DENNIS J. KUCINICH, Ohio
MARSHALL "MARK" SANFORD, South Carolina	ROD R. BLAGOJEVICH, Illinois
BOB BARR, Georgia	DANNY K. DAVIS, Illinois
DAN MILLER, Florida	JOHN F. TIERNEY, Massachusetts
ASA HUTCHINSON, Arkansas	JIM TURNER, Texas
LEE TERRY, Nebraska	THOMAS H. ALLEN, Maine
JUDY BIGGERT, Illinois	HAROLD E. FORD, JR., Tennessee
GREG WALDEN, Oregon	JANICE D. SCHAKOWSKY, Illinois
DOUG OSE, California	
PAUL RYAN, Wisconsin	BERNARD SANDERS, Vermont (Independent)
HELEN CHENOWETH-HAGE, Idaho	
DAVID VITTER, Louisiana	

KEVIN BINGER, *Staff Director*

DANIEL R. MOLL, *Deputy Staff Director*

JAMES C. WILSON, *Chief Counsel*

ROBERT A. BRIGGS, *Chief Clerk*

PHIL SCHILIRO, *Minority Staff Director*

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

STEPHEN HORN, California, *Chairman*

JUDY BIGGERT, Illinois	JIM TURNER, Texas
THOMAS M. DAVIS, Virginia	PAUL E. KANJORSKI, Pennsylvania
GREG WALDEN, Oregon	MAJOR R. OWENS, New York
DOUG OSE, California	PATSY T. MINK, Hawaii
PAUL RYAN, Wisconsin	CAROLYN B. MALONEY, New York

EX OFFICIO

DAN BURTON, Indiana

HENRY A. WAXMAN, California

J. RUSSELL GEORGE, *Staff Director and Chief Counsel*

EARL PIERCE, *Professional Staff Member*

ELIZABETH SEONG, *Clerk*

TREY HENDERSON, *Minority Counsel*

CONTENTS

	Page
Hearing held on December 4, 2000	1
Statement of:	
Barram, David, Administrator, General Services Administration; Sally Katzen, Deputy Director for Management, Office of Management and Budget; Stuart Gerson, esquire, partner, Epstein Becker & Green, PC; Paul Light, director, Center for Public Service, Brookings Institution; Jonathan Turley, Shapiro professor of public interest law, George Washington University School of Law; Todd Zywicki, associate professor of law, George Mason University School of Law; Norman J. Ornstein, resident scholar, American Enterprise Institute for Policy Research; and Dwight Ink, president emeritus, Institute of Public Administration, former Assistant Director for Executive Management, Office of Management and Budget	68
Watson, Jack H., Jr., chief legal strategist, Monsanto Co., former chief of staff for President Carter, and director of President Carter's Transition Teams; John H. Sununu, president, JHS Associates, Ltd., former Governor of New Hampshire, and chief of staff for President Bush; Hon. Mark Gearan, president, Hobart and William Smith Colleges, former deputy chief of staff and communications director for President Clinton; Bradley H. Patterson, Jr., senior fellow, National Academy of Public Administration, former advisor to President Eisenhower's Presidential Transition, and staff member, Nixon and Ford administrations; and Harry McPherson, partner, Verner Liipfert Bernhard McPherson & Hand, former counsel to President Johnson	19
Letters, statements, etc., submitted for the record by:	
Barram, David, Administrator, General Services Administration, prepared statement of	71
Biggert, Hon. Judy, a Representative in Congress from the State of Illinois, prepared statement of	11
Gerson, Stuart, esquire, partner, Epstein Becker & Green, PC, prepared statement of	95
Horn, Stephen, a Representative in Congress from the State of California: Memo dated November 23, 2000	82
Prepared statement of	3
Katzen, Sally, Deputy Director for Management, Office of Management and Budget, prepared statement of	79
Light, Paul, director, Center for Public Service, Brookings Institution, prepared statement of	104
Patterson, Bradley H., Jr., senior fellow, National Academy of Public Administration, former advisor to President Eisenhower's Presidential Transition, and staff member, Nixon and Ford administrations, prepared statement of	30
Turley, Jonathan, Shapiro professor of public interest law, George Washington University School of Law, prepared statement of	115
Turner, Hon. Jim, a Representative in Congress from the State of Texas, prepared statement of	7
Waxman, Hon. Henry A., a Representative in Congress from the State of California, prepared statement of	15
Zywicki, Todd, associate professor of law, George Mason University School of Law, prepared statement of	136

TRANSITIONING TO A NEW ADMINISTRATION: CAN THE NEXT PRESIDENT BE READY?

MONDAY, DECEMBER 4, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn, Biggert, Davis, Ose, Turner, Kanjorski, and Waxman (ex officio).

Staff present: J. Russell George, staff director and chief counsel; Randy Kaplan, counsel; Bonnie Heald, director of communications; Earl Pierce, professional staff member; Elizabeth Seong and James DeChene, clerks; Rachael Reddick, intern; Phil Barnett, minority chief counsel; Kristin Amerling, minority deputy chief counsel; Trey Henderson, minority counsel; and Jean Gosa, minority clerk.

Mr. HORN. A quorum being present, the hearing of the Subcommittee on Government Management, Information, and Technology will come to order.

These are extraordinary times in American history. That there is a need for this hearing is equally extraordinary, and disturbing. On October 12 of this year, the President signed into law the Presidential Transition Act of 2000, which I happened to have introduced in the House. Regardless of which candidate would be the next President, the 106th Congress wanted to give him greater assistance in assuming the highest office in the land. No one, however, anticipated the closeness of this race for the Presidency or the unsettling events that have followed.

The Presidential Transition Act as amended authorizes funding for the General Services Administration to provide suitable office space, staff compensation and other costs associated with the transition process. The act also calls for the Administrator of the General Services Administration to ascertain the, quote, apparent successful candidates for the office of President and Vice President. The Administrator, of course, does not determine the winners. That responsibility, as set in the Constitution, clearly belongs to the electoral college and, failing that, Congress.

Obviously, the Presidential transition period must begin well before Congress meets to tally the electoral college votes in January. The brief transition period from the day after election to the day of Inauguration is the time in which an incoming President makes

crucial administrative decisions. That time is running out for the next administration.

Indeed, the 88th Congress clearly recognized the importance of the transition period by stating in the 1963 law that “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.” Yet today, nearly 4 weeks after the Presidential election, the Administrator says he is still unable to ascertain a winner, and thus is not providing the appropriate assistance required by the Presidential Transition Act.

We’ve called this hearing to examine whether the Presidential Transition Act provides sufficient guidance to the Administrator on how to proceed when an election such as this is disputed. Clearly the law allows the Administrator certain discretion in complying with its provisions. It is imperative, however, that those charged with implementing this law most carefully consider the implications of their decisions and the precedents they establish. Our ultimate concern is to ensure the strength and continuity of the U.S. Government, most especially in extraordinary times such as these.

We have assembled a distinguished panel of witnesses today. I welcome all of you and look forward to your testimony. We will now have opening statements limited to 5 minutes at the most, and I start with the ranking member, the gentleman from Texas, Mr. Turner, 5 minutes for an opening statement.

[The prepared statement of Hon. Stephen Horn follows:]

DEN BURTON, INDIANA
CHAIRMAN
BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MARIELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
LEAHY W. EVERTS, FLORIDA
JOHN M. BOHNER, INDIANA
STEPHEN HORN, CALIFORNIA
JOHN L. MICA, FLORIDA
TOM DAVIS, VIRGINIA
JIM BENTON, INDIANA
MURKIN E. BOUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVENS C. LANTORNETTE, OHIO
MARSHALL W. WATKINS, SOUTH CAROLINA
ROD BARR, GEORGIA
TAMMY FRISKIE, FLORIDA
ASA HUTCHINSON, ARKANSAS
LEE TERRY, MISSISSIPPI
JUDY ROBERTS, ILLINOIS
GREG WALDEN, OREGON
DOLU GIBB, CALIFORNIA
PAUL IRWIN WISCONSIN
JOHN T. DOOLITTLE, CALIFORNIA
HELEN CHENOWETH, IDAHO

ONE HUNDRED SIXTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5274
MINORITY (202) 225-6051
TTY (202) 225-6692

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER
TOM LANTOS, CALIFORNIA
ROBERT E. WISE, JR., WEST VIRGINIA
MAJORIE OWENS, NEW YORK
SCOTT L. TROWER, NEW YORK
PAUL E. HANCOCK, PENNSYLVANIA
GARY A. CONDT, CALIFORNIA
PATSY T. MINK, HAWAII
CAROLYN MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
CHAKA FATTAH, PENNSYLVANIA
ELLMARIE DIMARCO, MARYLAND
DENNIS ROUSCH, OHIO
ROD R. BLAGOVICH, ILLINOIS
DANIEL K. DANIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALPHE, MAINE
HAROLD C. FORD, JR., TENNESSEE
BERNARD SANDERS, VERMONT,
INDEPENDENT

Opening Statement
Chairman Stephen Horn,
Subcommittee on Government Management,
Information, and Technology
December 4, 2000

A quorum being present, this hearing of the Subcommittee on Government Management, Information, and Technology will come to order.

These are extraordinary times in American history. That there is a need for this hearing is equally extraordinary -- and disturbing. On October 12th of this year, the president signed into law the Presidential Transition Act of 2000, which I introduced in the House. Regardless of which candidate would be the next president, the 106th Congress wanted to give him greater assistance in assuming the highest office in the land. No one, however, anticipated the closeness of this race for the White House, or the unsettling events that have followed.

The Presidential Transition Act, as amended, authorizes funding for the General Services Administration to provide suitable office space, staff compensation, and other costs associated with the transition process. The Act also calls for the administrator of the General Services Administration to ascertain the "apparent successful candidates for the office of president and vice president." The administrator, of course, does not determine the winners. That responsibility, as set in the Constitution, clearly belongs to the Electoral College and Congress.

Obviously, the presidential transition period must begin well before Congress meets to tally the Electoral College votes in January.

The brief transition period -- from the day after election to the day of inauguration -- is the time in which an incoming president makes crucial administrative decisions. That time is running out for the next administration.

Indeed, the 88th Congress clearly recognized the importance of the transition period by stating in the 1963 law that "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." Yet today -- nearly four weeks after the presidential election -- the administrator says he is still unable to ascertain a winner and, thus, is not providing the appropriate assistance required by the Presidential Transition Act.

I have called this hearing to examine whether the Presidential Transition Act provides sufficient guidance to the administrator on how to proceed when an election -- such as this -- is disputed. Clearly, the law allows the administrator certain discretion in complying with its provisions. It is imperative, however, that those charged with implementing this law most carefully consider the implications of their decisions -- and the precedents they establish. Our ultimate concern is to ensure the strength and continuity of the United States Government, most especially in extraordinary times such as these.

We have assembled a distinguished panel of witnesses today. I welcome all of you, and look forward to your testimony.

Mr. TURNER. Thank you, Mr. Chairman.

I think it is clear to all of us that the orderly transition from one Presidential administration to another is a matter of utmost importance to the country. In order to facilitate this transition, Congress passed the Presidential Transition Act of 1963, which provides funding and guidance in order to promote the orderly transfer of power from one administration to the next.

Prior to 1963, there was no formal provision to assist in the transition period. Under the act, the General Services Administration shall provide fully equipped headquarters and a variety of services for the President-elect's transition and Inaugural teams.

The act calls for the Administrator of the GSA to release Federal funds for transition once he or she has, in the words of the act, ascertained the apparent successful candidate. We know that the unique ongoing circumstances of the Presidential election of 2000 are unprecedented for purposes of the act. Additionally, there is no precedent, nor does the statute provide guidance for the Administrator in ascertaining the apparent successful candidate. The legislative history derived from the discussion of the original act on the floor of the House in 1963 provides perhaps our best evidence of the intent of the Congress.

Mr. Fascell of Florida, the then manager of the bill, in response to questions regarding how the Administrator of GSA would ascertain the apparent successful candidate in a situation where the election outcome is in question, stated, ". . . if the Administrator had any question in 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."

We know that the outcome of this election remains in doubt due to the fact that both campaigns have brought forth legal cases that are pending in both State and Federal courts. I fully appreciate the need for our next President-elect to begin a comprehensive transition to ensure that government operations continue running smoothly, yet we should not allow haste to distort our view or our implementation of the Presidential Transition Act. If the Administrator of the GSA were to incorrectly release funds to one campaign under the act, aside from breaking the law, it could result in a loss of public funds, waste, duplication, diminished credibility for the winner and a breach of proprietary information.

I am pleased to learn that the Administrator of GSA has in the interim, during this period of uncertainty, attempted to work with both campaigns to shorten the turnover time once a winner has been finally determined, and I commend the Administrator for their efforts in these difficult circumstances.

I think our hearing today provides us with a unique opportunity to review the law governing Presidential transitions. If there is one lesson that we can learn from the 100 million votes cast almost 4 weeks ago, it is that our two parties have a mandate to work together. I sincerely hope that today's hearing can be an opportunity for us to set an example of bipartisan cooperation that will be most certainly needed in the next Congress as a result of the closeness

of this Presidential contest. Our ability to govern in the interest of the American people will depend upon our success in this endeavor.

Thank you, Mr. Chairman, and I look forward to hearing from all of the distinguished witnesses that we have here today.

Mr. HORN. Well I thank the gentleman. He is a good example of the bipartisan cooperation that we've had on this committee for the last 6 years.

[The prepared statement of Hon. Jim Turner follows:]



CONGRESSMAN

JIM TURNER

208 Cannon Office Building
Washington, D.C. 20515

2nd District, Texas
<http://www.house.gov/turner>

FOR IMMEDIATE RELEASE
December 4, 2000

Contact: Colin Van Ostern
(202) 226-8569

STATEMENT OF THE HONORABLE JIM TURNER

**Government Management, Information & Technology Subcommittee Hearing:
*Transitioning to a New Administration: Can the Next President be Ready?***

“Thank you, Mr. Chairman. The orderly transition from one Presidential Administration to another is a matter of utmost importance the country. In order to facilitate this important event, Congress passed the Presidential Transition Act of 1963 (“the Act”), which provides funding and guidance in order to promote the orderly transfer of power from one Presidential administration to the next. Prior to 1963, there was no formal provision for such transfer of power. Under the Act, the General Services Administration (GSA) shall provide fully equipped headquarters and a variety of services for the President-elect’s transition and inaugural teams. The Act calls for the Administrator of the GSA to release the federal funds for transition once he or she has “ascertained” the apparently successful candidates. We know that the unique ongoing circumstances of the presidential election of 2000 are unprecedented for the purposes of this Act. Additionally, there is no precedent, and the statute provides little guidance for the Administrator to ascertain the apparent successful candidates.

The legislative history derived from the discussion of the original act on the floor of the House in 1963 provides our best evidence of the intent of Congress. Mr. Fascell of Florida, the manager of the bill, in response to questions regarding how the Administrator of GSA would ascertain the apparent successful candidates in a situation where the election outcome is in question, stated:

“...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.”

We know that the outcome of this election remains clouded, due to the fact that both campaigns have brought forward legal cases that are currently pending on both state and federal levels. I fully appreciate the need for the next President-elect to begin a comprehensive transition to ensure that government operations continue running smoothly. Yet we should not allow haste to distort our view or

implementation of the Presidential Transition Act. If the Administrator were to incorrectly release funds to one campaign under the Act, aside from breaking the law, it could result in a loss of public funds, waste, duplication, diminished credibility for the winner, and a breach of proprietary information.

I am pleased to learn that while we await the final determination of the outcome of the presidential election, the GSA continues to work with both campaigns to shorten the turnover time once a winner is determined and I commend them for their diligence.

Our hearing today will be a unique opportunity to review the law governing presidential transitions. If there is one lesson that we can learn from the 100 million votes cast almost four weeks ago, it is that our two parties have a mandate to work with each other. I sincerely hope that today's hearing can be an opportunity for us to set an example of bipartisanship for the next Congress. Our ability to govern in the interest of the American people will depend upon our success in this effort.

I welcome the witnesses here this morning and look forward to their testimony.”

###

Mr. HORN. I now yield to the vice chairman of the subcommittee Mrs. Biggert, the distinguished lady from Illinois.

Mrs. BIGGERT. Good morning, Mr. Chairman and members of the subcommittee. I want to thank you, Mr. Chairman, for calling this oversight hearing on the Presidential Transition Act of 1963. Given the unique and unprecedented situation in which our country finds itself today during this Presidential election year, this hearing is not only timely, but it is warranted and necessary.

Almost a month has passed since men and women across this great Nation and overseas cast their ballots for the candidate they hoped the next day would be President-elect. Well, here we are today, and still the keys to the transition offices and the funding that goes along with them have not been turned over to the successful candidate. It is not because there has been no successful candidate. It is because that candidate's success is being disputed, contested and litigated by the unsuccessful candidate. So as the litigation marches on in these few days remaining before the electors are seated and the final deposition made, I think the question we must ask is how can we help.

Not more than 2 months ago, we on the subcommittee hailed passage of the Presidential Transition Act of 2000. We asserted that our bill would make it easier for the next administration to assume office, but what happened? We did pass a good bill, but good bills, like good intentions, aren't always enough. What this subcommittee did not foresee was that this year's tight election could make this moot, at least as they applied to this election cycle. What we also did not take into account is how easily politics and political considerations can overtake common sense and the common good.

It is no secret that the success or failure of a new administration, at least for the first year of governing, often depends on how well the transition process is carried out. As some of our witnesses today have seen firsthand, it takes time, and in some instances a lot of time, to put the thousands of people, policies and procedures into place for successful governance.

Four weeks have come and gone, and January 20, 2001, is less than 8 weeks away. One-third of the precious time allocated for the transition has expired, and yet no individual has been afforded the assistance provided for by the Presidential Transition Act. This assistance is needed, as the 1963 act stated, to promote the orderly transfer of executive power.

Is this the fault of General Services Administration, the agency responsible for helping new administrations get up to speed? Is the GSA playing favorites or showing partisanship by not allowing the Bush-Cheney team to access the office space and systems that have been set up for transition purposes?

The GSA will state that it was unable to release the funding because the election is too close. Well, just because the election is close does not mean that GSA should abdicate its responsibility. The law gives GSA the authority to grant funds to the apparent winner. The law does not prevent the GSA from using a little common sense and making funds available to the likely winner. But because GSA has refused to grant funds to the apparent winner,

the Bush-Cheney team is compelled to raise funds for its own transition efforts.

Ironically Governor Bush now finds himself in the same position as did all other Presidents-elect prior to the passage of the 1963 act. He must finance his own transition in order to be prepared to take office on January 20. I commend him and Secretary Cheney for taking this action, for, after all, they are the ones ultimately responsible for putting a good team and good policies in by January 20.

So what does this situation call for? At least for this subcommittee it calls for us to write and pass legislation to remedy the alleged defects in the Presidential Transition Act by making crystal clear what steps the GSA must take if we again find ourselves in a situation similar to this. That would only be good for the country.

Again, Mr. Chairman, I commend you for calling this hearing. I look forward to the hearing from our witnesses and thank them for joining us today. Thank you.

Mr. HORN. I thank the gentlewoman. Thank you very much.

[The prepared statement of Hon. Judy Biggert follows:]



News From

JUDY BIGGERT

CONGRESSWOMAN ♦ 13TH DISTRICT ♦ ILLINOIS

FOR IMMEDIATE RELEASE
Monday, December 4, 2000

CONTACT: CHRIS CLOSE
(202) 225-3515

Opening Statement of Representative Judy Biggert (R-IL)
Government Reform Subcommittee on
Government Management, Information & Technology
Hearing on "Transitioning to a New Administration:
Can the Next President be Ready?"
December 4, 2000

Good Morning, Mr. Chairman and Members of the Subcommittee.

I want to thank you, Mr. Chairman, for calling this oversight hearing on the Presidential Transition Act of 1963. Given the unique and unprecedented situation in which our country finds itself during this presidential election year, this hearing is not only timely, it is warranted and necessary.

Almost a month has passed since men and women across this great nation and overseas cast their ballots for the candidate they hoped the next day would be President-elect. Well, here we are today, and still the keys to the transition offices and the funding that goes along with them have not been turned over to the successful candidate.

It is not because there has been no successful candidate; it is because that candidate's success is being disputed, contested, and litigated by the unsuccessful candidate.

So, as the litigation marches on in these few days remaining before the electors are seated and the final disposition is made, the question we must ask is, how can we help?

Not more than two months ago, we on this Subcommittee hailed passage of the Presidential Transition Act of 2000. We asserted that our bill would make it easier for the next Administration to assume office. But what happened? We did pass a good bill. But good bills, like good intentions, aren't always enough.

What this Subcommittee did not foresee was that this year's tight election could make our efforts moot – at least as they apply to this election cycle. And, what we also did not take into account is how easily politics and political considerations can overtake common sense and the common good.

(MORE)

508 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-1313
(202) 225-3515

115 W. 55TH STREET, SUITE 100
CLARENDON HILLS, IL 60514
(630) 655-2052

WWW.HOUSE.GOV/BIGGERT

It is no secret that the success or failure of a new Administration -- at least for the first year of governing -- often depends on how well the transition process is carried out. As some of our witnesses today have seen first-hand, it takes time -- in some instances, a lot of time -- to put the thousands of people, policies and procedures into place for successful governance.

Four weeks have come and gone since Election Day. January 20, 2001 is less than eight weeks away. One-third of the precious time allotted for transition has expired, and yet no individual has been afforded the assistance provided for by the Presidential Transition Act. This assistance is needed, as the 1963 Act stated, to "promote the orderly transfer of executive power."

Is this the fault of the General Services Administration (GSA), the agency responsible for helping new Administrations get up to speed? Is the GSA playing favorites or showing partisanship by not allowing the Bush-Cheney team to access the office space and systems that have been set aside for transition purposes?

The GSA will state that it was unable to release the funding because the election is too close.

Well, just because the election is close does not mean that the GSA should abdicate its responsibility. The law gives GSA the authority to grant funds to the "apparent" winner. The law does not prevent the GSA from using a little common sense and making funds available to the likely winner.

But because the GSA has refused to grant funds to the apparent winner, Governor Bush, the Bush-Cheney team is compelled to raise funds for its own transition efforts. Ironically, Governor Bush finds himself in the same position as did all other Presidents-elect prior to the passage of the Presidential Transition Act of 1963. He must finance his own transition in order to be prepared to take office on January 20th. I commend him and Secretary Cheney for taking this action, for after all, they are the ones ultimately responsible for putting a good team and good policies together by January 20.

So what does this situation call for? Well, at least for this Subcommittee, it calls for us to write and pass legislation to remedy the alleged defects in the Presidential Transition Act, by making crystal clear what steps the GSA must take if we again find ourselves in a situation similar to this. That would only be for the good of the country.

Again, Mr. Chairman, I commend you for calling this hearing. I look forward to hearing from our witnesses and thank them for joining us today. Thank you.

###

Mr. HORN. And now we're privileged to have the ranking member of the full committee, the gentleman from California, Mr. Waxman, 5 minutes.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

We are certainly facing an interesting situation that I don't think anybody quite envisioned, and that is that we really after all this time, I think it's 27 days since the Presidential election, we're not clear who the next President of the United States will be. And evidently GSA is not certain about that result either, so they haven't released the funds for the transition period.

Now, the main legal issue under examination in this hearing is the intent of the Presidential Transition Act and its appropriate application in the unusual circumstances we're facing. Now, the act requires release of funds to support the transition efforts of the apparent successful candidate as ascertained by the General Services Administrator. And the application of the act during close elections was discussed when this bill was on the floor. My colleague Mr. Turner quoted from then Congressman Dante Fascell, who was one of the authors of this bill, and he said, if they don't know who the winner is, then the Administrator shouldn't make any designation.

Well, I don't know whether we ought to say in the future the Administrator ought to make some determination tentatively and release funds. That raises a lot of different questions, and I think we ought to examine some of those questions. For example, should the Presidential Transition Act consider the implications of having the executive branch announce a judgment regarding the election outcome while the judicial branch is still in the process of considering significant questions relating to the outcome? I would think we would want to strive to minimize, not exacerbate, conflicts between the executive and the legislative branches of government. In addition, we should take a thorough look at the practical consequences both of delaying the funding of transition efforts and the funding of transition efforts that may have to stop if the other candidate is ultimately declared the winner.

Would the delay of several weeks in GSA funding have a critical impact on the effective operations of a new administration? That's an important question. Would it be cost-efficient to expend significant taxpayers' dollars on getting a transition office up and running and conducting training and orientation for one candidate if the other candidate is later determined to be the winner and then requires the same transition resources? Would it be appropriate to move forward with briefings of transition officials that involve proprietary information or otherwise sensitive government information when we're not certain that these individuals will end up governing? So maybe we want to look at alternative steps.

The point is we're in a very unusual situation right now. We don't know at this point who the next President will be. Now, my colleague from Illinois presented her opening statements as if we know; we know it's already Bush/Cheney, and therefore they ought to have the funds released to the Bush/Cheney transition. Well, maybe if you keep saying that, it will turn out to be true, but the decision as to who the President of the United States is going to be is not based on how many times you say it's resolved when we still have many courts trying to sort through these issues.

I know there clearly is a strategy on the Republican side to keep on with the mantra, well, we've won, therefore let's don't count the votes; we won, therefore let's don't go into the courts; we've won, give us the transition money. That seems to me maybe good public relations to try to change public attitudes about the idea that we ought to ultimately decide who really won, but I don't think it makes good policy sense when we're trying to adopt changes to legislation or evaluate the laws that are on the books. The law says that there has to be an apparent winner, and we leave that up to the GSA.

All of us want this resolved as quickly as possible. We know it is important to have the transition funding. But let's make sure we deal with the real substantive issues as to how the law should work in unusual circumstances such as this and not use a hearing or this strange situation we're in simply to repeat the mantra that we won, so don't talk about anything else, give us the funds. That's not really the way to make decisions for these very important issues that are going to be before us in the future, and I doubt that we will ever have a Presidential election as we have today, leaving things as uncertain as they are. If we do, then we ought to think through the best way to deal with it, and if the law needs to be changed, we should change it.

Thank you very much, Mr. Chairman.

Mr. HORN. Thank you.

[The prepared statement of Hon. Henry A. Waxman follows:]

STATEMENT OF REP. HENRY A. WAXMAN
GMIT Hearing: "Transitioning to a New Administration:
Can the Next President Be Ready?"
December 4, 2000

This year, the nation has experienced a remarkable presidential election. Today, 27 days after the election, the outcome is still undetermined, and a myriad of legal questions relating to the election remain unresolved.

These circumstances pose interesting and challenging questions regarding the process of ensuring an effective transition to the new Administration. I am pleased that we have an opportunity today to closely examine the legal and practical issues associated with transition with numerous distinguished witnesses.

The main legal issue under examination in this hearing is the intent of the Presidential Transition Act and its appropriate application in the unusual circumstances we are facing. The Act requires release of funds to support the transition effort to the "apparent successful candidates . . . as ascertained by the [General Services Administration] Administrator."

The application of the Act during close elections was discussed during floor debate on the Act in 1963. The Act's author, Rep. Dante Fascell, stated, "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 If . . . he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress."

We should carefully review this legislative intent as we consider the appropriate application of the law under the current circumstances.

As we consider the intent of the Presidential Transition Act, we also should consider the implications of having the executive branch announce a judgment regarding the election outcome while the judicial branch is still in the process of considering significant questions relating to the outcome. We should strive to minimize – not exacerbate – any conflicts between the branches of government.

In addition, we should take a thorough look at the practical consequences both of delaying the funding of transition efforts, and of funding a transition effort that may have to stop if the other candidate is ultimately declared the winner.

Would a delay of several weeks in GSA funding have a critical impact on the effective operation of the new Administration? Would it be cost-efficient to expend significant taxpayer dollars on getting a transition office up and running and conducting training and orientation for one candidate, if the other candidate is later determined the winner and requires the same transition resources? Would it be appropriate to move forward with briefings of transition officials that involve proprietary or otherwise sensitive government information when we are not certain that these individuals will end up governing? Are there alternative steps we can take to help ensure that key aspects of the transition process move forward?

The current presidential transition involves these and many other complex questions. We should explore these issues not only with respect to the immediate

circumstances, but with the goal of ensuring that the overall process is as effective as possible in future transitions.

I look forward to hearing from the witnesses on these important matters.

Mr. HORN. I now yield to the gentleman from California Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman. I am reminded yesterday morning when my daughters opted to argue with each other that at the end of the day what we need is a President who both he and his team has had a proper amount of briefing and training and education. And I am chuckling here somewhat because I ended up dealing with my daughters by asking them, well, today what are you? And they both scratched their head, and they finally came up with, well, we're sisters. And I said, well, on Friday what are you going to be? And they both scratched their heads, and they both simultaneously said, well, we're still going to be sisters.

Well, at the end of this entire process, we're all still going to be Americans, and it would seem to me that the country is best served, as Mr. Waxman and as Mr. Horn suggested, by moving this thing forward as expeditiously as possible. I don't understand why under such unique circumstances we can't take members of both campaign teams and start the transition process. I mean, it's not like we're going to spend all \$5.3 million the first day.

So I am looking for answers as to how we prepare whoever is going to lead this country for the 4 years that they'll be in office for. At the end of the day, it's like my daughters. At the end of the week, they're still sisters. They'll be sisters forever. At the end of the day, we're all still Americans. We still have to make this work. So how do we do that? That's why I came today, Mr. Chairman, and I appreciate the opportunity.

Mr. HORN. I thank the gentleman.

Now I yield 5 minutes to the gentleman from Pennsylvania Mr. Kanjorski.

Mr. KANJORSKI. Thank you very much, Mr. Chairman.

I tend to agree with Mr. Waxman that we should shy away from attempting to indicate our preferences for who may win this very close election with the hope that it will have some influence on the final result. I am just wondering whether or not we are not spending a lot of time worrying about how often a half dollar flipped will land on its edge, and we can go through an awful lot of preparation here. It seems to me if we have time to go through preparation here, we have time to go through real reform of government rather than trying to see what we can do after the fact of a close election and transition. I am sure if I have any insight as to how the Congress functions, nothing we do at this committee, nothing we formulate now will ever get done in time to affect the incoming administration, and that, in fact, maybe everything that we're doing here has to do with affecting the final result. I hope that's not the case, but I have a feeling that is what it is.

I just urge my colleagues to do what a lot of wise people in the last several weeks have recommended: Let's step back, take a breath and let the system go on, resolve this problem and not try to cause a hysteria either in the country or in the Congress or certainly for the next administration.

One thing I have to say about both candidates is they have staff and advisors around them that are eminently qualified to start the transition process. The fact that they may not have rented facilities or some rented computers will not in any way slow down the processes of the formulation of their government. It will not impact

negatively on their service as the President of the United States. If anything it will impact, it's more our hysteria and our failure to respond properly, act as a Congress and in a bipartisan way.

Thank you, Mr. Chairman.

Mr. HORN. I thank the gentleman.

I see no other Members for an opening statement. I now will call forward panel one of the witnesses. We have 13 witnesses before us this morning. The first is the Honorable John H. Sununu, Jack Watson, Mark Gearan, Bradley Patterson and Harry McPherson.

There are cards here, gentleman, and we'll swear you all in at once. Mr. Watson, Mr. Gearan, Mr. Patterson.

[Witnesses sworn.]

Mr. HORN. Please be seated.

Mr. Sununu will be here shortly. Let me just say how we operate. Some of you have prepared statements, and a number of you don't have prepared statements because of the last minute that we asked you, and we are very grateful to you. This bit of individual talent, some of whom I have known over the years, starting way back in the Eisenhower administration of which I was a part, and probably to somebody listening, they're saying, gee, did he say the Lincoln administration? But we have a lot of talent here, and we're delighted to tap your brains.

So we are going to start with Mr. Watson, the chief legal strategist for Monsanto Co., former chief of staff for President Carter, and director of President Carter's transition teams. Thanks for coming.

STATEMENT OF JACK H. WATSON, JR., CHIEF LEGAL STRATEGIST, MONSANTO CO., FORMER CHIEF OF STAFF FOR PRESIDENT CARTER, AND DIRECTOR OF PRESIDENT CARTER'S TRANSITION TEAMS; JOHN H. SUNUNU, PRESIDENT, JHS ASSOCIATES, LTD., FORMER GOVERNOR OF NEW HAMPSHIRE, AND CHIEF OF STAFF FOR PRESIDENT BUSH; HON. MARK GEARAN, PRESIDENT, HOBART AND WILLIAM SMITH COLLEGES, FORMER DEPUTY CHIEF OF STAFF AND COMMUNICATIONS DIRECTOR FOR PRESIDENT CLINTON; BRADLEY H. PATTERSON, JR., SENIOR FELLOW, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, FORMER ADVISOR TO PRESIDENT EISENHOWER'S PRESIDENTIAL TRANSITION, AND STAFF MEMBER, NIXON AND FORD ADMINISTRATIONS; AND HARRY McPHERSON, PARTNER, VERNER LIIPFERT BERNHARD McPHERSON & HAND, FORMER COUNSEL TO PRESIDENT JOHNSON

Mr. WATSON. Thank you Mr. Chairman, distinguished members of the subcommittee and the committee, for the opportunity to be here today and to comment briefly on the subject of Presidential transitions, and specifically on the circumstances and challenges that are presented by the current transition.

There is no question in anyone's mind about the importance of the transition in getting a new administration off to a strong and effective beginning. Under the best of circumstances, it is a formidable challenge for the incoming President and Vice President to do in approximately only 10 weeks all those things they need to do in order to assume office on January 20 with a "running start." The

whole purpose and intent of the Presidential Transition Act of 1963, as amended in 1976 and 1988, and of the Presidential Transition Act of 2000, are to assist the incoming and outgoing Presidents and Vice Presidents in achieving as smooth and seamless transition of power as possible from one administration to another.

Although the circumstances of the current Presidential election have unquestionably created an extremely trying and difficult situation for Governor Bush and Secretary Cheney on the one hand, and Vice President Gore and Senator Lieberman on the other, there is, in my opinion, no constitutional, Presidential, governmental or other crisis here. There is quite simply an incredibly close Presidential election, the outcome of which needs to be, and, I submit, will be, resolved as fairly and expeditiously as possible in the coming days.

Both Presidential candidates have turned to the courts for help in addressing the current situation, as both have a perfect legal right to do, and the State and Federal courts are, as we sit here this morning, addressing those requests and reviewing the parties' respective positions. The courts fully understand the importance of the issues presented, as well as the incredibly high stakes involved, and, I am personally confident, are trying to do everything within their constitutional responsibility and authority to resolve the issues in a legal, just, and expeditious way.

The courts have an important role to play here, and they are playing it. Once they decide the issues to be decided, the outcome of the election will be determined, once and for all, and the duly elected President-elect and Vice President-elect and, thankfully, the country itself will go on about the Nation's business.

As unusual and exasperating as the current situation is, we should take care not to overreact to it. The sky is not falling, and we shouldn't act as though it is. We should be calm, have confidence in our judicial system's ability to deal with the current situation—if not in our rather outmoded and outdated voting machines—and let the system run its proper course as the Constitution intends it to do.

Having said that, Mr. Chairman, there is something very important and very significant that we can do to address another serious problem related, not only to the Presidential transitions, but to the proper functioning of the Presidency itself. The problem is that we have a nomination and confirmation process that is broken and needs fixing. The appointments process in the Federal Government takes far too long, and the lags in getting people into office are taking a terrible toll on good governance. The gathering of seemingly endless, questionably relevant, but legally required background information and the filling out of redundant forms takes too long; the FBI field investigations take too long and, in many cases, are of questionable value to begin with; and the Senate confirmation process itself also takes too long. This is a problem, as all of you well understand, that will not easily be solved and which can only be addressed, much less fixed, by a genuinely determined and broad-based bipartisan effort.

Groups as varied as the 1989 National Commission on Public Service, chaired by former Federal Reserve Chairman Paul Volker, the 1996 20th Century Fund Task Force on Senate Reforms, and

the Transition to Governing Project of the American Enterprise Institute and the Brookings Institution have all recommended much needed reforms in this area that deserve careful review and considered action by the Congress and the executive branch. I respectfully submit, the sooner, the better.

For the sake of the country, we need to put partisanship aside and institute reforms regarding the Presidential appointment process that will permit our Presidents, irrespective of their party affiliation, to form their administrations and exercise their leadership without undue delays and unreasonable impediments.

Although time does not permit a fuller discussion of this crucially important matter, I strongly commend to the committee's attention an excellent article on the subject which appeared in the November/December 2000 issue of *Foreign Affairs Magazine*. The article was written by Norman Ornstein, one of the witnesses you will hear from, I believe, this morning, and Tom Donilon. The article not only concisely discusses the nature and extent of the problem, but outlines several specific recommendations for change.

Thank you, Mr. Chairman. I will be happy to take questions at the appropriate time if the subcommittee wishes.

Mr. HORN. Well, I thank the gentleman.

And I see that Mr. Sununu has arrived. If you will stand and take the oath, we will swear you in.

[Witness sworn.]

Mr. HORN. The clerk will note that all witnesses have now taken the oath, and we were going to start with Mr. Sununu, so here he is.

Mr. SUNUNU. I apologize, Mr. Chairman. I hope that you had been informed that I was going to be arriving at that hour.

Mr. HORN. We were.

Mr. SUNUNU. And I thank you for your indulgence.

I will try to be very brief, but I want to emphasize a couple of points. With all due respect to what I did hear of Jack Watson's testimony, the issue is not whether it is a crisis or not a crisis. The issue is whether it is good not to facilitate transition or not good not to facilitate transition, or more specifically whether it is right or wrong to not take advantage of tools that have been put into place very wisely by legislative bodies, the Congress, and the executive branch in the past having gone through the pain and difficulty of the reality of a transition process.

Most of the needs are relatively mundane. There are needs for space, there are needs for phone, there are needs for communication, there are needs for travel, there are needs for staff. But they come in a concentrated time—in a concentrated way at a time when there is a premium on that commodity of time.

It is so important to permit a new administration to get started correctly, and I suggest that whatever we do under the breadth and capacity of existing law, we find a way to fund that process as soon as possible. It is not just a matter of a 1-month delay. There is no time that will be as precious for transition to any new administration as these days and weeks. It is, in fact, the only time where they can focus on presentation rather than focus on fulfilling responsibilities of office. A 1-month delay now will be reflected in a 6-month to 1-year delay in getting things really started.

I'm doing this by memory because I did not have time to research the exact number, but my recollection is there were 40,000 to 60,000 resumes that arrived at the transition office within the first 2 weeks of opening the Bush transition office following President Reagan's service, and that was in a transition of like party where, sadly to say, most of the people who are already in office as Republicans, had been appointed as Republicans, thought they were going to be reappointed. And I would suggest to you that the hardest transition is a like-party transition, not a different-party transition, because the hardest thing to do is to do the preparation to get people out, not to get people in. They are both challenging, they are both demanding, and they are both a very important part of the time that is in front of us.

Having said that, I want to emphasize that the impact of delay is not linear. A 1-day delay is probably equivalent—now is equivalent to 6 to 10 days of delay after Inauguration.

I am not a part of the current transition. I do not expect ever to be asked to be a part of the current transition. I have not offered my services—I have received about two dozen resumes, unsolicited, of people who want me to somehow impact the appointment process.

I will reiterate what Jack Watson has said about reform of the process of appointment and confirmation. It is one of the most critical things we can do to make government work better, and it is part of this transition process. One of the most disappointing things to me as one who had a responsibility during the transition and as one who had a responsibility serving as Chief of Staff to President Bush in trying to continue the efforts of the transition in the early days and then fill in voids as they occurred is the reluctance, in fact, sometimes clear unwillingness, of individuals to go through the pain of the vetting process, not because they have anything to hide, not because they're uncomfortable with revealing data, but because of the cumbersome nature of the process and, frankly, in some cases the unbelievable cost.

It is not unusual for a major potential appointee to spend between \$10,000–\$60,000 on legal and accounting fees in preparing the forms to be named to a senior position in the Federal Government. That is ridiculous. It makes that position in some cases unable to be attained by people who are not of significant means. The process of the forms, the process of the field investigation, and, frankly, the long delay between appointment and confirmation is a discouraging factor to the best and the brightest and those that we should have in government. And so if there is any dividend that you might achieve out of this set of hearings which are focusing on the needs of transition, may I suggest, Mr. Chairman, that it would be extremely worthwhile to the country if you could somehow make a very pointed comment and recommendation in that direction.

Having said that, I would recommend that whatever you do, you find a way to encourage the allocation of some of the existing funds, even if it has to be done initially in a somewhat divided way, to get the two candidates who are still in somewhat doubt as to which one has been selected, to get the two of them started in an effective way. To force them to rely on private funds is exactly the wrong thing to do, and the history of the legislation that wisely

provided the structure and funding will tell you very clearly how much people understood the value of the legislation that was eventually passed.

Mr. Chairman, I thank you for the opportunity to participate this morning.

Mr. HORN. Both you and Mr. Watson have had a good opening for us, and I agree with the practicality that both of you faced, and you all made some good points. I think we can work out a situation, but we'll save that for the question period. And we would like, obviously, all of your views as how do you split it up in the short time we have before the administration has to take office one way or the other.

So we will now go to Mr. Mark Gearan, now president of Hobart and William Smith Colleges in Geneva, NY, one of the youngest presidents. He was former Deputy Chief of Staff and Communications Director for President Clinton in working on various transitions, but he was also the director of the Peace Corps, which is dear to all of us.

Mr. Gearan.

Mr. GEARAN. Thank you, Mr. Chairman. Thank you for that nice introduction. You observe that at the time of my appointment as president of Hobart and William Smith I was at a young age, but I believe your tenure as a distinguished college president named at the age of 38 far exceeds my youthful appointment.

So I thank you for this invitation. I am glad to be in your company as well as the other members of the committee, and I appreciate the opportunity to be here.

I come before you today to answer the question that you have posed to this panel: Can the next President be ready? I come to you as having gone through a Senate confirmation process myself as the Director of the Peace Corps and as a member of President's staff having gone through the requisite clearance and vetting procedure. So in that context I offer my testimony, in addition to my service here on Capitol Hill as an aide, and I appreciate this opportunity.

You have asked us the question: Transition to a new administration, can the next President be ready? My answer without hesitation is yes. The next President can indeed be ready to take over the office on January 20, 2001. While we are witnessing an extraordinary transition to be sure, I have full confidence that the next President will be able to start his administration with the necessary complement of White House staff and members of his Cabinet in the beginnings of the more complete administration as they take power.

In fairness, I think it should be observed that the answer to your question has different dimensions for Vice President Gore and Senator Lieberman than it does for Governor Bush and Secretary Cheney. To state the obvious, the Vice President has the opportunity to continue to rely on members of the Clinton administration political appointees as holdovers, while Governor Bush would undoubtedly wish to bring in his own team. Nevertheless, it is the case, that both transitions are currently under way as we speak and are being coordinated by exceedingly able individuals that I know very well. Roy Neel for Vice President Gore and Secretary Andy Card

for Governor Bush are knowledgeable about the intricacies of a transition and are well-positioned to deal with this unprecedented set of facts. Indeed, Secretary Card was my liaison as the Deputy Director of the Clinton transition, while Secretary Card represented the Bush administration.

But when one considers your question, “can the next President be ready?” I answer the following reasons for my very affirmative response: First, when you work backward from Inauguration day, what must the President-elect, the newly sworn-in President, indeed have? Certainly a White House staff that must be named and cleared, and while those appointments obviously do not carry Senate confirmation, those clearances are important; and second, the Cabinet officers as well in place early in the administration. Given that most Cabinet appointees come generally from Federal or State elected or appointed office, the procedures, the necessary background information is frequently known about these appointees.

I was pleased to read a recent report in which the FBI has stated they have already taken steps to increase the number of investigators to clear top appointees in a week to 10 days compared with the usual 3-week period. I’m sure that will help. The upper level of Presidential appointees, the second, third and fourth-tier appointees, generally follow the Inauguration day.

Second, President Clinton’s recent Executive order creating a transition coordinating council will, I think, serve as a useful vehicle for streamlining and facilitating this process. This seems to be a good idea in any transition but it is particularly propitious this year.

And, third, the President-elect and his team will have the benefit of some very important source materials for their appointees. Notably, the recently released Brookings Institution “Survivors Guide for Presidential Appointees” that was issued in coordination with the Council on Excellence in Government provides a treasure trove of information for political appointees.

In my judgment, this abbreviated transition from the expected 73 days may cause some delays into the administration, but there is no doubt in my mind that the new President can be ready with his key appointees. The second, third and fourth-tier appointees may take some longer period of time into the administration. However, to the extent that Cabinet secretaries and agency heads have the opportunity to work with career public servants in their departments, in their agencies, this may very well be a silver lining in our current dilemma. The new appointees will have the chance to see firsthand the skill, the dedication, and the commitment and competence of career employees of the Federal Government.

In addition, I am hopeful, like Governor Sununu and Mr. Watson, that this abbreviated transition and the spotlight it is placing on this entire appointments process may lead to some very long-needed reforms.

Scholars from the Brookings and Heritage Foundation have noted the increase in delays, confusion and embarrassment in the appointment process. They’ve also found that the entire appointment process favors individuals who have had prior government experience. Indeed, when one observes the growth and the sheer numbers of top-level executive branch appointees, going from 196

in 1961 to 809 in 1993 to 774 in 1998, when you combine those numbers with the sheer length of time it takes to get an appointment, it's not surprising that we witness such inefficiencies. At a time when we need able and competent, dedicated women and men to come into public service, this is very troubling.

On my college campus at Hobart and William Smith, I see a great deal of interest from our students in public service. There is a great deal of interest in contemplating coming to Washington or in State governments and local governments and serving in public service. Anything you can do to streamline this process would be critically important.

So I commend the reforms that have been suggested to encourage more training and orientation for new department heads and agency heads and Presidential appointees to enhance their focus. And, again, the spotlight on the antiquated system of the Presidential appointment process will lead to streamlining and standardizing and coordinating the financial disclosure reports and avoid the duplication of effort that is frequently so vexing and frustrating to appointees, in addition to reducing the burden of filing in both the White House, the Office of Government Ethics and the U.S. Senate.

And finally, I think one other aspect—that I am not sure that even any kind of funding issue would result from your part, but one element—of this transition that will be missing is the opportunity for the President-elect to build and develop a honeymoon, to put chips in the political bank that will serve him well in his tenure as President. Transitions traditionally allow for that reintroduction, if you will, to the American people of the newly elected President and his priorities and his values with his statements. I am not sure any legislation will take back that time.

Nevertheless, it is my view, to answer your question again, will the next President be ready, most affirmatively yes. This is a resilient country. The Presidency has been tested in the past many times in this decade and in this century, and I have full confidence that with the capacity and competence of the individuals involved on both sides in this present transition, and with your good effort, that the next President can come in ready and proceeding in good faith.

I appreciate the opportunity to testify, sir.

Mr. HORN. Thank you very much. Those were very helpful comments, and I am sure more questions will come out between different transitions once we get to the questions.

The next gentleman is truly an American civil servant as well as a political appointee to several Presidents. Brad Patterson started in the State Department in 1945, and when I first knew him, he was putting together the Cabinet secretariat of President Eisenhower.

Needless to say, when President Eisenhower, who probably had more experience than any President in terms of international coalitions and all the rest of it, when he got in there, he couldn't believe it. There was hardly any staff around, and he was used to a staff in the military as Supreme Commander in Europe. And Mr. Patterson helped pattern all of that.

And he has also written a major book now put out by Brookings, the White House Staff: Inside the West Wing and Beyond. That

has nothing to do with the current TV West Wing, but they might well take a few examples from Mr. Patterson's book. It is bipartisan. Lloyd Cutler and Dick Cheney have endorsed the book.

We're delighted to have you here.

He's helped everybody from the Indians to the Alaska earthquakes and all the rest of it. So, Mr. Patterson, we're glad to have you.

Mr. PATTERSON. Thank you, Mr. Chairman, for your very kind introduction.

Mr. Chairman and members of the subcommittee, I am honored to appear before you this morning and doubly honored to be in the company on this panel of such distinguished fellow veterans of service on the White House staff.

I think the contribution I could best make to the subject of the Presidential transition would be to address two aspects of the transition which are important, but not right now in the limelight. First, let me speak about the implications of the transition for the professional staffs of the modern White House. And second, I would like to mention the pertinency of the transition for a major enterprise also occurring on January 20 next: the Inaugural activities which accompany the swearing-in.

About the professional staffs of the modern White House. In my recent book, the White House Staff, Inside the West Wing and Beyond, I give the total number of what I call the White House staff community. It is 5,915 men and women. That figure includes the domestic, economic, and national security affairs staffs; the White House Office, including the First Lady's group, the Vice President's Office, the Residence, the Military Office, the Secret Service units directly serving the President, the National Park Service, Postal Service and GSA support teams, the White House fellows, detailees, volunteers and interns. It excludes the rest of the Executive Office except those in the Office of Administration directly supporting the White House. So that White House staff family numbers nearly 6,000 people.

On January 20 what will happen? Will all the desks be vacated, all the file cabinets cleaned out, all the shelves emptied? Fortunately, no. As to people, there are two traditions in Presidential service. The first tradition is that no person has tenure in his or her desk at the White House. That means that every person's service in the White House staff community is entirely at the pleasure of the President. The second, equally strong, tradition is that while policy officials change, hundreds of the technical and support personnel of the modern White House are invited to stay on to serve the next President. In fact, many have served several Presidents over three or four decades. One executive clerk, Bill Hopkins, served 40 years under 7 Presidents. One of Mr. Hopkins' predecessors, Maurice Latta, served 50 years.

The Office of the Executive Clerk is a particularly good example of professional continuity at the White House. That's the office which handles all of the public papers of the President: enrolled bills coming through Congress, Executive orders, proclamations, commissions, messages to Congress—A little vignette: In the years past, such messages to Congress were delivered by the clerk dressed in formal attire, riding a bicycle to the Capitol.

The Executive Clerk's Office is a treasure house of wisdom on White House procedures. On January 21, for instance, if a brand new White House staffer exclaims, "How do we get an Executive order issued?" He or she can ask the executive clerk and find out immediately. The present executive clerk has been there for 21 years.

The new First Family will be welcomed into the executive residence by the Chief Usher, a 32-year veteran. Some of his 91-member staff have served in the mansion for more than three decades. The new First Family can bring in a new chef, of course, but they would be damn fools if they fired all the butlers and waiters or the telephone operators or the 2,200 men and women who staff the Military Office, fly Air Force One and the helicopters, manage Camp David, and who set up the incredibly sophisticated communications equipment which keeps a U.S. President, while visiting a hamlet in China, tied into all his worldwide military commanders.

100 National Park Service Staff maintain those White House 18 acres; 133 GSA engineers keep up the EOB and the East and West Wings; 1,200 Secret Service professionals protect the First Family wherever any of them are. The President, the First Family, the Nation are fortunate to have such dedicated and strictly nonpolitical associates in the modern White House. They personify the Presidential transition at its best.

One Reagan White House veteran remembered, "When we came here, there were some people who wanted to dismiss every single person who was on the White House payroll. Now, the President certainly has the authority to do so, but there had been a time-honored group of people within the White House who basically live from President to President, serve the Presidency, were proud of that association, but kept things working. The White House telephone operators are a perfect example of that. And yet there were some in our transition who said, 'Let's get rid of the White House operators.' I fought those actions, and the President agreed. We were successful in preventing inexperienced people from the campaign from coming over to the White House and getting jobs that might embarrass the White House or the President."

As for those file cabinets, not totally empty luckily. I have peeked at the executive clerk's current files. The first entry is dated 1911. The clerk's office maintains a collection of loose-leaf notebooks, the pages of which set forth the statutory authority for every single Presidential appointment. The clerk lets no nomination document pass up to the Oval Office unless it conforms to the legal parameters. That card file and those notebooks stay right in the White House.

In the counsels' and chief of staff's and the President's physicians' offices is another vital collection of papers, the emergency manual. When, following the Reagan assassination attempt in 1981, Counsel Fred Fielding started to discuss the 25th amendment and saw the Cabinet's eyes, as he said, "glaze over," Fielding and his successors, among them C. Boyden Gray and Lloyd Cutler, worked to compile a manual covering every possible contingency of a Presidential disability. That compilation remains in the White House.

So, hopefully, will the new 131-page staff manual which the Clinton White House has put together summarizing White House procedures and rules of the road for its employees: how to book a conference room, how to arrange for a foreign visitor. The staff manual lays out all the laws and regulations about ethics for White House personnel. Such a compendium is surely designed to survive the transition.

In finishing this section of my testimony, allow me to quote one paragraph from my book: "The White House then is not empty at the inaugural noon. Throughout its expectant halls, in its foyers and kitchens and its switchboards and guardposts, men and women are on duty who will serve tomorrow as they served yesterday. Some have walked taller in the mornings of two, three or four decades, skilled committed and proud, to support the office which they honor and the house which they revere. They will continue to be unknown to their fellow Americans, and some of them even to their President, who years later will depart as they again remain. Their respectful loyalty is always transferred to each new chief executive, and President after President is rewarded by their service."

Now, in addition to empty transition offices—about which the subcommittee will hear other testimony this morning—there is another contingent of nervously expectant men and women in town: those preparing for the Inaugural. There are three Inaugural institutions here. There's the Joint Congressional Committee for the Inaugural, which is in charge of all the swearing-in preparations and the ceremony itself. I'm sure the work of that committee is well under way; although committee members will be needing to get word about the list of dignitaries and friends to which to send the formal invitations.

There's the Armed Forces Inaugural Committee [AFIC], which is also already organized and at work, since the Department of Defense, the Military District of Washington and the various armed services contribute so much to all the Inaugural activities.

The overall direction of the Inaugural will however come from the Presidential Inaugural Committee, the chair and vice chair and members of which must be chosen right away by the President-elect.

And the Inaugural program consists of much, much more than the swearing in. Typically those include: a reception for distinguished ladies; the Inaugural gala; a Governors' reception; a reception honoring the Vice President-elect and his wife; a dance for Young Republicans/Democrats; an Inaugural medal; Inaugural decorations; Inaugural license plates; an Inaugural concert; the Inaugural parade; a cocktail buffet for the national citizens for Bush/Gore; and the Inaugural ball held in eight or nine separate downtown locations.

It was expected that the transition period this year would be, as usual, some 74 days, and, as you can appreciate from our listing of Inaugural activities, every last day of those 74 is desperately needed as lead time for these massive events. Having thousands of enthusiastic celebrants at the Inaugural concert; designing and striking the special Inaugural medal; engraving, addressing and mailing 100,000 invitations to the ball; organizing and staging a 3

or 4-hour parade and so forth. We used to have 74 days. Now only 47. To quote Senator Slade Gorton, "I am cautiously pessimistic."

I'll finish my testimony a little early. I do want to compliment the General Services Administration for setting up not only the Presidential transition offices as per the legislation, but there is another piece of legislation, Public Law 90-626, which authorizes the GSA to support the Inaugural, and there is another separate suite of empty offices which they've established with a little committee and staff of 30 already there at 600 Independence Avenue.

So the GSA is poised and ready to go. The question is, are we? Thank you, Mr. Chairman.

[The prepared statement of Mr. Patterson follows:]

30

TESTIMONY OF

BRADLEY H. PATTERSON, JR.

Before the

**Subcommittee on Government Management, Information and Technology of
the Committee on Government Reform of the House of Representatives**

December 4, 2000

Mr. Chairman and Members of the Subcommittee:

I am honored to appear before you this morning and doubly honored to be in the company, on this Panel, of such distinguished fellow veterans of service on the White House staff.

I think the contribution I could best make to the subject of the presidential transition would be to address two aspects of the transition which are important, but not right now in the limelight. *First*, let me speak about the implications of the transition for the professional staffs of the modern White House, and *second*, I would like to mention the pertinency of the transition for a major enterprise also occurring on January 20 next: the Inaugural activities which accompany the swearing-in.

The Professional Staffs of the White House

In my recent book, *The White House Staff, Inside the West Wing and Beyond* (Brookings Institution Press) I give the total number of what I call the "White House Staff Community." It is 5,915 men and women. That figure includes the domestic, economic and national security affairs staffs, the White House Office including the First Lady's group, the Vice President's office, the Residence, the Military Office, the Secret Service units directly serving the White House, the National Park Service, Postal Service, and GSA support teams, the White House Fellows, detailees, volunteers and interns. It excludes the rest of the Executive Office, except for those in the Office of Administration directly supporting the White House. That White House staff family numbers nearly 6000 people.

On January 20, what will happen?

Will all the desks be vacated, all the file cabinets cleaned out, all the shelves emptied?

Fortunately, no.

As to people: There are two traditions in presidential service:

The first tradition is: that no person has tenure in his or her desk *at* the White House. That means that every person's service *in* the White House staff community is entirely at the pleasure of the president.

The second, equally strong tradition is: that while policy officials change, hundreds of the technical and support personnel of the modern White House are invited to stay on to serve the next president. In fact many have served several presidents -- over three or four decades. One, Executive Clerk Bill Hopkins, served forty years under seven presidents; one of Mr. Hopkins' predecessors, Maurice Latta, served fifty years.

The office of the Executive Clerk is a particularly good example of professional continuity at the White House. That is the office which handles all of the public papers of the president: enrolled bills coming from Congress, Executive Orders, Proclamations, Commissions, Messages to the Congress. (In years past, such messages were delivered by the Clerk, dressed in formal attire, riding a bicycle to the Capitol.) The Executive Clerk's office is a treasure-house of wisdom on White House procedures. On January 21, for instance, if a brand new White House staffer exclaims "How do we get an Executive Order issued?" he or she can ask the Executive Clerk and find out immediately. The present Executive Clerk has been there for twenty-one years.

The new First Family will be welcomed into the Executive Residence by the Chief Usher -- a 32-year veteran. Some of his 91-member staff have served in the Mansion for more than three decades. The new First Family can bring in a new chef, of course, but they would be damn fools if they fired all the butlers and waiters. Or the telephone operators, or the 2200 men and women who staff the Military Office, fly Air Force One and the helicopters, manage Camp David, set up the incredibly sophisticated communications equipment which keeps a U.S. President, while visiting a hamlet in China, tied into all his worldwide military commanders. One hundred National Park Service staff maintain the White House eighteen acres, 133 GSA engineers keep up the EOB and the East and West Wings, 1200 Secret Service professionals protect the first family wherever any of them are. The president, the first family, the nation are

fortunate to have such dedicated and strictly non-political associates in the modern White House. They personify the presidential transition at its best.

One Reagan White House veteran remembered (and I quote):

When we came in, there were some people who wanted to dismiss every single person who was on the White House payroll. Now the president certainly has the authority... to do so, but there had been a time-honored group of...people within the White House who basically live from president to president, serve the presidency, were proud of that association, but kept things working. The White House telephone operators are a perfect example of that. And yet there were some in our transition who said, "Let's get rid of the White House operators." I fought those actions and the president agreed... We were successful in preventing inexperienced people from the campaign from coming over to the White House and getting jobs that might embarrass the White House or the president.

As for those empty file-cabinets: not totally empty, luckily.

I have peeked at the Executive Clerk's card-files: the first entry is dated 1911. The Clerk's office maintains a collection of looseleaf notebooks, the pages of which set forth the statutory authority for every single presidential appointment. The Clerk lets no nomination document pass up to the Oval Office unless it conforms to the legal parameters. That card file, and those notebooks, stay right there in the White House.

In the Counsel's and the Chief of Staff's and the President's Physician's offices is another vital collection of papers: the emergency manual. When, following the Reagan assassination attempt in 1981, Counsel Fred Fielding started to discuss the 25th Amendment and saw the Cabinet's eyes, as he said "glaze over," Fielding and his successors, among them Boyden Gray and Lloyd Cutler, worked to compile a manual covering every possible contingency of presidential disability. That compilation remains in the White House. So, hopefully, will the new 131-page Staff Manual which the Clinton White House has put together, summarizing White House procedures and "rules of the road" for its employees: how to book a conference room, arrange for a foreign visitor, use the Athletic Center. The Staff Manual lays out all the laws and regulations about ethics for White House personnel. Such a compendium is surely designed to survive the transition.

As for bookshelves: the White House support professionals in the Office of Administration manage a permanent Executive Office Building library of 65,000 volumes and 1000 journal titles.

In finishing this section of my testimony, allow me to quote one paragraph from my book:

The White House, then, is not empty at the Inaugural noon.

Throughout its expectant halls, in its foyers and kitchens, at its switchboards and guardposts, men and women are on duty who will serve tomorrow, as they served yesterday. Some have walked taller in the mornings of two, three or four decades: skilled, committed and proud -- to support the office which they honor and the House which they revere. They will continue to be unknown to their fellow Americans and some of them even to their president, who years later will depart, as they again remain. Their respectful loyalty is always transferred to each new chief executive, and president after president is rewarded by their service.

The Presidential Inaugural: Its Activities, Events and Festivities

In addition to the empty Transition offices -- about which the Subcommittee will hear other testimony this morning -- there is another contingent of nervously expectant men and women in town: those preparing for the Inaugural.

There are three Inaugural groups. Here at the Capitol there is the Joint Congressional Committee for the Inauguration, which is in charge of all the swearing-in preparations and the ceremony itself. I am sure that the work of that Committee is well underway, although the Committee members will be needing to get word about the list of dignitaries and friends to whom it should send the formal invitations.

There is the Armed Forces Inaugural Committee (AFIC) which is also already organized and at work -- since the Department of Defense, the Military District of Washington and the various armed services contribute so much to all the Inaugural activities.

The overall direction of the Inaugural will, however, come from the Presidential Inaugural Committee -- the Chair and Vice Chair and Members of which must be chosen right away by the President-elect.

An Inaugural program consists of much much more than the swearing-in. Typically there are: a Reception for Distinguished Ladies, the Inaugural Gala, (managed by the Party National Committee), a Governors' Reception, a Reception Honoring the Vice President-Elect and his wife, a dance for Young (Republicans or Democrats), an Inaugural Medal, Inaugural decorations, Inaugural License Plates, an Inaugural Concert, the Inaugural Parade, a Cocktail-Bufferet for the "National Citizens for Bush?/Gore?" and the Inaugural Ball (held in eight or nine separate downtown locations).

It was expected that the transition period this year would be, as usual, some seventy-four days -- and as you can appreciate from that listing of Inaugural activities, every last day of those seventy-four is desperately needed as lead-time for these massive events: having thousands of enthusiastic celebrants at the Inaugural Concert, designing and striking a special Inaugural Medal, engraving, addressing and mailing a hundred thousand invitations to the Ball, organizing and staging a three or four-hour-long Parade with not only military components, but with bands and floats from the president's and vice president's home states and towns. The National Park Service has already begun to construct the viewing stands, but for these other associated activities, can all these preparations be started and successfully completed in a transition period which, as of this date, is no longer 74 days, but only 47?

To quote Senator Slade Gorton: "I am cautiously pessimistic."

I am impressed with the foresight of the folks at the General Services Administration who have not only organized a fully-equipped Transition Office, in implementation of the Presidential Transition Act, but have also instituted a "GSA Presidential Inaugural Support Team" pursuant to Public Law 90-626. The GSA team is under the direction of Ms. Toni Hazlewood with a staff of thirty. Sixty-five thousand square feet of office, press and reception space have been sequestered at 600 Independence Avenue, SW, and are ready right now to accomodate the 1300-odd workers and volunteers who will make up the future Presidential Inaugural Committee and its phalanx of subcommittees. Staff of the Armed Forces Inaugural

Committee have already moved into some of that space. To quote one GSA representative: "We are poised and ready to go."

I have authored and sent to the Subcommittee two papers dealing with the presidential transition. One is Presidential Transition Memo Number One of the National Academy of Public Administration, entitled "The Structure and Organization of the White House Staff," and the other is titled "Steps in Transition Planning -- Who Does What?" Please consider them as supplements to this testimony.

Thank you, and I will be happy to respond to any questions.

Presidential Transition Memos
from the
National Academy of Public Administration

Memorandum No. 1

THE STRUCTURE AND ORGANIZATION OF THE WHITE HOUSE STAFF

By Bradley H. Patterson, Jr.

For additional information, please contact:

- Dwight Ink, Chair Presidential Transition Project Panel
@ (703) 723-0208, e-mail: dwightink@aol.com; or
- Herb Jasper, Staff Director, Presidential Transition Project Panel
@ (301) 229-0644, e-mail: herbjasper@hotmail.com; or
- Robert J. O'Neill, Jr., President, National Academy of Public
Administration @ (202) 347-3190, e-mail: roneill@napawash.org; or
- The author of the Memorandum @ (301) 320-5840, e-mail:
bradshirl@aol.com

THE STRUCTURE AND ORGANIZATION OF THE WHITE HOUSE STAFF

Options and Choices for the New President

To Set the Stage: The White House Staff as of the Fall of 2000:

The current White House Staff is comprised of 125 separately identifiable units: 46 policy offices, 28 supporting policy and operational offices, and 51 professional/technical units.

Appended at the end of this paper is an organization chart of the present White House, with its key, and also with the complete listing of the 125.¹

I. The First Area Of Choice About The Staff: What Functions Should Be There?

Before making commitments about people, the president-elect should decide on the functions which he needs to have included in his personal staff. Which must be located in his immediate White House environs -- as contrasted with being in the rest of the Executive Office, or in the cabinet departments -- or which could be dispensed with entirely?

A. The initial inquiry is: what presidential needs have been identified by the preceding nine presidents over at least the past 47 years as clearly requiring offices in the White House?

The answer is the following: (numbers correspond to the chart)

Chief of Staff (4)
 (Kennedy and Carter were reluctant to use either the job or the title)
 Cabinet Secretary (5)
 Staff Secretary (6)
 National Security Affairs (9)
 (The staff of the statutory National Security Council)
 Economic Policy (10)
 (Clinton boosted it to be called the "National Economic Council")
 Domestic Policy (11)
 (More recently termed the "Domestic Policy Council")
 Legislative Affairs (12)
 Counsel to the President (13)

¹The chart, the figures, and the substance of this paper are based on (and much expanded in) a book by the author, just published by the Brookings Institution Press: *The White House Staff: Inside the West Wing and Beyond*. Readers seeking in-depth descriptions of the White House offices mentioned in this paper will find them in the book.

Intergovernmental Affairs (15)
 (Johnson and Nixon tried to use the Vice President in this role)
 Presidential Personnel (16)
 Press Secretary (18)
 Public Liaison (19)
 Speechwriting (20)
 Scheduling (21)

The president of 2001 would be making a mistake to place any of these fourteen functions outside of the immediate White House perimeter. Could he relocate national security coordination to a secretary of state who would be the “vicar” of foreign policy? No. Could he redelegate patronage to the party national committee? No. Does the Public Liaison operation attract too many “non-presidential” matters into the White House, or pander too much to contentious advocacy groups? No; its outreach benefits have been judged to outweigh those criticisms.

B. The next inquiry: Four additional functions have also been identified as meeting presidential needs and have been formalized into White House offices by more recent presidents.

Which of them should continue as part of the president’s personal staff? Viz:

Political Affairs (14)
 Communications (17)
 The Advance Office (22)
 Management and Administration of the White House (7)

Since the first three of these so closely involve the president’s personal (as contrasted with institutional) requirements, it is doubtful that the president of 2001 would want to let them loose to any other place.

An argument could perhaps be made to assign the White House management and administration responsibilities to the Office of Administration (OA) in the Executive Office. The M and A duties, however, involve ruling on who gets which office space in the White House complex, and “Can Cabinet Officer X use presidential aircraft?” Such issues prickle with personality and turf idiosyncrasies not easily settled short of the senior White House command. The Management and Administration office, furthermore, now supervises the White House Military Office, the units of which (e.g. the White House Communications Agency, Air Force One, Marine One, the White House Physician, Camp David) provide highly personal services to the Chief Executive. These four functions are also likely to stay in the White House Office.

C. The third inquiry about functions concerns the use of special assistants for special purposes (23) -- a category prized by presidents for the flexibility it offers them to create White House “czars” to personify, and to boost attention to, presidential

priorities. In most cases there is an implication that such offices are temporary. Each president has created several of them. During 2000 President Clinton used six:

- An Assistant for the Year 2000 Conversion (Y2K)
- A National AIDS Policy Coordinator
- An Assistant for Environmental Initiatives
- An Assistant for the President's Initiative for One America
- A Special Envoy to the Americas
- A Senior Adviser to the Chief of Staff for Native American Affairs

The first of these has done his job and gone.

The functions represented by second, third, fourth and fifth of the above group will have to be scrutinized by the president-elect. He would choose to retain those offices only if he concludes that (a) they embody his own policy priorities, (b) the functions cannot be assigned outside the White House perimeter and (c) if he should transfer or eliminate them, the likely uproar from some of the affected advocacy groups will be politically acceptable.

To be specific: AIDS issues are both domestic and international, involve controversial health, socioeconomic and budgetary choices, will be long-lasting rather than temporary, and are watched over by a phalanx of vocal interest groups. The current National AIDS Policy Coordinator's office includes three functions: policy development, interagency coordination and outreach. The incoming president will have to move with great care in reviewing whether to relocate or disestablish this office. Technically the present Coordinator reports to the Domestic Policy chief, but the prominence of the issues persuaded President Clinton to give the job a special, high visibility.

The coordination of environmental issues could arguably be assigned to the Council on Environmental Quality in the Executive Office, but President Clinton made effective use of the two successive White House assistants who developed his legislative program in this area.

The One America office has been an outreach, rather than a policy function. If it is to be retained, it could arguably be shifted to the Public Liaison operation.

The Envoy to the Americas is primarily a coordination and outreach function. If retained, it could possibly be assigned to the National Security Council staff, but this would diminish the visibility which some would argue is a valuable element of White House-led foreign policy initiatives.

At its best, the Special Assistant for Native American affairs fills a tripartite function of policy development, coordination and outreach, which originated -- and was quite successful -- in the Nixon administration; as such it is more substantive in nature than merely public liaison work. Only with difficulty would this function fit into the

Intergovernmental Affairs office, since federally recognized tribal governments, by treaty, are entitled to a direct relationship with the federal government, un-mediated by, and independent of, States.

An obvious concluding comment: the president of 2001 may have --- almost certainly will have -- policy priorities of his own to the managers of which he will wish to give central coordinating authority and enhanced visibility. Like presidents before him, he will create his own White House "czars" and, like them, he should have the flexibility to do so.

D. The fourth inquiry is whether it is desirable to have one or more senior officers on the staff with generalized assignments (8) -- carrying titles such as "Senior Adviser for Policy and Strategy," "Counselor," or similar. A caution is expressed here: while a president may enjoy the flexibility of creating open-ended billets, free-roamers can muck up the well-understood organizational responsibilities of a diverse, intense, fast-moving group. Competition always arises among top policy advisers; one needs to be wary of adding extra competitors.

II. The Second Area of Choice about the White House Staff: For the Functions Deemed Necessary, What Kinds of People Should be Appointed to Manage Them?

Ideally, there are six desiderata for White House staffers:

A. Loyalty to the president and to his policies

Typically as evidenced by long personal acquaintanceship and intimate familiarity with these policies.

B. Considerable expertise in the function to be managed

The national security adviser, speech writers, the counsel, the press secretary, the legislative and intergovernmental affairs directors, to spotlight the most obvious examples, cannot be amateurs; they must be experienced professionals in their fields.

C. Diversity

They cannot all be from Tennessee, or Texas; cannot all be men or Baptists, or white or even from one faction of the party.

D. Familiarity with the environment of Washington -- knowing not just how to campaign, but how to govern

They will best serve the president who are at home in the contentious tumult of Washington, who recognize the legitimacy of and will tolerate but never be overwhelmed by the pressures from the cabinet, from other politicians, from congress, the courts,

advocacy groups, and the bureaucracy -- and from the omnipresent and unrelenting media.

E. Being without any hidden personal agendas

Having no plans for personal fame or fortune -- or for writing kiss-and-tell books. Amid the swirl of hot debate, knowing how to temper advocacy (including his or her own) with the higher calling of serving as an honest broker.

F. Willing and able to make a full commitment of time and energy

Prepared to spend atrocious hours, under pressure, sacrificing some personal privacy and many family nights and weekends, receiving in return comparatively modest pay but, in the end, the intense, quiet honor of public service.

The ideal White House staff officer will score high on all six points; a very low mark on any one of them is a grim warning-sign. Experience in the campaign would be quite helpful for the staffers in, for instance, the Communications operation, but not necessarily in other White House offices. One more requirement: White House staffers are of course expected to be partisans of the person who is president, but every last one of them must also be respectful of the presidential office and uphold its integrity in all of their conduct.

III. The Third Area of Choice About the White House Staff: How to Use the Vice President?

Beginning in 1953 with Ike's inviting Nixon to attend Cabinet and NSC meetings, there has been a steadily increasing number of assignments and responsibilities given by the president to the vice president (exceptions: Johnson and Humphrey, Nixon and Agnew). The culmination of this trend so far is the Clinton-Gore partnership. There is nothing in the Constitution or the statutes which either impels or limits the president in structuring his relationship with his vice president, so, legally, the president's hands are free to set whatever arrangements he wishes. Four decades of history, however, have established a tradition of expectations that would be difficult to reverse.

And in 2001, one looks at both Messrs. Lieberman and Cheney and sees capabilities and talents clearly qualifying either of them to accept and handle heavy substantive assignments from the president.

Currently the vice president has three offices: one at the Capitol, a ceremonial office on the second floor of the Eisenhower Executive Office Building, and an office on the ground floor of the West Wing itself. Since 1978, the law has authorized paid staff for the vice president; Mr. Gore's staff (including his "Reinventing Government" group) totalled 144. The FY 2001 budget for his office and residence is a minimum of \$4,027,000.

The new president and the vice president -- and only those two -- will sit down, review their respective commitments, interests, talents and priorities, and start to shape the role for the vice president in the next administration. As those priorities may change, the role can change as well. It is remarkable that for this relationship at the highest levels of our government, there is such freedom, such an absence of constraints.

IV. The Fourth Area of Choice About the White House Staff: What Functions Should the First Lady Perform?

The First Lady has traditionally taken on the responsibility for the social events at the Executive Mansion; a Social Office staff supports this function. But tradition has dramatically changed; not only Mrs. Roosevelt, but Mrs. Carter, Mrs. Reagan, Mrs. Bush (to a modest extent) and especially Mrs. Clinton have desired and have been given significant policy advisory and operational roles.² Having the First Lady take charge of a major policy development and legislative lobbying enterprise like the 1993-4 health care initiative will almost certainly not be repeated. There are, however, hundreds of other causes to which she could lend help, or supporting activities which she and the president could agree to have her undertake, e.g. sponsoring White House conferences on issues of importance to the president, and engaging in domestic and international travel -- in the course of which she would presumably conduct both private and public appearances.

Regardless of what her predecessors did -- and while there are expectations that she will be more active than, say, Mamie Eisenhower --there is absolutely no set model or prescription for her role; the president and she --alone --will decide what will fit with his and her interests and talents.

There are consequences for the staff, however (the law authorizes paid staff for both top spouses). A full first lady schedule (beyond the social events area) will require specialized assistants in her own office: for press, for speechwriting and for advance (the president's aides here will be too busy with their own duties). Plans for her domestic travel will mean that close supportive relationships must be formed between her office and the president's Domestic and Economic, the Political and the Intergovernmental Affairs shops; appropriate NSC staff members will be tasked to brief her -- and travel with her -- on trips abroad. To ensure effective arrangements for all of this, and to keep her office tightly tied into the interrelated stream of presidential/vice presidential activities and schedules, a chief of staff in her own office is indispensable. Finally, the president must approve office space -- for her and her helpers.

²Chapter 18 of the above-cited book gives a summary of the assignments Mrs. Clinton undertook, and of the staff which supported her.

V. The Fifth Area of Choice About the White House Staff: The Functions of the Spouse of the Vice President.

As we now see, there is *de facto* a quadriad of VVIPs at the White House with policy advisory and, to some extent, operational responsibilities. Mrs. Quayle and Mrs. Gore have both desired, have been capable of, and have been given important supporting functions at the White House, growing out of their own special capabilities and interests – Mrs. Quayle in breast-cancer awareness and federal disaster assistance, Mrs. Gore in mental health and children’s television. That same 1978 statute authorizes paid staff for the wife of the vice president when in the capacity of assisting her husband.

This practice of enlisting vice presidential spouses in White House policy business is too new to be called a precedent, but if one reflects on the personalities and experiences of Lynne Cheney and Hadassah Lieberman, the conclusion is obvious: neither will be staying home baking cookies. Either will be certainly be invited -- called upon -- to make substantive contributions in the White House arena, in areas tailored to their own competencies and priorities. The president and the vice president should be prepared to identify, and to discuss with the spouse, which areas these will be.

VI. The Sixth Area of Choice About the White House: What Will be its Internal Structure and Hierarchy? What Will be the Role of the Chief of Staff?

With the functions of the staff defined, the senior appointees designated and the vice presidential and the two spouses’ roles outlined, attention would next turn to internal organization: who supervises whom? The current tradition is that the heads of the eighteen offices identified in Sections I-A and B above are all rated as Assistants to the President, but that the chief of staff outranks them and has a *de facto* supervisory role over the whole establishment.

Different combinations have been/can be engineered: the Scheduling and Advance offices consolidated, the Political and Intergovernmental operations combined, the Communications Director having jurisdiction over the Press Secretary, Public Liaison and Speechwriting units, the Cabinet Secretary supervising the executive secretaries of cabinet councils. How should foreign economic policy issues be allocated as between the economic policy office and the NSC? The specific choices need not be specified here but can be worked out early on and then changed as needed. General observation: offices at first combined or consolidated tend, after experience, to be split and separated.

One area deserves attention: whether the NSC staff should have its own counsel, speech writers, legislative liaison, press secretary and communications operations, or should rely on the larger White House units. The Iran/Contra episode taught that the NSC definitely needs legal expertise; it has been worked out that the NSC legal adviser sits in the NSC framework, but then works extremely closely with the Counsel to the

President. In the Bush administration there were quarrels as to which unit of speech writers should draft foreign policy addresses; the Clinton White House settled this by keeping that responsibility within the NSC.

The chief of staff is system manager: the boss of none but the quarterback of everything.³ "Everything" now includes national security affairs: all its material destined for the president. Here, however, the chief of staff and the national security adviser must work out an accommodation of professional and personal trust so that the chief of staff need not micromanage the national security business, but be aware of everything of presidential significance taking place in the NSC bailiwick.

Conversely, while the chief of staff will, himself, often have to get involved with congressmen and senators, with governors and mayors and with heads of national advocacy groups, the chief must conduct these contacts in full collaboration with the legislative, intergovernmental and public liaison heads on the staff. Whether and how many deputies the chief of staff should have will also be sorted out early in the new administration.

VII. An Area of Caution: White House Staff Relations with the Cabinet

It is the thesis of the author's book, and of this paper, that the last 47 years of presidential experience have culminated in dramatic change along the White House/Cabinet axis. On major issues today, policy development, policy coordination, policy articulation and in frequent instances, policy implementation have been drawn away from the cabinet departments and centered in the White House and in its large and potent staff. Two striking examples stand out: (A) On the day after election, the campaign does not end, but metamorphoses into "Communications" and, led by the White House, goes right on broadcasting the virtues of Number One to the American public. (B) In national security affairs the president is not only the commander-in-chief but now also chief diplomat. By secure telephone and e-mail, or in face-to-face summit sessions, he is constantly in touch with -- personally negotiating with -- his fellow chiefs of state all over the world. The consequences of this centering: the significant increase, not so much in numbers as in responsibilities now laid on White House staff shoulders -- to support this new kind of presidency.

Fortunately, neither Mr. Bush nor Mr. Gore, in their campaigns, has raised the old shibboleth of preserving "cabinet government." But strength of influence in the White House staff breeds a continuing risk: the alienation of the cabinet. President, chief of staff and all the White House staff seniors must remain aware of this risk and must carry out their indispensably central duties with a special diplomacy and sensitivity for the distinguished roles and the personal concerns of the administration's cabinet leadership.

³The twenty essential principles governing the role of the Chief of Staff are set forth in pages 348-355 of the above-cited book.

VIII. The Whole White House Staff Community

The preceding pages have focused on the senior levels of the White House staff. The president-elect will soon appreciate that the modern White House is a large, many-faceted team, nearly 6000 strong. The Military Office (2200), the Secret Service White House units (1200), the Residence staff (96), the National Park Service group (100), the GSA Service Delivery folks (133), half of the Office of Administration (101) -- are his lesser but indispensable teammates. One of those offices, the Executive Clerk, is an unduplicatable reservoir of knowledge about White House processes, especially how the formal, official public papers of the president are to be handled.

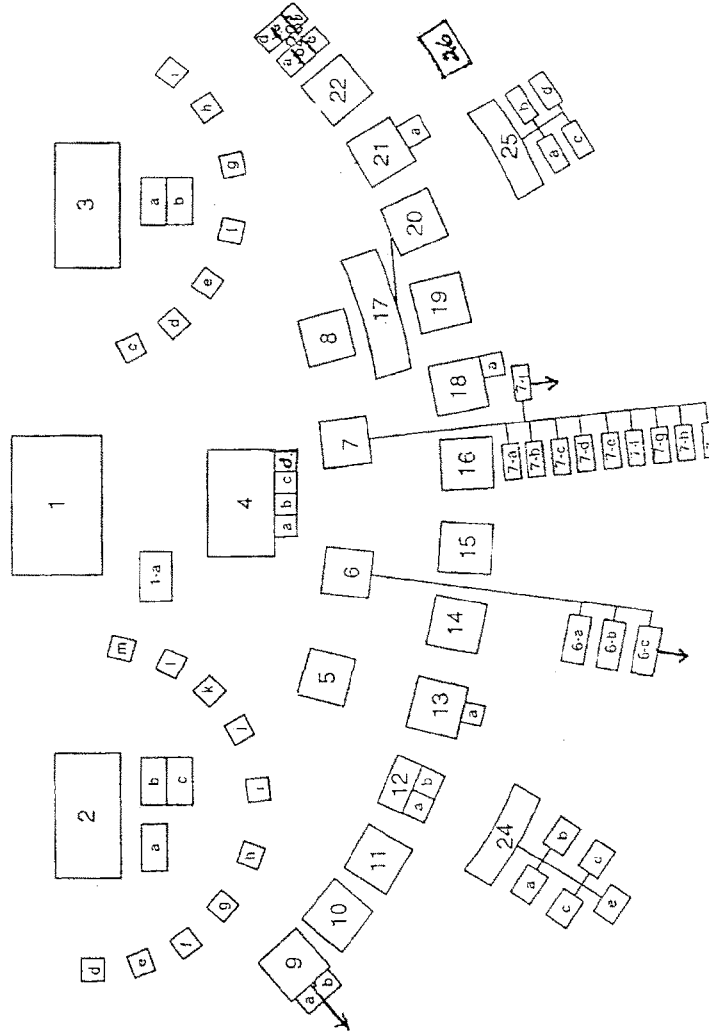
All the 6000 who serve at the White House serve at the president's pleasure, but there is very definitely a tradition that most of the ones just mentioned, being professionals with full and intense loyalty to the presidential office, are invited to stay from administration to administration.

Even they cannot keep the place running, however, without a thousand volunteers, plus the cohorts of interns (a decision needs to be made about whether to continue this program at its current rate of 800 per year.)

Let the president-elect not make the mistake of promising to cut the staff by some fixed percentage; let him first make the foregoing six-fold set of decisions and then decide whether the functions he designates as required are staffed with the personnel necessary to help him discharge his constitutional duties effectively.

Bradley H. Patterson, Jr., Senior Fellow
The National Academy of Public Administration
November 1, 2000

THE WHITE HOUSE STAFF



Key to the Organization Chart of the White House Staff

1. The President
 - 1-a Director of Oval Office Operations, Presidential Aide, President's Secretaries.
West Wing Receptionist
2. The Vice President
 - 2-a Executive Assistant
 - 2-b Chief of Staff and Counselor
 - 2-c Deputy Chief of Staff
 - 2-d Director of Scheduling
 - 2-e Director of Advance
 - 2-f Communications Director
 - 2-g Counsel
 - 2-h Director of Legislative Affairs
 - 2-i Chief Domestic Policy Adviser
 - 2-j Director of Correspondence
 - 2-k Assistant for National Security Affairs
 - 2-l Senior Policy Adviser (National Partnership for Reinventing Government) and Staff
 - 2-m Spouse of the Vice President
3. The First Lady
 - 3-a Chief of Staff
 - 3-b Deputy Chief of Staff
 - 3-c Press/Communications
 - 2-d Social Secretary
 - 3-e Director of Scheduling
 - 3-f Speechwriting
 - 3-g Director of Personal Correspondence
 - 3-h Special Assistants
 - 3-i Millennium Project
4. Chief of Staff to the President
 - 4-a Deputy Chief of Staff
 - 4-b Deputy Chief of Staff
 - 4-c Counselor
 - 4-d Counselor
5. Cabinet Secretary and Deputy
6. Staff Secretary
 - 6-a The Executive Clerk
 - 6-b Records Management
 - 6-c Correspondence Office
(Ten Specialized Units)
7. Management and Administration
 - 7-a White House Operations
 - 7-b Personnel Liaison
 - 7-c White House Conference Center
 - 7-d Photography Office
 - 7-e Visitors Office
 - 7-f Travel Office
 - 7-g Civilian Telephone Operators
 - 7-h Intern Office
 - 7-i GSA Service Delivery Team
 - 7-j The Military Office (Ten Units--
Including WHCA, Air Force One, etc.)
8. Senior Adviser for Policy and Strategy
- 9 National Security Affairs
 - 9-a Situation Room
 - 9-b Executive Secretary
(Eighteen Specialized Units)
10. Economic Policy Assistant
11. Domestic Policy Assistant
12. Legislative Affairs Director
 - 12-a House Legislative Affairs
 - 12-b Senate Legislative Affairs
13. Counsel to the President
 - 13-a Personnel Security Office
14. Political Affairs
15. Intergovernmental Affairs
16. Presidential Personnel Office
17. Communications

- 18. Press Secretary
 - 18-a News Analysis
- 20. Speechwriting and Research
- 22. Advance Office
- 24. White House Units of the US Secret Service
 - 24-a President's Protective Detail
 - 24-b Vice President's Protective Detail
 - 24-c Technical Security Division
 - 24-d Protective Research Division
 - 24-e The Uniformed Division
- 25. The Chief Usher and the Staff of the Mansion
- 26. Office of White House Fellows
 - 25-a The Curator
 - 25-b The Family Theater
 - 25-c National Park Service White House Liaison Office
 - 25-d Graphics and Calligraphy Unit
- 19. Public Liaison
- 21. Scheduling
 - 21-a Presidential Diarist
- 23. Special Assistants for Special Projects
 - 23-a National AIDS Policy Director
 - 23-b Y2K Coordinator
 - 23-c Environmental Policy Office
 - 23-d Special Envoy to the Americas
 - 23-e President's Initiative for One America
 - 23-f Senior Adviser for Native (White House Police) American Affairs.

THE UNITS OF THE WHITE HOUSE STAFF

- A. Principal Policy Offices
1. National Security Affairs
 - a. Executive Secretary
 - b. African Affairs
 - c. Asian Affairs
 - d. Central and Eastern Europe
 - e. Defense Policy and Arms Control
 - f. European Affairs
 - g. Multilateral and Humanitarian Affairs
 - h. Intelligence Programs
 - i. 1. Inter-American Affairs
 - j. International Economic Affairs
 - k. International Health Affairs
 - l. Legal Advisor
 - m. Legislative Affairs
 - n. Near East and South Asian Affairs
 - o. Nonproliferation and Export Controls
 - p. Press and Communications
 - q. Russia/Ukraine/Eurasian Affairs
 - r. Speechwriting
 - s. Transnational Threats
 2. National Economic Council
 3. Domestic Policy Council
 4. Counsel to the President (and Personnel Security Office)
 5. Legislative Affairs (House and Senate)
 6. Political Affairs
 7. Intergovernmental Affairs
 8. Presidential Personnel
 9. Communications
 10. Press Secretary
 11. Public Liaison
 12. Speechwriting and Research
 13. Scheduling
 14. Advance
 15. Management and Administration
 16. Senior Adviser for Policy and Strategy
 17. The First Lady
 18. The Vice President
 19. Cabinet Affairs
 20. Staff Secretary
 21. Special Assistants for Special Projects:
 - a. National AIDS Policy Director
 - b. Office of Environmental Issues
 - c. Y2K Coordinator
 - d. Senior Advisor for Native American Affairs
 - e. President's Initiative for One America

f. Special Envoy to the Americas

22. Chief of Staff

Subtotal: 46

Supporting Policy and Operations Offices

1. Oval Office Operations and the Presidential Aide
2. Deputy Chief of Staff for Policy
3. Deputy Chief of Staff for Operations
4. Counselor/Senior Adviser to the Chief of Staff
5. Counselor/Senior Adviser to the Chief of Staff
6. News Summary unit in the Press Office
7. Women's Outreach Office in the Public Liaison Office
8. Chief of Staff and Counselor to the Vice President (and Deputy Chief of Staff)
9. Political Director for the Vice President
10. Scheduling Office for the Vice President
11. Advance Office for the Vice President
12. Communications Office for the Vice President
13. National Security Adviser for the Vice President
14. Office of the Domestic Policy Adviser for the Vice President
15. Office of the Senior Policy Adviser (National Partnership for Reinventing Government) for the Vice President
16. Counsel to the Vice President
17. Legislative Affairs Office for the Vice President (in the Capitol)
18. Correspondence Office for the Vice President (in the Dirksen Building)
19. Spouse of the Vice President
20. Chief of Staff to the First Lady
21. Deputy Chief of Staff to the First Lady
22. Director of Communications for the First Lady
23. Press Office for the First Lady
24. Director of Correspondence for the First Lady
25. Director of Scheduling for the First Lady
26. Director of Speechwriting for the First Lady
27. Social Secretary and the Social Aides
28. The Millennium Council

Subtotal: 28

Professional/Technical Offices

1. The Situation Room of the National Security Council
1. Administrative Office of the National Security Council
2. Records and Access Management Staff of the National Security Council
3. White House Operations
4. White House Personnel Liaison Unit (*of M and A*)
5. Intern. Program
6. Photography Office

7. Travel Office
8. Telephone Operators
9. Visitors Office
10. White House Conference Center
11. Supporting Staff from the Office of Administration
 - a. White House Database
 - b. GSA Service Delivery Team
 - c. OEOB Library and Law Library
12. The Presidential Diarist
13. White House Branch of the U.S. Postal Service
14. The White House Military Office - Director's Office
15. White House Communications Agency
16. Camp David
17. Military Aides to the President
18. White House Mess and the Presidential Watch
19. Transportation Agency
20. Presidential Contingency Programs
21. Ceremonies Unit
22. Presidential Pilot and *Air Force One*
23. *Marine One*
24. The Physician to the President and the White House Medical Unit
25. USSS: Presidential Protective Division
26. USSS: Vice Presidential Protective Division
27. USSS: Technical Security Division
28. USSS: Protective Research
29. USSS: Uniformed Division
30. The Executive Clerk
31. Records Management Office (and Archives Support)
32. Correspondence Office
 - a. Agency Liaison Unit
 - b. Gifts Unit
 - c. Electronic Mail Unit
 - d. Presidential Messages
 - e. Student Correspondence
 - f. Comment Line
 - g. The Volunteer Office
 - h. Mail Analysis Unit
 - i. Presidential Greetings Unit
 - j. Presidential Support
33. The Chief Usher and the Staff of the Executive Residence
34. The Family Theater
35. The Curator
36. National Park Service White House Liaison Office
37. Graphics and Calligraphy Unit
38. Office of White House Fellows

Subtotal: 51

TOTAL: 125

Mr. HORN. Thank you very much. That's most interesting, and I think probably everybody's ears went up when you said 5,900 staff members at the White House and when you think that the Brown, Lowe Commission suggested to President Roosevelt that you could get along with six anonymous assistants, and he ran the Second World War on that basis, both civil and international.

We now go to a gentleman that has been here many years, both in the Capitol for the legislative branch and in the various White Houses, as well as various departments. Harry McPherson is sort of a legend around here, and if you want to read the finest book that has ever been written on the Senate of the United States in the 1940's, 1950's and 1960's, read "A Political Education," Atlantic-Little Brown 1972. Mr. McPherson is not only a great observer, he's also a very literate writer. It's the finest book I have ever seen on the House and the Senate and the executive branch.

So, Mr. McPherson, we're delighted to have you here.

Mr. MCPHERSON. Mr. Chairman, I thank you for that more than I can say. You and I go back to the days of Lyndon Johnson and Tommy Kuchel in the U.S. Senate, and it's wonderful to be before you today.

I'd adopt almost everything that's been said here, because I think it's all right on, and I hope the subcommittee has absorbed it. I have no prepared testimony, but I have a few observations and anecdotes to tell, as anyone has who's been around here too long.

One is that I share Jack Watson's view that this is not a crisis at the moment for the reason that both campaigns, both potential Presidents, are surrounded by veterans of Washington. This transition procedure that the Congress has encouraged and developed over the years I think is most valuable for the administration coming in from the hinterland with very little experience in Washington. That's not the case with either the Bush or the Gore campaigns.

Governor Bush himself was here with his father. His Vice President served as chief of staff in the White House as well as Defense Secretary. Vice President Gore, Senator Lieberman, that doesn't require dwelling on. Both of them are surrounded by veterans of past administrations, from the Pentagon and State Department and elsewhere. This is not, "Mr. Smith Goes to Washington," somebody coming from the country who's never seen the White House or the Washington Monument. That's not the situation at all, and so I think the transition assistance that is most desperately needed by an ingenu administration is not so required by either of these.

In my view, the biggest question for a new administration is not so much where it's going to be housed or how many bucks it's going to have to pay for this or that transitional assistance; it's an attitudinal one. The biggest question is whether the incoming group is prepared to listen to the people who are already here. If the Bush group is willing to sit down and pay attention to serious people in the Clinton administration as they talk about the issues they have confronted, it will help alot. There is just no way for even these veterans I have just been talking about to be thoroughly up to speed on the big issues that a new President will confront right from January 20th on.

The Middle East, relations with Russia, with parts of Asia, Latin America, the foreign policy issues are the most obvious. But there are domestic ones, as well. My own experience in 1968, made this a particularly poignant question. Lyndon Johnson was determined that his administration would leave behind not only a Great Society, but would have the best transition effort that any administration ever had. So each one of us in our offices was told to prepare everything that anybody would need coming into our office.

I prepared two enormous notebooks for my successor, a guy named John Erlichman. I've told this story before in Erlichman's presence, so I don't feel as if this is abusing the departed. I spent 2 hours talking to John about what the special counsel to the President did, and I showed him memoranda that I had written to Lyndon Johnson that were quite revealing—in fact, maybe even dangerous by revealing—because Johnson had told us to do that, tell him everything that we have had to confront.

He never asked a question and, you know, after a while, even if you're special counsel to the President or a Congressman or whatever, if you have described what you do for about 2 hours, you've pretty well run out of steam.

So I said, well, what would you like to do and he said, well, could we have some lunch. So we went down to the White House mess, and he said, "I do have two questions. Who gets to eat here in the White House mess?" That was one, and the second one was, when do you get to use White House cars for personal purposes. I mean, you can say that John Erlichman really had his eye on the ball and not on all this talk about policy and stuff. But I was rather appalled because I had done my best.

When I talked to him about it—I have to say this—when he got out of prison and he and I were on a panel one time, I mentioned this story, and he said, you know, I was such an arrogant jerk when I came in, I just didn't want to hear anything from anybody in the Lyndon Johnson administration.

So my point in telling this story about Erlichman, who I came to like a lot and was a good guy—my point in telling the story is that both sides, both the incumbent administration and the new one coming in, have got to really talk, to really open up, and it's a matter of attitude more than statute or appropriations.

To go back to what the gentleman from California said in his opening remarks, I don't see any reason on Earth why the current administration can't work with both campaigns about serious, emergent issues right now. I'm talking about sitting down with them and saying, here's what's going on in the Middle East. There's no reason why that has to wait until this Florida recount is resolved. It can happen today, it can start today; and it's the kind of urgent issue that if we want our new President to be able to handle, that's something that can be done if they will it to be done.

The last thing I will just say is just "amen" to what everyone has said about the appointment process. It is nuts. The press has a lot to do with it. I don't know how you can change the press and get them off this business of nitpicking every appointment and somebody's holding of a mutual fund that may have 50 stocks, one of which will ultimately be affected in some way by that person's deci-

sion in the executive branch. We have to get real because otherwise people are simply not going to put themselves through this mess of an appointments process.

Thanks.

Mr. HORN. You're not quite done yet.

Just before, since you're under oath and you want to swear to this, were you there in the meeting that President Johnson called with his six top aides and what he told you about what you should do with Members of Congress. Valente tells the story very well.

Mr. MCPHERSON. No.

Mr. HORN. Well, every administration coming into the White House, regardless of party, ought to take that advice, and I believe what he said was, look, when you get a call from a Member of Congress, the Senate or the House, you answer it this day, even if it's 2 a.m. or 3 a.m., and if you don't I'm going to kick you right out of here.

Mr. MCPHERSON. I have heard Jack tell that story.

Mr. HORN. I didn't do the other things that Johnson said, of course, to make it really register, but that was a very fine administration in relating to the Hill, obviously because he had been a former leader.

Well, thank you very much. We appreciate all the wisdom we've had from all of you here, and now we'll open it up to questions. I'm going to start with the ranking member, Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman. It seems to me that all of our witnesses today have talked about the difficulty of the appointment's process and confirmation of potential appointees, the vetting process that must take place.

Mr. Watson, I know you addressed that in your remarks. Give us some concrete suggestions here. You're talking about this subcommittee perhaps trying to make improvements in this area, and yet I'm not sure I have gotten a handle on exactly what we ought to consider doing as a matter of change in the law to improve that situation.

Mr. WATSON. Thank you, Mr. Chairman.

The article that I commended to the committee's attention, is an article that appeared in the November-December issue this year of "Foreign Affairs." It is written by Mr. Norman Ornstein of the American Enterprise Institute and Mr. Tom Donilon, who in the Clinton administration, served as chief of staff to the Secretary of State.

In that article, Mr. Turner, are numerous recommendations as to what can be done by both the executive branch and the Senate and, indeed, the Congress at large to improve the appointment's process. A great deal of the change, as Mr. McPherson said and as John Sununu and others would agree, is a matter of attitude. It is a matter of a genuinely profound bipartisan determination to do something about a system that's not working as the Nation needs it to work.

One of the things the article points to is the custom in the Senate to place a "hold" on nominees, that frequently has absolutely nothing to do with the merits or demerits, the qualifications or lack thereof, of the prospective appointee, but rather with matters totally impertinent to that issue.

Another example of change is that there are literally a half dozen different complicated forms, Mr. Turner, that have to be filled out in which there is an enormous redundancy. As John Sununu said, people have to spend between \$10,000 and \$60,000 in retaining lawyers and accountants simply to fill out those forms, much of the information of which is of extremely doubtful relevance to the issue of the person's fitness for office. So, eliminating redundancy and duplication of forms, creating—as the American Enterprise Institute and the Brookings Institution are recommending—a common electronic nominations form that will serve all purposes is another idea.

Another is to decriminalize the appointment process. Under current law and practice, information that is provided in the course of filling out those forms can serve as the basis for a criminal investigation, when I think it was not the intent of Congress to do that in such a wholesale way. So, again, that's a subject that requires careful congressional review. I'm not suggesting that we suspend the judicial process in all these matters, but I do believe this is a subject that needs to be looked at.

Still another is to streamline the FBI background check, setting a clearer set of standards as to what it is we should be looking for in terms of information that pertains to the qualification of the man or woman who is being nominated to fill a particular post, and focusing on that information and no other. It has also been suggested, and I think this deserves careful congressional consideration, that we have full field investigations only for the most sensitive national security and defense positions and not for other, even high-ranking, but less "sensitive" positions in the government.

A fair question, Congressman, is, do we really need full field investigations for an Under Secretary of Health and Human Services or an Assistant Secretary of Transportation? I say that, not meaning to imply that those positions are of any less importance, but rather that the nature of their role and responsibility in the government is so radically different that it calls into question, certainly in my mind, whether we need full field investigations for them.

There are several other Senate procedural reforms that were outlined in that 1996 20th Century Fund Report I mentioned in my testimony, to which I would refer the committee's attention; but, by way of example, Congressman, these are some of the things I think deserve very, very close attention and reform.

Finally, virtually no reforms would make a great difference unless the Democrats and the Republicans come together and say, we are going to fix this process together, no matter who the next President is.

Mr. TURNER. Thank you, Mr. Watson.

Mr. HORN. I now yield 5 minutes for questioning to the vice chairman of the subcommittee, Mrs. Biggert, the gentlewoman from Illinois.

Mrs. BIGGERT. Thank you, Mr. Chairman.

In a memo dated November 13, 2000, John Podesta, the White House Chief of Staff, issued a memo to the heads of executive departments and agencies in which he said that, and I quote, you may continue to provide the kind of information or assistance, if

any, that you typically provide to Presidential candidates and to continue to prepare for the transition so that we are able to provide full assistance quickly to the Office of the President-elect.

Do you think within those parameters that either the Republican or the Democrat receives the necessary information? You were talking about sitting down and having policy discussions, and yet I wonder if—as a President or Presidential candidate, whether they really have access to some of the information that they might want to start on early on.

Maybe—Mr. Gearan, I think you talked about that.

Mr. GEARAN. Thank you, Congresswoman.

Yes, I think Mr. Podesta's intent there certainly is clear. And I think it underscores as Mr. McPherson's point which I think is the salient point here. As I mentioned, I was Secretary Christopher's deputy and walked into my very first meeting in the Roosevelt Room with the outgoing Bush administration. Mr. Baker and Andy Card, with Mr. Card being our main liaison, and because of our friendship and because of his personal integrity and character, the relationship of that transition was vastly enhanced. And certainly I believe it's a credit to Mr. Card in particular. But they were honoring that process as well.

It would be my hope that's the intent of Mr. Podesta and certainly the President who would want to provide that kind of access. I think the President's Executive order certainly is consonant with that; it is a tonal dimension to this transition that can end the awkwardness, whether it's a friendly takeover or a hostile takeover of administration. But those relationships, I think, starting with the top would be access provided and with that goodwill. Certainly they would provide any incoming transition team with the access and support that they would need.

Mrs. BIGGERT. Governor Sununu.

Mr. SUNUNU. I don't want to be the one that is on the other end of the spectrum here alone, but I don't mind doing that if necessary. I think something is being missed here.

The transition void that is being created is not in being able to name a true handful of the complete Cabinet in kind. It is not in not being able to name the 10 top staff members in the White House. The problem is not being able to have the detailed interaction, for example, that allows the potential President and his staff to prepare a budget for presentation to Congress with full access into the Office of Management and Budget.

It is an inability to put together the full structure of a personnel office that will move into the White House and then begin to add personnel after the Inauguration date. It is the inability to prepare a staffing structure and have them begin to interact fully with the existing press office and begin to prepare for a smooth transition there. It is the inability of the legal counsel and the supporting members of the legal counsel's office to begin to prepare all the materials and assist everybody in filling out these unbelievably complex forms and to begin to inform them of the subtle issues that are involved in the criminalization aspects that were addressed by Jack Watson. It is the inability of putting together a staff support structure and having them interact and have full access to the manuals that Mr. McPherson and Mr. Patterson referred to, and

all the archives that are there, on a full basis so that they can begin to deal with the issues that are associated with paper flow for the President, the issues that are associated with making sure the staff is aware of all their responsibilities, not just the mythical responsibilities of each position that are there. It is the telecommunications access that is necessary to begin to communicate back and forth all the details that are necessary for potential members that are going to be appointed to understand what is happening.

So it is not the problems at the top. It is the problems and layers through—2 through 10 that are not being supported in this void, and it is that that is going to be the most dramatic problem.

Let me give you one example from my own personal experience that was absolutely critical, and it had to do with the savings and loan issue. If we had not had full briefings and opportunities to go into details with second, third, fourth and fifth-tier members of the departments that were associated there, we would never have had the capacity to get a good head start in making a new policy decision on what should or should not be done to deal with the savings and loan crisis, and I think one of the most important things President Bush did is immediately, on coming into office, having had his—what was then his transition group and then his new Cabinet speak directly and forcefully on the basis of their briefings. He made the quick decision of fix it and fix it fast, which I think was absolutely critical in restructuring the financial institutions in this country; and I believe it was the critical factor in fueling the kind of recovery that we eventually had.

Mrs. BIGGERT. Thank you. My time has expired.

Mr. HORN. If I might, since I think that's a relevant question for all of you, let me put it this way: What's the biggest mistake made by administrations you belonged to that could have been avoided by a more complete or comprehensive transition? Because that's sort of what you're talking about, Mr. Sununu.

I'd like to hear, I think the panel would, from each of you, where would a shortness of it and, you know, the little we've had of it, it's an evolution here, but did you see mistakes made because of the impression of that?

Mr. Watson.

Mr. WATSON. Mr. Chairman, it would take too long to get into all of our mistakes in 1976, but on a more serious note, any transition, whether it's 10 weeks or less, absolutely requires the people running the transition to exercise a process of exclusion, to keep things off the agenda that don't need to be there, in effect, focusing only on matters that the President must deal with in the first 6 months of his administration, for example.

The purpose of a transition is not to plan for an entire Presidential administration; it is to get the President and his new administration off to a running start and deal with those issues, key appointments, and so forth that must be addressed, in the period between January 20th and the first August recess of the Congress.

So I would say, Mr. Chairman, a mistake we made in the 1976 transition in some respects, and that almost every transition makes to one degree or another, was trying to focus on and deal with too many things. The internal and external pressures on a President-

elect to put things on his transition agenda are overwhelming. Everybody wants to have their issue, their perspective, their priority, their item on the agenda, and you have to be very careful to limit what you try to do.

Mr. HORN. Mr. Gearan, anything you want to add?

Mr. GEARAN. Well, I think that's very well said, Mr. Chairman, and similarly, I'd agree. We do not have the time to detail all of our—

Mr. HORN. Give us a few horror stories at least.

Mr. GEARAN. I can easily do that. I would make one observation from our point in Washington, where we put together briefing books and cluster groups to study all the Cabinet departments and agencies, everything from the Tuna Commission to the Department of Defense. But what we did not study, per the then-President, was the White House in any kind of detail and rigor. I think the President would certainly join me in his observation that the transition team, should study the Cabinet, agency departments in detail, and would be well-placed to have that kind of rigorous study and analysis of the White House.

Mr. HORN. Mr. Patterson.

Mr. PATTERSON. Mr. Chairman, as you will recall, precisely what Mark was talking about, about conversations between outgoing and incoming White House staff. The objective of the very helpful amendment which your committee approved and the Congress approved in the Presidential Transition Act of 2000, namely for providing workshops and briefings, that had not been the case in the past and now is the case.

Of course, the problem is, the time is creeping shorter and shorter, but that authority is there, and the public Administrator such as the distinguished gentleman you will be hearing from later—Dwight Ink, behind me—and many others and your committee and the committee in the Senate were wise enough to approve that amendment, and it is on the books. So as soon as a new team is for sure, definite, those new provisions will be there, and I know that many of us in the public administration community commend the Congress for that wisdom.

Mr. HORN. Mr. McPherson, because the compression of that thing is of course different, it was a party within an executive branch when you started with the Cabinet members and other key advisers after the President was tragically assassinated, President Johnson had his hands full.

Mr. MCPHERSON. He did. I was not in the White House for that first year, but I was fairly close to him and others; and I believe that if Lyndon Johnson had a heyday in the Presidency, if he really made a gigantic contribution that people in both parties would acknowledge, it was in his handling of the government, of the Presidency, in that first year after November 22, 1963.

He did it using his tremendous knowledge of Congress, but going far beyond that. He connected with everyone of significance in the life of a Presidency—business leaders, labor leaders, civil rights leaders; he made it a practice to bring in everybody who hated him and whom he hated, but who was significant. He lined them up.

I was with him 9 days after he became President, one Sunday. I spent Sunday sitting in the Oval Office with him just listening

to him talking to people whom I knew he despised and who certainly didn't like him, but whom he needed if the government was to function. And each of those people came out and said things to the press that were very supportive: We really want to help this President, he's really going to try to work. He was on the phone constantly with every person, and Charlie Halleck and the leaders of the Republicans in the Congress. He really worked it 16, 18 hours a day. His staff, as Jack Valente would tell you and would tell you if he was sitting here, was worked down to the bone by Johnson, who was determined not just to win the election in 1964, but to make the country work again after it had been brought to a shuddering halt in Dallas.

Mr. HORN. Any other addition?

Mr. Sununu, you opened that question, so do you want to close out on it?

Mr. SUNUNU. Well, the biggest mistake I think we made is, even though we heard to a great extent everything you're hearing today about the difficulties of the appointment process and about how hard it is to get good people to come in, I think we underestimated to some extent the burden that would be in getting the good people approved and confirmed and through there.

You hear the words, you read the words, you get good counsel, and until you do it, you don't understand how serious that problem really is; and I think we underestimated it a bit.

Mr. HORN. Well, let's see, go over here now to—we'll yield to the gentleman from Pennsylvania, Mr. Kanjorski, for questions.

Mr. KANJORSKI. Thank you, Mr. Chairman.

In listening to the observations and some of the testimony, I see us going in what I think is a very positive direction, that is, the real problems associated with transitions of administrations as opposed to the immediate problem that we're faced with of not having a certainty of who is actually the next President. I'm glad to see everyone taking that course, because there's nothing that should come out of this hearing that gives any indication of who should be the winner or the loser of this contest that's before us.

But, Mr. Chairman, I have to confess that I have been around here long enough now to have experienced some of what the gentlemen are talking about, and that really scares me. So maybe I have been here too long. I agree with Mr. Sununu.

I sat on the Banking Committee and the most impressive activity of President Bush was on January 8th, some 12 days before his Inauguration, he sent the formulation to the Banking Committee of how to handle the S&L crisis, and I have to say, I'm a Democrat, as you know, Mr. Sununu, but that impressed me so much—

Mr. SUNUNU. I had noticed, sir.

Mr. KANJORSKI. That quite impressed me, so much that this incoming President would take such a difficult issue and complicated and understandable issue by the general public, but to resolve it—as you know, we had been trying to resolve that issue from the early 1980's. But I had great hopes for his Presidency as a result of that. I won't go into what errors may have been made later on in the Presidency.

The experience I had in the transition in 1992 after the Bush administration, and I don't know whether it was the court cases that

were going on at the time, but I remember so well being in the White House the day after Inauguration. I remember trying to get something done that had to be done concurrently between the new and the changing administration, and all the computers were gone, the guts were taken out of the computers; and we were actually working, rather than using computers, through documents. We had to go back to manual typewriters, and I saw the wrinkled brow. I think it may have been a court order, some litigation that was pending, that seized all that information to make sure they could find out what people were thinking or writing about. But it certainly did slow down the implementation of that administration.

And then I remember a fact that everybody was astounded about, that they had a Lyndon Johnson telephone still there, about 20 years behind times, and that situation took a little bit to rewire.

So every White House, coming and going, has its difficulties. What I'm interested in is the observations perhaps from this distinguished panel of how badly do we do up here on the Hill. And it's interesting, we can put a committee together to handle an Inauguration and do a pretty nice job, but I don't know any committee that comes together of the Congress, the House and Senate, for transition purposes—and it strikes me, it is much more important than having a parade—to have a nice smooth entrance of the leadership with the new government, which we easily could facilitate here on the Hill.

Finally, I can't help but ask this question. Every administration that I've seen come through and every transition and the last one we had, Nannygate and drugs. Are we over those two things now and does anybody have any idea what the next disqualifying, past, vicious occurrence, other than hiring a nanny, is going to be for all these people that we have to cast aside? Does anybody have any idea out there what we should prepare the American people for?

And I'm just wondering whether or not that is a political activity that's occurring? Are we in the Congress throwing these things out and trying to weaken people who are qualified to serve from coming; or is that a media circus that's occurring, and if so, what can we all do about it?

Remember, I'm calling the Nannygate and the drug situations, if we think about it, the beginning years of the Clinton administration, so many very fine qualified people had to step aside and leave and not be considered, or be terribly embarrassed those who were considered, and drug process out—I think we're looking at the Acting Attorney General during those hard periods there when we couldn't even put into place someone at the Department of Justice.

Are we doing that again? Is that a possibility, and if you will—

Mr. SUNUNU. I can't tell you what the next Nannygate-type issue will be. You will have to ask the press. They will find one and they will make it.

What is incumbent upon us collectively, Republican and Democrat, is perhaps to commit ourselves not to exploit what they raise; and the easiest way for that to be snuffed is for a bipartisan, significant bipartisan group to say, we hear what you're saying, that is not a qualification that we care about for Attorney General as it was in that case. We hear that, we see that. It is a flaw that

can be remediated, and we are going to only address the significant qualifications for that office.

Now, that's not easy to do. I don't pretend that it is easy to do politically. We are often tempted beyond our capacity to do the right thing, but if we keep worrying about it and talking about it and having a dialog on how to deal with it, maybe eventually we can give each other mutual strength and be able to come to that point where we can stand up and say, it's really not significant, let's move on.

Mr. WATSON. Mr. Kanjorski, two quick points in response to some of what you have just said.

One, I agree with John, we can't predict what the next one is going to be. But what we can predict is that whatever it is, it will take courage and common sense for Members of the Congress to deal with, whatever it is. Focusing on the real question that's put to the Congress in terms of the confirmation procedure, is the person who's been nominated for the post fit or not fit for the post, and all information that is relevant and important to that question is what we should consider and not other endless, intrusive, unnecessary intrusion into the person's private life.

Point two, with respect to your earlier question about what more the Congress can do, I can only speak from my own experience, Congressman. In 1976, I'm afraid I bore more resemblance to "Mr. Smith comes to Washington" than to the "seasoned old hand in Washington affairs." I can tell you, Mr. Chairman, that the reception cooperation and help I received as director of the transition for President-elect Carter in 1976 from the Members of Congress, from the committee and subcommittee chairs, members and staff, was exemplary.

As I sit here, I'm looking at the Portrait of Congressman Jack Brooks behind you. It was Congressman Jack Brooks that I worked with to amend the 1963 act to increase the funding under the act from \$900,000 to the \$3 million put into place in the 1976 act, and all I had to do with Mr. Brooks was to come to him and say, Mr. Brooks, will you help us understand and analyze what needs to be done here, and he did it.

So I think with the transition acts which the Congress has passed, with the funding it has made available, with the amendments it has passed in the 2000 Presidential Transition Act in terms of briefing support and orientation support, the Congress is doing its part.

Mr. PATTERSON. Mr. Chairman, just an observation as a footnote. One remembers constitutionally there is no transition. Power changes at noon on January 20.

I recall President Eisenhower in his last Cabinet meeting, at which I was present, admonishing them, first of all, to collaborate with the Kennedy folks and help them out in every way possible. But then immediately he reminded the Cabinet "There's just one President, gentlemen, and that's me until noon of the 20th"; and he didn't want any of the new folks making statements or pretending to speak for the government. So he just reminded them that January 20 noon had that constitutional aspect to it.

Mr. HORN. OK. I see no more answers to that question, and I will now yield 5 minutes for questioning to the gentleman from Califor-

nia, Mr. Ose, who will be followed by the gentleman from Virginia, Mr. Davis.

Mr. OSE. Thank you, Mr. Chairman. I really only have one question. I want to direct it to Mr. Watson and Mr. McPherson, and any others can respond.

From a legal standpoint, does the Presidential Transition Act provide flexibility in a situation like we are experiencing today or does it narrow our choices? In other words, is there an interpretation that can be made in the Presidential Transition Act that would allow both campaigns basically to be provided the assistance they need in anticipation that one of them will be the winner?

Mr. WATSON. Congressman, I would not present myself as an authority on the Presidential—

Mr. OSE. You're a former Chief of Staff.

Mr. WATSON. I have read it carefully, however; and I'll try and answer your question.

We really have two lines of help coming here, at least two lines of broad categories of help. One is money. If my memory serves me, we have \$7.1 million appropriated for this purpose currently. About \$5.3 million of it to be divided among the incoming and outgoing Presidents and Vice Presidents. That's one category. And I think that the act is somewhat less flexible as to the release of those funds than it is with respect to the second category.

The second category of assistance really goes to what John Sununu was talking about. It is the "making available of information." It is the sharing of briefing books that have already been prepared. That sharing, with both camps, in my opinion, would be fully permissible under the act, of budget information, of other information related to defense and economic issues, etc.

Again, I would refer back to what I said a few moments ago, sir, that we must keep in mind that in a transition you're only able to focus effectively on the most immediate and highest priority issues with which the President is going to have to deal in the early days, weeks and months of his administration. With respect to those issues, I think there is flexibility under the act for the assistance to be provided to both camps in the current situation.

Mr. OSE. If I might followup on that, Mr. Watson. The issue you're pointing out is that particular assistance, that second type, is not something that would necessarily fall to GSA. As Mr. Sununu implicitly suggested, that's something much more personal. It's something like the height of responsibility. One of you is going to be President, come in here.

Mr. WATSON. Yes, exactly. And I will tell you again, from my own experience, Congressman, in 1980, when we lost the election to Governor Reagan, at the President's direction, I again headed the transition, this time from the position of chief of staff at the White House. We had prepared in all the departments and major agencies of the government briefing books for the new people, which we immediately made available to Governor Reagan and his people.

I believe—I'm not a part of any of the current transition efforts, but I believe, based on what I have read and understand to be true, that such briefing materials are available now, and it would be my

recommendation that, on that informal basis which is permitted under the act, that information be made available to both sides.

Mr. OSE. I want to go to Mr. McPherson.

Mr. MCPHERSON. I don't see any bar to the kind of cooperation we've been talking about between the incumbent administration and both campaigns, not at all so far as the serious stuff is concerned, the issues that they're going—the new guy is going to confront.

Mr. OSE. From a practical side, Governor Sununu, any observations?

Mr. SUNUNU. Yeah. In order to share materials you have to have people with a place to be where that material can be shared. You have to have people in place and you have to have offices for those people in place and you have to have telephones for them to use in a coherent basis, not picking a phone up in one law office or another office in town but in a concentrated area. So, in theory, what Jack has addressed can be done. In practice, I don't think it can be done unless GSA makes available facilities, phones, and a support structure so that the people that are going to share this material have a place where they can come together as a coherent entity and start working to take advantage of what is being shared.

Mr. OSE. Mr. Chairman, may I have, just with the liberty of the committee, ask one other question?

Mr. HORN. Certainly.

Mr. OSE. Are you aware of any bar under the current Presidential Transition Act that precludes GSA from providing such assistance today to both campaigns?

Mr. SUNUNU. I am not a lawyer, and I thank the Lord for that, so I can't give you a legal answer to that, but from what I have read in the documents there is nothing that would do that except that they would be giving less money eventually to the one that is chosen. In other words, some of the funds will have been expended on someone who would end up not being the President, but other than that bar in terms of the total amount of money that's there, I do not believe that there is a problem.

Mr. OSE. So if we had \$4 or \$5 point something million, split it equally \$2.65 each—I mean, we spend \$2.65 million in the space of time I've had to question the panel. So I mean I don't see this as something that's—

Mr. SUNUNU. It's not a problem except that someone would have to make do with only \$2.65 million until such time as that you added it, and the question is whether you feel you can add to the process when the final winner is selected.

Mr. OSE. Do any of you know of any bar that would prevent GSA from offering such assistance to both camps?

Mr. WATSON. I know of no such.

Mr. PATTERSON. The statute, of course, says that "the terms President-elect and Vice President-elect shall mean such persons as are the apparent successful candidate for the office of President as ascertained by the administrator."

Mr. HORN. The Administrator is in the room; and we will, after those questions of Mr. Davis, why we will get to that with the Administrator.

Gentleman from Virginia, Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman. And, again, I guess you could give it to both—probably give it to both and come back to Congress. We're still in session. I'm sure we could make it work. I'm concerned that the fact that the funds haven't been transferred, they're out in the fundraising mode trying to get money up to get the transition working smoothly, I think that is going to have an effect in the early days of a new administration. What is your judgment on the impact the delay of releasing transition funds would have on a new administration? Anyone want to take that?

Mr. SUNUNU. I go back to what I said originally, Mr. Davis. I think it's a very nonlinear effect. One, this is quality time for transition. You can focus on it, you can do the background work, you are not burdened by the responsibility of administering under the duties that you will eventually get after January 20th. So there's a very disproportionate non-linear impact. My guess is that if you lose a month in transition it will delay you being up and running by about 6 months in the process.

Mr. DAVIS. Mr. Watson.

Mr. WATSON. Mr. Davis, again, not being part of the current transitions, I can't give sworn testimony as to what they are, or are not, doing. But based on what I read and understand about both the efforts of Governor Bush and Secretary Cheney and Vice President Gore and Senator Lieberman, they are under way informally with the kinds of efforts they need to have under way to vet their appointments, make their appointment decisions and so forth; and indeed I think I saw Secretary Cheney has established transition offices in Virginia for that purpose temporarily.

So I think we should not assume here—because I do not think it would be practical or realistic to assume—that nothing's being done right now in these two camps. I think a great deal is being done, point No. 1.

Point No. 2, I agree with John Sununu that the other thing we need to keep in mind is that this Presidential election is going to be decided very shortly. So that the period of time we are now dealing with in terms of selection of who the winning candidates are here is a very short window. We are not talking about another month, but, I suspect, another week or so.

Mr. DAVIS. No, but we've lost a month.

Mr. WATSON. But we can't do anything about that lost month at this point. It's lost, and so the question is what can we do prospectively.

Mr. DAVIS. Yeah. Well, you still worry about bringing people on and having to hire; and it just seems to me these are distractions. It's on the margin but didn't have to happen. And Mr. Ose's suggestion, maybe you give a little bit to both sides and you come back and have Congress sort out, these are really small amounts in the scheme of things that the new administration can get up and operating on a timely manner instead.

Mr. GEARAN. Mr. Davis, if I might, I share Jack's view that this is time that has been lost certainly. But I believe as Mr. Light will tell you from the Brookings Institution, that long before the election they had a whole project of the Presidential appointee initiative, a bipartisan effort, and estimated at that time, even with a full transition, even with a landslide election that could have oc-

curred, that it would have been October in the year 2001 before all Presidential appointees were at their desks. That was their estimation, which underscores what I tried to present in my testimony: the need for reform. This month is lost. I think the President-elect can go forward with it, but hopefully the kind of streamlining reforms that could be put into place will be prospectively helpful.

Mr. DAVIS. Let me just ask, do you think Congress ought to do anything? Instead of putting the burden on the GSA Administrator, we could do something legislatively to define an apparent winner by certification or something like that? Is there any particular language anyone would suggest?

Mr. WATSON. I have a strong view on that, Mr. Davis.

Mr. DAVIS. I'd love to hear it.

Mr. WATSON. It is that our judicial process has before it now the election contest issues which the parties have a legal right to have before them; and it is my most respectful but firm view that neither the legislative branch nor the executive branch should interfere with the proper functioning of the judicial process in this situation. Let that process work and run its course, as it is about to do, without interference.

Mr. DAVIS. Let me followup. What if you had an electoral vote that was clearly going to the House? Under those circumstances here, you couldn't release anything to anybody until the election went to the House of Representatives in January, where you probably would be better off giving money to each side to at least plan.

Mr. WATSON. That's why I think we are unanimous in our view on this panel that everything as an informal and practical matter that can be done to share information and make these people, both sides, both groups of people prepare, facilitate and expedite their preparation should be done.

Mr. DAVIS. Thank you very much.

Mr. HORN. I might add to that question just some figures. We have it easy if we want to pursue that, because the Vice President, it would be part of the \$1.8 million we have designated for President and the Vice President, the outgoing administration. That would be, according to the Congressional Research Service, our fine support staff is \$305,000. If Mr. Gore was made President, that money would revert to the Treasury because he's not leaving.

But I think it's pretty simple and the principal witness will be, I am sure, helping us with some of the figures. And that's the next panel, with the Administrator of the General Services Administration. That is a solvable problem, and it makes it easy because nobody is losing anything. The Vice President at that point is coming out.

The concern most of us have is, good heavens, can't we get some money to them so they don't have to go hat in hand, which I think was pointed out is not a good thing to be doing because somebody will make a lot of hubbub about it. And we ought to at least give them some decent planning space and communications and so forth so they can do the necessary things that all of you so eloquently have noted.

Gentleman, I have no more questions, and I don't think my colleagues do. We thank you very much for sharing your experience, and I must say, Mr. McPherson, I enjoy C-SPAN on Saturday

afternoon when it tells me all about Lyndon Johnson's phones and who he's talking to. And as you say, he hit the ones that liked him and the ones that didn't like him; but he was a dynamic President. Thank you all for coming.

We now call forward the second panel. The second panel will be the Administrator of the General Services Administration Mr. Barram; Ms. Katzen, Deputy Director for Management; Stuart Gerson, a partner in Epstein Becker & Green; Paul Light, director, Center for Public Service at Brookings; Jonathan Turley, Shapiro professor of public interest law at the George Washington School of Law; Todd Zywicki, associate professor of law, George Mason University School of Law; Norman Ornstein, resident scholar, American Enterprise Institute for Policy Research; and we will close with the Honorable Dwight Ink, president emeritus, Institute of Public Administration. He's probably served more Presidents than everybody else put together.

If we have everybody behind the right sign, we will administer the oath. If anybody is going to be, for those in the administration, assisting them, please have them raise their hand so the clerk can note if you are dependent upon any aides. We don't want to have to give the oath in the middle of the hearing. So if you've got people that are going to give you information for the record, let's have them in back of you.

I don't see any, so we'll deal strictly with the witnesses that are listed.

[Witnesses sworn.]

Mr. HORN. The clerk will note that all witnesses have affirmed or sworn.

Now we will get the star witness, and he's at the edge of the table. Maybe that's because the door has closed, but anyhow we have a very distinguished member. He has been very helpful to this committee and Congress in the years we've been here, and that's the Honorable David Barram, Administrator of General Services Administration. They have a fine job they do during the year, and this one probably surprises GSA Administrators to get into it, but the Congress thought that would be sort of a neutral way, and they were in charge of getting all those fine things like space and documents and all the rest in collusion, we will say, with the National Archives which—we now turn to Mr. Barram, and we're delighted to have him, and please proceed.

STATEMENTS OF DAVID BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; SALLY KATZEN, DEPUTY DIRECTOR FOR MANAGEMENT, OFFICE OF MANAGEMENT AND BUDGET; STUART GERSON, ESQUIRE, PARTNER, EPSTEIN BECKER & GREEN, PC; PAUL LIGHT, DIRECTOR, CENTER FOR PUBLIC SERVICE, BROOKINGS INSTITUTION; JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW; TODD ZYWICKI, ASSOCIATE PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW; NORMAN J. ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE FOR POLICY RESEARCH; AND DWIGHT INK, PRESIDENT EMERITUS, INSTITUTE OF PUBLIC ADMINISTRATION, FORMER ASSISTANT DIRECTOR FOR EXECUTIVE MANAGEMENT, OFFICE OF MANAGEMENT AND BUDGET

Mr. BARRAM. Thank you very much, Mr. Chairman, and members of the committee. As I've said many times to you and anybody who will listen, this is not your father's GSA, and never has it been so profoundly interesting as it is right now.

I am very pleased to be here to talk about the implementation of the Presidential Transition Act and how GSA plans to assist in an orderly Presidential transition of 2000/2001.

By the way, I would like to put into the record or make sure it gets into the record an opinion by the Department of Justice about whether we can fund two candidates, and their answer is no. Although I think, like a lot of people, it would be nice if we thought the law would work to do that for the reasons you said.

But, anyway, under the Presidential Transition Act of 1963 as amended, GSA is the provider of a fully equipped headquarters and a variety of services for the President-elect's transition team. Most of the facilities and services we provide to the President-elect and his transition team are generally the same as we provide to all our customers: office space, telecommunications, IT services and equipment, and furnishing supplies and other things they need to do their job.

Because GSA is the custodian of Federal transition funds, we also serve as the financial advisor, accountant and payroll office for the transition.

Under the Presidential Transition Act of 2000, GSA was given two new responsibilities. The first is coordinating orientation activities for high-level nominees and appointees. The second is to work with the National Archives and Records Administration and others on a transition directory. Congress has appropriated \$5.27 million for the 2000/2001 incoming transition to pay for those services and facilities as well as compensation for transition staff. \$1 million of that will pay for the orientation activities and directory.

In order to facilitate an orderly transition, we have been working with both campaigns since August, and we continue to do so on a daily basis. We have leased office space, provided security for it, fully furnished and equipped it, and arranged for telecommunications and information technology services to begin as soon as the President-elect is apparent. We have begun planning the orientation activities and have prepared a working draft of the transition directory.

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.

As Representative Fascell explained during the 1963 discussion of the bill, "in a close contest, the Administrator simply would not make the decision." Representative Fascell went on to explain that "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."

A few people have speculated about whether the GSA Administrator is the right official, but the law seems quite clear to me. Under the Presidential Transition Act, GSA has no role in determining who the next President will be or affecting the contest for the Presidency. The law does not authorize me to pick the next President or predict who the next President will be. Instead the law creates a simple common-sense requirement for me to identify the President-elect after it is clear that one candidate has won the election.

In this unprecedented, incredibly close and intensely contested election, with legal action being pursued by both sides, it is not apparent to me who the winner is. That is why I have not ascertained a President-elect. In extremely close elections State laws provides for various means to ensure that the results are correct. The country is going through that process now.

I don't intend to predict when it will be apparent who the winner is, but I am confident that we will all know and probably all agree when the winner is apparent. Both candidates are honorable men, and each is convinced that he has won this extremely close race. I intend to respect the integrity of their public statements.

During the last 3 weeks our American political system has faced a huge test. In my view, our system as usual is working. We Americans trust each other enough to believe we can get through this challenge.

Because the President-elect will have a shortened transition period, we at GSA have been working diligently to give the transition team the tools it needs for a smooth transition. We continue to work closely with both campaigns to shorten the turnover time so that what once took a week or more can now be done in a day or within hours. We have talked with both campaigns before the election to ensure that we were setting up the space and systems so that they could use them productively. In the last few days we have suggested additional steps to speed the turnover, such things as creating Local Area Network and e-mail accounts and passwords, providing their staffs with remote access to the transition intranet, preparing financial and contractual documents for goods and services their teams will need, even ordering stationery. We

are acting professionally and with no bias toward either candidate as we have been since August and will continue to do.

With so many rapid technological changes, I think this may be actually the last transition where the transition team will need 90,000 square feet of office space and 500 computers in one location in Washington, DC. For example, staff of both campaigns are already linked in virtual space. Compare this to the last transition in which laptops were invisible, and wireless technology barely existed. We already see that many of the administrative paper-based transactions of 1992 will now be done electronically, saving time and money for the taxpayers. We think that the preparations GSA has already made, including taking advantage of technology, will help make the 2000/2001 transition, though short, a smooth transition. Thank you.

Mr. HORN. We thank you.

[The prepared statement of Mr. Barram follows:]

71

Testimony of

David Barram

Administrator of General Services

Before the

**SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION AND TECHNOLOGY**

Hearing on the Presidential Transition, 2000

December 4, 2000

BARRAM
BAR

Mr. Chairman, Members of the Subcommittee, I am pleased to talk about the implementation of the Presidential Transition Act, and how GSA plans to assist in an orderly Presidential Transition of 2000-2001.

Under the Presidential Transition Act of 1963, as amended, GSA is the provider of a fully equipped headquarters and a variety of services for the President-elect's transition team. Most of the facilities and services we provide to the President-elect and his transition team are generally the same as we provide to all our customers – office space, telecommunications, IT services and equipment, and furnishings, supplies and other things they need to do their jobs. Because GSA is the custodian of Federal transition funds, we also serve as the financial advisor, accountant and payroll office for the transition.

Under the Presidential Transition Act of 2000, GSA was given two new responsibilities. The first is coordinating orientation activities for high level nominees and appointees. The second is to work with the National Archives and Records Administration on a transition directory.

Congress has appropriated \$5.27 million for the 2000-2001 incoming transition to pay for these services and facilities, as well as compensation for transition staff. One million of that will pay for the orientation activities and directory.

In order to facilitate an orderly transition, we have been working with both campaigns since August and we continue to do so on a daily basis. We have leased office space, provided security for it, fully furnished and equipped it, and arranged for telecommunications and information technology services to begin as soon as a President-elect is apparent. We have begun planning the orientation activities and prepared a working draft of the transition directory.

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.¹

¹ 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 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.

Under the Presidential Transition Act, GSA has no role in determining who the next President will be or affecting the contest for the Presidency. The law does not authorize me to pick the next President or predict who the next president will be. Instead, the law creates a simple, common sense requirement for me to identify the President-elect after it is clear that one candidate has won the election. In this unprecedented, incredibly close, and intensely contested election, with legal action being pursued by both sides, it is not apparent to me who the winner is. That is why I have not "ascertained" a President-elect. In extremely close elections, state laws provide for various means to ensure that the results are correct. The Country is going through that process now. I don't intend to predict when it will be apparent who the winner is. But I am confident that we will all know and probably all agree when the winner is apparent.

In extremely close elections, state laws provide for various means to ensure that the results are correct. The Country is going through that process now. I don't intend to predict when it will be apparent who the winner is. But I am confident that we will all know and probably all agree when the winner is apparent.

Both candidates are honorable men and each is convinced he has won this extremely close race. I intend to respect the integrity of their public statements. During the last three weeks, our great American political system has faced a huge test. In my view, our system, as usual, is working. We Americans trust each other enough to believe we can get through this challenge.

Because the President-elect will have a shortened transition period, we at GSA have been working diligently to give the Transition team the tools it needs for a smooth transition. We continue to work closely with both campaigns to shorten the turnover time so that what once took a week or more can now be done in a day or within hours. We talked with both campaigns before the election to ensure we were setting up the space and systems so that they could use them productively. In the last few days we have suggested additional steps to speed the turnover – such things as creating Local Area Network and e-mail accounts and passwords, providing their staffs with remote access to the Transition intranet, preparing financial and contractual documents for goods and services their teams will need, even ordering stationery. We are acting professionally and with no bias toward either candidate, as we have been since August and will continue to do.

With so many rapid technological changes, we think that this may actually be the last transition where the transition team will need 90,000 square feet of office space and 500 computers in one location in Washington, DC. For example, staff of both campaigns are already linked in virtual space. Compare this to the last transition in which laptops were invisible and wireless technology barely existed.

We already see that many of the administrative paper-based transactions of 1992 will now be done electronically, saving time and money for the taxpayers. We think that the preparations GSA has already made, including taking advantage of technology, will help make the 2000-2001 transition, though short, a smooth transition.

Mr. HORN. Before we go to questions, I would like to hear from Ms. Katzen, the Deputy Director for Management of the Office of Management and Budget.

Ms. KATZEN. Thank you, Mr. Chairman and members of the subcommittee. Thank you for inviting me here to testify about OMB's implementation of the Presidential Transition Act. Given the events since November 7, 2000, we do not know who the next President will be. Nonetheless, much work has already been done, and we are ready to ensure that a smooth transition from this administration to the President-elect, whoever that may be, will, in fact, occur.

The Presidential Transition Act of 1963, as amended, provides for an efficient transfer of authority from one administration to the next, and it outlines specific roles for a number of Federal agencies, including GSA, the Office of Personnel Management, the Office of Presidential Personnel and the U.S. Archivist.

OMB does not have a specific role outlined in the act. Nonetheless we have been doing our part to assist in a transition process. As you know, OMB was instrumental in obtaining funding for the Presidential transition and specifically in helping secure funding in the continuing resolution so that funding would be available for our successors. Funding was, in fact, appropriated for the incoming administration, and the \$5.3 million in funds that was provided for the incoming President was apportioned by OMB and is available for GSA to release when the Administrator determines that the statutory test has been satisfied.

In addition, OMB, like every other Federal agency, is doing everything it can, preparing briefing materials on the organization, function and duties of the organization, that were referred to by the previous panel to assist the President-elect and his staff. We are preparing to share that material with the next OMB Director or other appropriate representatives of a President-elect. The delay in identifying the President-elect has absolutely not affected our work in this area.

As you know, the bulk of OMB staff are career professionals whose mission is to serve the Presidency and the Nation, not any individual President. Our senior career staff is actively working with OMB leadership to prepare for the transition. The expertise and institutional memory of OMB's career staff will be invaluable to the next President regardless of which candidate ultimately is inaugurated.

In addition, several weeks ago OMB began work on an Executive order that the President issued on November 27, 2000, creating a transition coordinating council. OMB Director Jacob J. Lew is OMB's representative and member of the Council. The Council will provide the President-elect's team with coordinated services and will ensure that we are as prepared as we can be for an orderly transition to the new administration. Specifically, the Council will oversee the transition activities of the agencies and departments and direct that training materials and orientation sessions be prepared for appointees nominated by the President-elect. In addition, the work of the Council will memorialize the process under which the President's appointees and the President-elect's appointees will collaborate during the transition process.

The administration is seeking to do whatever we can in the way of providing transition assistance on a parallel basis to both candidates. We at OMB are prepared to do our part in that process. Thank you, Mr. Chairman.

[The prepared statement of Ms. Katzen follows:]



DEPUTY DIRECTOR
FOR MANAGEMENT

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Katzen
KAT

STATEMENT OF THE HONORABLE SALLY KATZEN
DEPUTY DIRECTOR FOR MANAGEMENT
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
December 4, 2000

Mr. Chairman and members of the Subcommittee, I thank you for inviting me here today to discuss the implementation of the Presidential Transition Act. Given the events since November 7, 2000, we do not know who the next President will be. Nonetheless, much work has already been done, and we are ready to ensure that a smooth transition from this Administration to the President-elect, whoever that may be, will occur.

The Presidential Transition Act (Act) provides for an efficient transfer of authority from one Administration to the next and outlines specific roles for a number of Federal agencies, including the General Services Administration (GSA), the Office of Personnel Management, the Office of Presidential Personnel, and the U.S. Archivist.

Although OMB does not have a specific role outlined in the Act, OMB has been doing its part in assisting the transition process. As you know, OMB was instrumental in obtaining funding for the Presidential transition, and helping to secure funding in the continuing resolution—funding that would have otherwise not been available for the incoming Administration. The \$5.3 million in funds that was provided for the incoming President is available for the GSA to release, once the Administrator determines that there is a clear victor in the presidential election.

In addition, OMB, like every other Federal agency, is doing everything we can—preparing briefing materials on the organization, function, and duties of our organization—to assist the President-elect and his staff. We are preparing to share that material with the next OMB Director or other appropriate representatives of a President-elect. The delay in identifying the President-elect has not affected that work.

As you know, the bulk of OMB's staff are career professionals whose mission is to serve the Presidency and the Nation, not any individual President. Our senior career staff is actively working with the Director and other OMB leadership to prepare for the transition. The expertise and institutional memory of OMB's career staff will be invaluable to the next President, regardless of which candidate ultimately is inaugurated.

In addition, several weeks ago, OMB began work on an Executive Order that the President issued on November 27, 2000, creating a transition-coordinating council. OMB Director Jacob J. Lew serves as a member. The Council will provide the President-elect's team with coordinated services and will ensure that we are as prepared as we can be for an

orderly transition to the new administration. Specifically, the Council will oversee the transition activities of the agencies and departments and direct that training materials and orientation sessions be prepared for appointees nominated by the President-elect. In addition, the work of the Council will memorialize the process under which the President's appointees and the President-elect's appointees will collaborate during the transition process.

The Administration is seeking to do whatever we can in the way of providing transition assistance on a parallel basis to both candidates. We at OMB are prepared to do our part in that process.

Mr. HORN. We thank you very much, and before we go down the line, and I know you all have excellent ideas, I am going to stop here for some questions on the first two administration officials, and I want to put into the record a memorandum for heads of executive departments and agencies from John Podesta, chief of staff, Presidential Transition Guidance, dated November 15, 2000, and the Administrator, I know, is well aware of it because everybody has asked him on that question.

[The information referred to follows:]

November 13, 2000

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: JOHN PODESTA
CHIEF OF STAFF

SUBJECT: Presidential Transition Guidance

A number of agencies have raised questions about how they should handle requests for assistance or information by members of a Presidential Transition team. Because of the uncertainty over election results, no President-elect has been identified to receive Federal funds and assistance under the Presidential Transition Act of 1963. Until a President-elect is clearly identified, therefore, no transition assistance as contemplated under the Transition Act is available. You may continue to provide the kind of information or assistance, if any, that you typically provide to presidential candidates, and should continue to prepare for the Transition so that we are able to provide full assistance quickly to the Office of the President-elect.

Please contact Maria Echaveste, Deputy Chief of Staff, or Thurgood Marshall, Jr., Assistant to the President for Cabinet Affairs, with any questions.

Mr. HORN. And in Mr. Podesta's memoranda it says, "until a President-elect is clearly identified, therefore no transition assistance as contemplated under the Transition Act is available. You may continue to provide the kind of information or assistance, if any, that you typically provide to Presidential candidates and should continue to prepare for the transition so that we are able to provide full assistance quickly to the office of President-elect."

With that, Mr. Barram, did that memo of Mr. Podesta have any influence on your decision?

Mr. BARRAM. No.

Mr. HORN. And you stated a legal opinion, and I don't know if the staff and Members have it. Do we have it? If so, we'd like a copy of it. We'll get a copy of it so we can all see it.

Mr. BARRAM. The legal opinion I mentioned was from the Department of Justice to Beth Nolan, counsel to the President. It was fundamentally around the question that Mr. Ose raised about whether there could be money provided out of this fund for more than one candidate. And the answer, their interpretation of the law, is clearly no.

Mr. HORN. Go ahead, Mr. Gerson.

Mr. GERSON. I've looked at this as a lawyer and as a denizen, a former denizen, of the Justice Department, and I believe the Administrator is right. I remember an old contracts case in which there were two ships called the Peerless. I don't think there can be two apparent winners. That's one of the things that I think is implied by Mr. Ose's question and that you perhaps would like to address. I can speak about it later in my remarks.

Mr. HORN. Obviously one of the ways if we don't have any more signals along the way would be since the Clinton administration has funds of \$1.8 million to go out of the administration and the offices they hold, and if the Vice President was the President-elect one way or the other, or possible President-elect, he would return the \$305,000 for the Vice President's Office to the Treasury. Now, obviously one thought is if he's already got \$305,000 no matter what he does, would it not be possible to at least give \$305,000 or something in that range to the other contender for the Presidency? What do you think of that?

Mr. GERSON. My guess is that the Administrator would balk at it because as he sees his entitlement, and I think he's right, although we may disagree about how he exercised it, he is only entitled to make available the cash, space and services to the apparent winner. The other part does take care of itself, you are certainly correct about that. I think that's a matter that you want to address. I mean, had he seen it another way, he likely could have done that with respect to Governor Bush, but I think he feels constrained, and I think the plain meaning of the statute constrains him from doing what is otherwise entirely reasonable.

Mr. HORN. I am told that the Supreme Court of the United States has held that the Florida Supreme Court had no justification for extending the vote count deadline. The case was remanded to the Florida Supreme Court to explain how they came to their decision. Is that a little road stone along the way, that might get some money loose for the possible but likely President-elect of the United States?

Mr. BARRAM. Is that a rhetorical question?

Mr. HORN. No, it's a question, does that give you a little more of a signal?

Mr. BARRAM. I don't want to predict how I could decide on the apparent winner. I don't think it's going to be that complicated, frankly, and there are a lot of things going on, and they'll certainly shake out. Nobody wants to have this prolonged any longer than necessary. I don't want to say that's a little step or a big step, but obviously it's important.

Mr. HORN. Yes, Professor Zywicki.

Mr. ZYWICKI. Yes. A quick note. Section 4 of the original act says that for the outgoing President or Vice President, that the funds that the Administrator is authorized to provide are requested for a period not to exceed 6 months from the date of the expiration of his term. If the expiration of the term is January 20, one would think that the outgoing funds would not be made available to the outgoing Vice President until after that date.

Mr. HORN. Yeah. It says in section 4, as you referred to it, that it shall not become effective with respect to a former President until 6 months after the expiration of his term of office as President.

Mr. BARRAM. Actually I think it might start 30 days in advance and proceed 6 months afterward.

Mr. HORN. Well, any other questions, my colleague, Mr. Turner, gentlemen, the ranking member?

Mr. TURNER. Thank you, Mr. Chairman. I think it is a good suggestion that we have heard made by some of the members of our committee. It would be nice if we could provide both Vice President Gore and Governor Bush some assistance during this difficult period that we find ourselves in due to the legal proceedings surrounding the outcome of the election. But, Mr. Barram, I gather what you're telling us is that as you read the statute and as you've been advised by legal counsel, you don't have the option of sharing the money between the two contenders. That is not an option even available or in any way that could be construed from the reading of the act.

Mr. BARRAM. That's correct. Regardless of what I would personally like to see, that's the way I read the law.

Mr. TURNER. In fact, the language of the legislation itself actually defines for you the terms "President-elect" and "Vice President-elect." And I am reading from the act here, it says, "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."

So you're trying to follow the statute and determine who is the apparent-to-all successful candidate, and as of yet that does not seem to be apparent to any of us with the ongoing legal proceedings that have clouded the outcome of the election. Is that basically the position you've taken?

Mr. BARRAM. Yes, yes.

Mr. TURNER. It wouldn't even allow you under that language to say, I think it's probably going to be Vice President Gore or probably going to be Governor Bush, and therefore I will go ahead and release funds.

Mr. BARRAM. I took an oath to well and faithfully exercise the responsibilities of the office, and I see it that way. And I know it's not popular with some people, and it makes some people nervous, and it makes some people in GSA nervous. If Governor Bush would become the President, some people are wondering whether he would take it out on them. I don't see it that way. I think he's an honorable man. Take it out on me. You are welcome to take it out on me, but my agency has done a spectacular job of putting together the facilities, the capability, the resources, and our people are eager for a President-elect to be apparent so that person and his team can get working in our space.

Mr. TURNER. I noticed in your testimony before the committee, your written testimony, that you actually had gone back and cited in a footnote the debate on the act when it was originally passed in 1963 where Mr. Fascell, the gentleman from Florida, was asked what happens if there is a close election. And I noted that when he responded to that inquiry about what would happen if you don't know who is the winner, he said it is an unlikely proposition, which I guess turned out to be false because we have that situation today. But he said, if it were to happen—and I'm reading from page 13349 of the Congressional Record in 1963—if the Administrator had any question in his mind, any question, "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 he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress."

And as I recall, you actually cited that provision in your testimony.

Mr. BARRAM. I meant to cite the intelligent human being part. I don't know if I did. It's amazing to me how Florida figures prominently again.

I never thought when I came to Washington I would be reading the Congressional Record about discussions between Members 40 years ago, but I did read that, and some things never change. The conversation was a lot about whether we should spend any money at all, and Representative Fascell was arguing for why this was a good idea, and Mr. Gross from Iowa was saying, I don't think any of these candidates that I see coming on the scene in 1964 are going to have any trouble buying their next sandwich, so why do we have to give them any money? Things are funny how they go. They seem not to change no matter how much time goes by.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. HORN. You're quite welcome.

I now yield to the lawyers now on our side; that is, the vice chairman of the subcommittee, Mrs. Biggert, the gentlewoman from Illinois.

Mrs. BIGGERT. Thank you, Mr. Chairman.

The chairman referenced the memo from John Podesta of November 13, 2000. Do you know who he consulted with before that memo was issued?

Mr. BARRAM. Who the chief of staff consulted with? No, I do not know.

Mrs. BIGGERT. OK. But it was sent to all the executive agencies?

Mr. BARRAM. Yes.

Mrs. BIGGERT. And you received that?

Mr. BARRAM. Yes.

Mrs. BIGGERT. And I know in your testimony you spoke about the type of assistance that GSA was providing to both the Bush and the Gore teams. Could you be a little more specific about what is actually being done right now?

Mr. BARRAM. Well, we have had extensive conversations—we have a woman named June Huber, who is our career executive who is leading the GSA transition activity. She has been in constant contact with Clay Johnson and Roy Neel, and other members of the two transition teams for a couple of months, maybe 3 months now, to do a couple things; one, to make sure that each of them would have the kind of productive work space that they want. So we've been working and talking to them about that.

Mrs. BIGGERT. But one of the things that Governor Sununu mentioned, that it's very hard when you don't have the keys to the office and you don't have the space, and you have to maybe go from lawyer's office to lawyer's office, so there really is no physical space available that these transition teams could have.

Mr. BARRAM. There's no government-provided transition space.

Mrs. BIGGERT. Are you aware that they have a transition space where this is accomplished, then, if you've been meeting with these people?

Mr. BARRAM. You mean the space in Virginia that—

Mrs. BIGGERT. Yes.

Mr. BARRAM. Yes, I am aware that they have some space.

Mr. HORN. Could I take that point, if I might? The space you were going to give either one, I believe, is the one where the Y2K effort of Mr. Koskinen occurred?

Mr. BARRAM. Right.

Mr. HORN. I was told by a reporter when he leased that space, it was a \$50 million operation. I said, you've got to be kidding. Now, how long is that lease? Is anybody in it now?

Mr. BARRAM. Nobody's in it now.

Mr. HORN. And if it's empty, why couldn't we move people into it now, because we aren't going to spend much money? I think you've already got a lease with that building. Who does own the building?

Mr. BARRAM. GSA has a lease for that space, 90,000 square feet, which we are planning to turn over to a transition team soon.

Mr. HORN. What does that 90,000 square feet cost?

Mr. BARRAM. I think we're projecting \$700,000 during that period of time.

Mr. HORN. \$700,000 over what period?

Mr. BARRAM. I think it's 'til 30 days after the inauguration. That's correct.

Mr. HORN. Well, Y2K was over as of January 1999, going on 2000. Was that just a long-term lease even though we didn't have any use for it?

Mr. BARRAM. I don't think I know the answer. Nobody was in that space for a period of time.

Ms. KATZEN. I can tell you that the Y2K facility, known as the ICC, was used through at least late May, early June. There was the problem not only of the December 31 date change, but also con-

cerns about what would happen with leap year. And then there was some other problem that the technical people were concerned about. We started backing out of the space and moving things out, but I don't think it was until at least end of May, early June that the Y2K effort relinquished control of that space.

Mr. HORN. Who was put in it?

Mr. BARRAM. From May until now I don't think anybody. We have a 10-year lease with that building, I am told, and we have follow-on tenants in mind to go in there.

Mr. HORN. So the lease is already being paid regardless who is in it. So conceivably you could move at least one of the "Presidents-elect," that have come along and give them the space at \$1 a week or something? Because, I think it's not very smart for anybody to be putting their hand out to have various people want influence and this kind of thing because that's the way it will look from some nitpickiness, as Mr. Sununu said, I think, or somebody said it, that a nitpicking member of the press might take it that way.

Mr. TURLEY. Mr. Chairman, can I just interrupt for 1 second, before the Administrator leaves, I was handed a note that says that the Supreme Court has apparently ruled unanimously for Bush. I thought that might be relevant—your staff may want to confirm it before the Administrator leaves—to see how that would affect his decision not to designate President Bush as the President-elect.

Mr. OSE. Mr. Chairman, if I might interject. We have not seen the decision from the Supreme Court, and I am not quite sure it's fair to Mr. Barram to put the him on the spot.

Mr. TURLEY. I didn't mean to put him on the spot, but I expect this is a contingency that he might have thought of. If it's true, I thought it would be a relevant question.

Mrs. BIGGERT. Mr. Chairman, could I reclaim my time?

Mr. HORN. Yes. Go ahead. I apologize for taking so much of it.

Mrs. BIGGERT. I would like to ask Mrs. Katzen also about the detail of assistance, but do you know whether John Podesta acted in consultation with the President as far as his memo?

Ms. KATZEN. I do not know.

Mrs. BIGGERT. Mr. Barram, you don't know?

Mr. BARRAM. No.

Mrs. BIGGERT. Could you then return to a little more specifics on the type of assistance that is being given to the transition teams?

Mr. BARRAM. There are a lot of things that any enterprise doing what they're going to do needs to deal with. How do you pay your people? What kind of personnel services do you need? How do you lay out space? What kind of technology support do you need? For example, normal course of events would be for a tenant to plan to go into a space, and we would work with them to lay out the space. Doing it fast it might take 4, 5, or 6 days. What we have talked to both camps about is let's talk about how you might want to configure it if you were going to go in tomorrow.

So we are trying to do those kind of things in advance. We've talked to them about what kind of resume managing system would they like to have? How do you want the telephones to work? You asked me for specifics. What kind of domain name do you want on your e-mail addresses so we don't have to spend an hour or 3 hours or 2 days getting that simple thing fixed up? And that has nothing

to do with ascertaining an apparent winner. It's just mechanical, logistic stuff that we ought to do in advance.

Mrs. BIGGERT. What about, then, briefings on foreign affairs or things that might be security complications? Is this part of your job?

Mr. BARRAM. GSA's responsibility is to prepare the space, provide the support. Those kind of things you talked about are the purview of the relevant governmental agency.

Mrs. BIGGERT. Are you aware of what the other Federal agencies are doing then in this context?

Mr. BARRAM. I know that I'm aware that they're doing it. I couldn't give you specifics about what each agency is doing. I know that we at GSA have prepared a very extensive briefing book. We think we can tell our story to the people that want to know very quickly and efficiently.

Mrs. BIGGERT. Have those books been delivered to both?

Mr. BARRAM. The books haven't been delivered yet.

Mrs. BIGGERT. So they're waiting—you're waiting until there is an apparent winner.

Mr. BARRAM. Yes.

Mrs. BIGGERT. So really the only thing that has been done is what?

Mr. BARRAM. I've tried to explain all the things that we have done in preparation for the transition. We have the building space ready. We have worked very hard on the——

Mrs. BIGGERT. But there's been no actual contact where you've actually sat down with the teams?

Mr. BARRAM. I don't want to say no to that because we have spent a lot of time with the teams, but I think your question is have you started with the briefings with those teams, and the answer is no.

Mrs. BIGGERT. And, Mrs. Katzen, you would say the same thing as far as what you're doing?

Ms. KATZEN. I would make two different comments. First, with respect to national security, immediately after the conventions arrangements were made to have national security briefings for both candidates. The question of whether that was sufficient was raised, I think, by Mr. Card in a conversation with Mr. Podesta. The White House press secretary, Jake Siewert, announced at the end of last week the White House was that prepared to provide more detailed national security briefings to both parties, leading me to conclude that, where there is a time-sensitive matter requiring immediate consultation, we will be able to work our way through the problem.

So in response to your question, I do think on the national security front that more information is being shared with both of the candidates. Second is that we have——

Mrs. BIGGERT. How is that being done?

Ms. KATZEN. I don't know. It involves national security, so it would probably be handled through the National Security Advisor who was responsible for the briefings of both the Governor and Vice President's offices after the conventions. But the details of the arrangements have not been shared with me.

The second comment is that the OMB briefing books, which are quite voluminous, hopefully will be very helpful. I took some comfort from the unanimity of opinion on the preceding panel that it was important for the new people to listen to the incumbents as they describe some of the problems they had faced and some of the solutions they had thought of and were pursuing. But those books are in the final stages of preparation, and we are prepared to provide those at the appropriate time.

My own experience with the 1992–1993 transition was that kind of information wasn't really made available until late December or early January in some instances, but I think it would be desirable in a perfect world for us to do it sooner rather than later.

Mrs. BIGGERT. So the kind of assistance or information that is given to Presidential candidates would not include these types of briefings since they have not been delivered; is that correct?

Ms. KATZEN. That's correct.

Mrs. BIGGERT. Thank you.

Thank you, Mr. Chairman.

Mr. HORN. We thank you.

Before we leave that question that we posed, that Mrs. Biggert and I posed to Mr. Barram, I did not have a chance, as the other representative of the administration, Mrs. Katzen, are you familiar with the November 13 memorandum from Mr. Podesta?

Ms. KATZEN. Yes.

Mr. HORN. Did he consult you?

Ms. KATZEN. No.

Mr. HORN. Did the President consult you?

Ms. KATZEN. No.

Mr. HORN. Because we're told that both of them consulted each other as you would think, the President's chief of staff would certainly ask the President on a delicate thing. But you weren't one of them that was consulted on this?

Ms. KATZEN. That's correct.

Mr. HORN. OK. Because we're told that they all down there have consulted on it. They just won't admit it. So I was curious. Neither one of you claim that anybody asked you and you weren't consulted.

Ms. KATZEN. I would have to say that it is not customary for Mr. Podesta, the chief of staff, to consult me on each of the memos that he sends to the agency heads. So I had not expected to be consulted on this document.

Mr. HORN. Well, I would think that when you're talking Presidential transition, that cuts across the whole board. It isn't just one or two. So, OK, we will now move to Mr.—

Mr. TURNER. I have one.

Mr. HORN. Sure. The gentleman from Texas, Mr. Turner.

Mr. TURNER. I want to inquire as to one matter that caught my attention and it hasn't been mentioned yet today, and that is that in 1988 the Presidential Transition's Effectiveness Act which amended the original bill, required the disclosure of private contributions for purposes of transition. Prior to that time, there was no disclosure of any privately donated funds used by any President-elect or Vice President-elect. And I noted that in an answer to a question propounded by the committee you mentioned that the

Clinton administration actually expended \$5.2 million in transition expenses from private sources which were disclosed according to law. So I gather it's not all that unusual to have President-elects expending private funds during the transition period.

Mr. BARRAM. We only had one really significant transition since 1988. So in the transition from Reagan to Bush there was a relatively small amount raised that I noted, and in the Clinton transition there was \$5 million. I forget whatever the number was I wrote in the answer. So that's the sample.

Mr. TURNER. Does this include expenses such as those raised for inaugural parties and those kind of things, or are we strictly talking about transition expenses as we've been talking about?

Mr. BARRAM. Transition only. Inaugural is another kettle of fish.

Mr. INK. Before 1963, that's the way they raised money was through private resources. However, I think everybody will agree that was not the desirable route to follow.

Mr. TURNER. And I can appreciate that.

Now in 1992 during the Clinton transition where we were expending according to your numbers, \$5.2 million in private funds, the Federal Government had appropriated \$3.5 million for that purpose. Fortunately, we have increased that amount in the Presidential Transition Act appropriations effective for this year to \$7.1 million. So at least we double the amount that the Federal Government is willing to pay to assist in the transition. But obviously, when Clinton took office in 1992, the \$3.5 million must not have been enough to pay for the expenses of transition since \$5.2 million in additional donated funds came in to accomplish that task.

Mr. BARRAM. I wasn't here. If Mark Gearan were still here, he might tell us what they spent it on, why they needed it. But things are expensive and there's a lot of work to be done.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. HORN. The gentleman from California, Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman. I want to examine something here. Mr. Barram, excuse me. I don't know if it was Mrs. Katzen or Mr. Barram. One of you indicated that we've got a 10-year lease on 90,000 square feet costing \$50 million.

Mr. BARRAM. I didn't say \$50 million.

Mr. HORN. No, I said that, what a reporter told me when Mr. Koskinen had him in.

Ms. KATZEN. That was the total cost for the entire operation, which included not only the space, but also all of the fitting out, and all of the contractors who were hired to work for approximately 6 to 9 months, if not a year, before the date change. The whole ICC was estimated initially to be \$50 million; it was not the space alone.

Mr. OSE. So you had interior improvements, partitions, demountable and otherwise, put in within the \$50 million. The question I have, this is finished space, this is carpets, walls, all this stuff.

Mr. BARRAM. Yes, but every time you change tenants, you change a few things here and there. And in the case of the Y2K, there was a lot of equipment that was taken out. So we had to redo some of the space. So yeah, we've done a little bit of that.

Mr. OSE. Have we done any of that since late May early June?

Mr. BARRAM. In the days up to the election, we were getting that space fitted out.

Mr. OSE. In anticipation of someone occupying it?

Mr. BARRAM. Yes.

Mr. OSE. So you've had the space planning done?

Mr. BARRAM. Well, there are two parts to space planning. We've had the big spaces available. But once a tenant wants to go in, he's going to want offices in a certain configuration and technology lines drawn a certain way. We tried to anticipate as much of that as we can, make it simple, like we do for all our tenants, but there's still some of that work that has to be done.

Mr. OSE. Have either of the campaigns given you any space planning parameters?

Mr. BARRAM. We have talked with them. Only the basics, but not the details, and that's what we have been talking about with them, even in the last week, about—can you be more specific so we can be ready to hit the ground with you.

Mr. OSE. This is the issue that I'm trying to get at. Once we determine who wins or who won, then you have the space planning process. And from my experience that can be rather lengthy, and then you have your construction period. Tell me how that's going to work.

Mr. BARRAM. These days with modular furniture and moveable walls, and if we have CAD systems that help us design space much faster, we think we can do this in a very short period of time. We're talking hours and days, not days and weeks. This should not be a gating factor to somebody being efficient. We're trying everything we can to make sure that doesn't happen.

Mr. OSE. That's what I was trying to get at. I have another question, Mr. Chairman, if I might.

Mr. HORN. Certainly.

Mr. OSE. Mr. Turner referenced the act itself, and I asked this question earlier about a bar to who might be provided this assistance, and I'm looking at the act, and I followed Mr. Turner when he read it and he read it word for word, but there's nothing in here. In fact, it refers in the plural to the apparent successful candidates.

Mr. BARRAM. That's Vice President and President. That's why it's plural, I think.

Mr. OSE. Then it refers in the plural to such persons as are the apparent successful candidates, and I suggest within the body of the Congress, you might have some disagreement as to who are the successful candidates, but I'm just trying to find a way that we can start the ball rolling for whomever wins. And with all due respect, I see Mr. Gerson shaking his head.

Mr. GERSON. I wish you were right, I really do, because what you're suggesting is entirely reasonable. But what I think I heard the Administrator say, and I believe I heard him correctly, he is correct that the operative terms "President-elect" and "Vice President-elect" are then defined as such persons as are the apparent successful candidates. That's the way that the statute reads. Let me say in saying that I'm a textual literalist. I believe in following the plain meaning. I think the Administrator could have come to a different decision. On the other hand, I think if you want to do the thing that you want to do, you can do one or both of two things.

One, you can change the statute for the future; and two, the House can deal with it as a special appropriations matter as you are still in session. But I think that even though we are on opposite sides of the track on much of this, the Administrator's reading of the literal words of the statute is correct. As I said, I don't think he applied the term correctly, but in that regard "persons" means President and Vice President. I don't think there is a doubt about it.

Mr. OSE. Mr. Chairman, when we get around to considering this, I would suggest that the word "apparent" offers the opportunity for an interpretation that would allow at this juncture, in a circumstance such as we've enjoyed today, so to speak, it would allow the apparent candidates to have access to this space. Somehow or another the business of the country has to be addressed. This has to move. I mean, this is the United States of America that we're talking about.

Mr. HORN. Well, I agree with you, especially when the space is already leased. There isn't an extension just for the President-elect and Vice President-elect. They've got the space.

Mr. OSE. If we have to, I'll go out there with my Magic Marker and I'll draw a line down the middle of the room, and we'll put one on one side and the other on the other. I don't care. But somehow or another we've got to break this.

Mr. HORN. In the British tradition of a shadow cabinet.

Mr. OSE. Thank you, Mr. Chairman.

Mr. HORN. Any questions from my colleagues before we move down the line with Mr. Gerson. We don't want to lose the precious talent we've got here. We might run through this several times in the next few decades. Anything to add, Mr. Gerson.

Mr. GERSON. Not at this time.

Mr. HORN. OK. We'll start with Mr. Light then.

Mr. GERSON. Oh, I'm sorry. You meant in terms of additional—

Mr. HORN. I'm sorry.

Mr. GERSON. I would like to say something if I could.

Mr. HORN. Yeah, go ahead.

Mr. GERSON. I would address what I think were the real questions. Let me note at the outset two things, that there's a certain symmetry in my following, Mrs. Katzen. We have been opponents, we've been colleagues, but at the end of all of this, like Mr. Ose's daughters, we'll still be the same. We'll still be friends. And I say also while I'm here in a purely private capacity, I know that the Bush/Cheney camp bears no ill will to the Administrator whom they believe is trying his mightiest, given the way he reads the statute and is providing a substantial assistance within the bounds that he feels he can. So I want to make that clear as well. He's not on the spot. I think it's all of us who are. While I respectfully disagree with him, I certainly think that he's acting honorably.

In sum, it's my view that this subcommittee will likely want to consider clarifying amendments to the act. I believe that the act already provides the authority and the obligation to the Administrator to fund and support the transition to the administration led by Governor Bush and Secretary Cheney, whom I believe are the apparent winners of the 2000 election. At the same time, given the vagaries of the statute and the dearth of definitional guidance that has been provided, it is understandable why the Administrator has

been reticent in committing to the expenditure of resources at this time. We've learned a lot in recent weeks that we didn't think we needed to know about in regard to the conduct of elections, and the very narrow question that brings this particular panel together fits into that category.

I would say, though, at the outset that I think the questions addressed to the previous panel are at least as important, perhaps more important with regard to the need for collegiality in the actual transition. It was in this room while I was serving as the acting attorney general at the beginning of the Clinton administration that a now-departed Member of Congress, he's still alive but he's no longer a Member of the Congress, said under the watchful eye of Mr. Brooks, with whom I had actually consulted on the issue that this other fellow thought was so controversial. He said, I thought we had an election to get rid of people like that, Mr. Gerson, who still seems to think that he's running something. That aside, the need for collegiality between ingoing and outgoing administrations cannot be underestimated. At the same time, though, I think John Sununu was absolutely correct in saying you need the facilities in order to get it done too, and I think that's an important issue.

In all of the functions that encompass a transition—I've been involved in several on either side as part of an incoming administration, on part of an outgoing administration and then sort of with my feet in both camps in 1992, 1993 it's readily apparent that the national interest is best served by a vigorous transition effort that begins early and allows an incoming administration to gain mastery of the activities of the governmental departments and put in place the competent individuals able to serve the public forcefully and properly starting on day one, the day that the administration formally takes office.

The understanding of this need for promptness pervades the legislative history of the act. And recent history has shown especially where there is a change of governing political parties, that this is a matter of continuing national importance.

The Act defines the operative term "President-elect" and "Vice President-elect" as the apparent successful candidates. And here, Mr. Ose, I wanted to address in a different way, I think, the point that you very legitimately are trying to raise. The use of the conditional word apparent as opposed to some other word voted in by the electoral college or something else, strongly suggests that the drafters of the statute knew that the Administrator's determination could be upset by subsequent events both related to the electoral process and otherwise. Given the use of that term in the statute, I suggest respectfully that the Administrator could have determined that the Bush-Cheney ticket were the apparently successful contestants once the election returns in Florida were so certified by the secretary of state of Florida. At that point, the ticket had apparently 271 electoral votes, a majority sufficient to assure ultimate election.

In declining to proclaim the success of the Republican ticket, the Administrator has cited a number of things, one of which was the exchange that Mr. Turner pointed out in his questioning between Mr. Fascell and his interlocutor. These exchanges exist, but that

doesn't substitute for what actually gets written into a statute. And what the statute said is something that's conditional that is subject to opinion and to determination.

Now, again, I respect the decision that the Administrator has made, while I might disagree with it, and hence, I think that there are things that you might want to address. One is changing the nature of this altogether, and creating a statute or changing the statute to the point that it can encompass the events that we have today, an election which the sum is too close to call, which it certainly has equivocal aspects to it where it makes all the sense in the world for the very points that have been made since Lyndon Johnson himself was the majority leader of the Senate, and so spoke to this very bill, that you need to get running early, quick and hard, and that's one thing that you might wish to do.

The second thing, of course, is to change the definition to something clearer. And the third is to alter or remove this idea, that there is discretion in the Administrator that is otherwise unreviewable. Now, I don't know how a court would determine it. We've had too many lawsuits, and nobody is suggesting that anybody sue anybody, but there ought to be clearer guidance, and it ought to be clear that there is at least a potentially reviewable external decision that would allow for the encompassing of the vagary of the term that the Congress itself chose, "apparent," not absolute, not scientifically certain, clinically certain or anything else but apparent. With that, I ask that my formal remarks be made a part of the record and I thank the chairman.

[The prepared statement of Mr. Gerson follows:]

Testimony of Stuart M. Gerson, Esquire

Regarding the implementation of the Presidential Transition Act of 1963, as amended.

Epstein Becker & Green, PC
1227 25th Street, NW, Suite 700
Washington, DC 20037

Before the Subcommittee on Government Management, Information, and Technology of
the Committee on Government Reform

December 4, 2000

Mister Chairman, as someone with substantial experience in presidential transitions, I appreciate the opportunity to discuss with you the question of the authority of the Administrator of the General Services Administration under the Presidential Transition Act of 1963, as amended.

In sum, it is my view that, while this Subcommittee likely will want to consider clarifying amendments to the Act, the Act itself currently provides the Administrator with both the authority and the obligation to fund and support the transition to an administration led by Governor George W. Bush and Dick Cheney, the apparent winners of the 2000 election. At the same time, given the vagaries of the statute and the dearth of definitional guidance that has been provided, it is understandable why the Administrator has been reticent in committing to the expenditure of resources at this time.

We all have learned a great deal in the past several weeks about issues with which we never had been particularly concerned before. These lessons -- ranging from the expected operation of the indirect presidential vote in just the manner that the framers of the Constitution envisioned, *i.e.*, providing a political offset to the power of the most populous areas, to the

vagaries of the hanging or dimpled chad -- will provide us with further fuel for an election law agenda that will occupy much of our attention in the next few years.

Another such issue, the one that brings us here, has to do with the authorization granted to the Administrator of the General Services Administration under the Presidential Transition Act to provide facilities and funds to an incoming presidential administration.

In the 1988 transition to the administration of President George Herbert Walker Bush, I led a transition team concerned with national and international financial institutions supported by the United States. In the 1992 transition to the administration of President Bill Clinton, I served first as an Assistant Attorney General briefing my political successors but, in part because of difficulties in the transition process itself, I then served as acting Attorney General, counseling the new administration and then passing the baton, and a good deal of information, to the finally-confirmed Attorney General, Janet Reno.

In each of these functions, it was readily apparent that the national interest is best served by a vigorous transition effort that begins early and allows an incoming administration to gain mastery over the activities of the various governmental departments and to put in place competent officials able to serve the public forcefully and properly, starting on day one, the day the new administration formally takes office. The understanding of this need for promptness pervades the legislative history of the Act and recent history has shown, especially when there is a change of governing political parties, that it is a matter of continuing national importance.

Many commentators have contrasted the relative ease with which the administration of President Bush was able to take office in 1988, Bush having been of the same party as his predecessor, President Reagan, and having been able to undertake a prompt transition, with the difficulties incurred in 1992, by the Administration of President Clinton, whose party had been

out of office, in getting its nominees in place and completing its transition to office. Those problems would have been even more acute had there been pronounced delay in ascertaining whether, in 1992, Mr. Clinton had been the successful candidate.

The Act defines the operative terms “President-elect” and “Vice-President-elect” 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” The use of the conditional word “apparent” suggests strongly that the drafters of the statute knew that the Administrator’s determination could be upset by subsequent events, both related to the electoral process and otherwise. Given the term used in the statute itself, I respectfully suggest that the Administrator could have, and should have, determined the Bush-Cheney ticket to have been the apparently successful contestants once the election returns in Florida were so certified by the Secretary of State of Florida. At that point, the Bush-Cheney ticket apparently had 271 electoral votes, a majority sufficient to assure ultimate election.

In declining to proclaim the “success” of the Republican ticket, the Administrator fluctuated among a number of rationales in his apparent need for clinical certainty. In particular, he considered whether to wait for the Electoral College results or a concession declaration. He also focused upon an exchange in the legislative debate in which a sponsor assured an interrogator that the Administrator could withhold transition funding if he had any doubt about the election results. This, however, was not the standard employed in the statute itself, and the exchange has little, if any, value in legal analysis.

I should note immediately that, while I believe that the Administrator should have made a different decision – putting the demonstrated need for a prompt transition ahead of the understandable drive for scientific certainty – the nature of the complicated and equivocal post-

election legal battles gives one a great deal of sympathy for the Administrator's non-action. This is not a case, therefore, where one would recommend legal action against the Administrator to resolve the issue; there have been more than enough lawsuits filed and the public interest hardly would be served by yet another one.

However, the nature of the issue that has arisen suggests that this Subcommittee might do well to consider two potential amendments to the Presidential Transition Act. First, some attempt should be made further to define the words "apparent successful candidates" or to substitute a different benchmark altogether. It is clear that the conditional nature of the qualification should continue because it is not, in my opinion, in the national interest as defined frequently by Congress to wait until the Electoral College has voted before allowing a presidential transition formally to begin. I think the term should be subject to fair debate and hence do not offer much further suggestion beyond noting that the operative term should be an objective one subject to as little interpretation as is possible. Thus, for example, "success" could be pegged to the States' certification processes, irrespective of later potential challenges.

Second, it should be made clear that the Administrator's determination is subject to potential review and is not committed to his sole discretion. It is probable that, under the federal Administrative Procedure Act, 5 U.S.C. § 553, a court would, if necessary, hold that such a determination is reviewable because there is nothing in the plain language of the law that states that the matter is committed entirely to agency discretion. However, as a protection against arbitrariness and capriciousness, the Subcommittee might well wish to consider legislative clarification to note that the standard should be easier to apply and that decisions under it are subject to review.

These are unusual times but they should not be allowed to pass without gathering and acting upon the wisdom that we can achieve in dealing with the previously-unforeseen events that they produce. In the instance of the Presidential Transition Act, it is clear that the GSA Administrators of the future might benefit from some legislative assistance.

Thank you, Mr. Chairman. I would be happy to respond to any questions.

Mr. HORN. I might say, and I should have the minute we introduce you, that your full remarks are automatically put in the record.

What's concerned me on some of this is several weeks ago after the election, and after a number of States did get most of their ballots through the system, Mr. Card, the designated chief of staff by Governor Bush, phoned the White House and never got any answers for a long time. Now, apparently, that's changed. But what worries me is, are they just trying to make life tough for their successor? It seems to me that when they raised \$5 million or so back in 1993 to do a lot of this, they certainly ought to know what the problems were. And I would think that they would try to get a lawyer that put a broad stretch to this law. It might not be as clear as it should be, but just say hey, let's give them the space.

Mr. GERSON. Well, I don't disagree. Ms. Katzen is from OMB, and she knows more about the expenditure of public funds than I do. But conceivably, if you're looking to push the envelope a little bit, that might relate to the ability, for example, of GSA to lease the space at a marginal rate, given the real estate realities that two or three members of this subcommittee have already pointed out. There may be other ways to address it. I want to be clear that what I'm addressing is this statute, and I think it does have problems, and we're experiencing those problems. That's not to say that there are not some interstitial solutions that might practically be available, the press and other inquirers notwithstanding, I think we all know how the public interest best would be served, and that would be to provide as much information to whomever might be the incoming administration as is usually possible to do.

Ms. KATZEN. Mr. Horn, I simply wanted to respond to the speculation that there may be some thought in the west wing that we should make it more difficult for the incoming administration. And I have to unequivocally and absolutely say that is not the case. The President made it very clear before the election that he wanted to make the transition as smooth, as helpful, as constructive as possible. You heard during the earlier panel discussions about there not being computers in the west wing in 1993 and in some of the other Executive Office of the President facilities. You heard about a number of other things that did cause us problems, and the President was determined that this would be a constructive, helpful, supportive transition. Any thought that any action that we are taking is designed to make it tough on the new guys is just not founded.

Mr. HORN. Well, I'm sure they are when they work for you, but there's a lot of people around this place downtown.

So, let's see, any other questions on this? Then we'll move to Mr. Light. Oh, go ahead. The gentlewoman from Illinois, Mrs. Biggert.

Mrs. BIGGERT. One thing is that if either the Bush team or the Gore team is using their own finances to do this, and then later becomes the President-elect, will they be reimbursed for funds that have been used, private funds that have been reimbursed?

Mr. BARRAM. The law is I think clear that you can't—until the Administrator ascertains the apparent winner, money cannot be expended. So money spent before couldn't be reimbursed. One of the things that I comfort myself with as a citizen is that in lieu

of the conversation earlier about how much money the Bush team is going to raise and the Gore team would raise, I imagine to supplement the amount of money that you have appropriated, hopefully it will settle out soon enough so that money will get to be spent on the front half. We'll see.

Mrs. BIGGERT. Would you recommend clarifying that law or do you think that it's proper the way it is?

Mr. BARRAM. Oh, sure. If you want my personal opinion, I'm not hung up on the ability of the Administrator to make and ascertain an apparent winner. I think the real serious issue in America is the kind of voting machines that we have. So that is something to worry about.

I would also be happy if the Congress were to tackle the question that Mr. Ose was raising, and others, that there ought to be a way to split this money and have enough available in this unusual circumstance. You know, Representative Fascell was right; it's unusual for this to happen. It isn't going to happen that many more times. So you don't get to burden yourself thinking if we had twice as much available in this kind of a situation that we're going to be breaking the Republic. It's not going to happen that way. I just think the law makes it impossible for me to do anything that, to use Mr. Gerson's words, would be common sense.

Mrs. BIGGERT. Thank you. Let's hope it doesn't happen again soon.

Mr. HORN. Thank you very much. We now get to Paul Light, director, Center for Public Service at the Brookings Institution. Mr. Light is probably one of the finest commentators on the executive branch in the country. So we look for your wisdom.

Mr. LIGHT. Well, I'm afraid to say right off the bat that we're now looking at another statute that I encountered earlier in my career and worked on as a staff member of the Senate Governmental Affairs Committee.

Mr. OSE. Mr. Light, can you move that microphone closer, please?

Mr. LIGHT. I guess we're now on. I was saying that this is another statute that I worked on earlier in my career as a staffer for Senate Governmental Affairs. And I don't recall ever having looked at the apparent successful candidates problem. We didn't think it would come up. We didn't focus attention on it at all. We embedded in the 1988 Presidential Transitions Effectiveness Act disclosure requirements as a condition of taking transition funds, the President-elect and Vice President-elect would agree to disclose the sources and purposes of their private fundraising. And luckily, Governor Bush and Secretary Cheney have agreed to disclose, even though they don't have to.

I should acknowledge at the very beginning here that we wouldn't be arguing so much about the value of this space for the transition if GSA hadn't done such a terrific job in developing and preparing this space. If this space were down at the Navy Yard and it hadn't been done so well, I'm suspecting that we might have a transition elsewhere anyway. June Huber and her staff have done a terrific job and the Administrator is to be congratulated for his leadership in pushing the agency to be prepared on time.

I should say that, you know, in 1988 when we did have the Transitions Effectiveness Act hearings Dante, Fascell did testify. His testimony showed the primary purposes of the 1963 act again to be that we have a prompt start to the transition, that we move quickly to provide the President and Vice President-elect access to resources that could help them get a hold of government. It was also designed to drive private funding out of the transition business. The authors of the 1963 act worried about the amounts of private fundraising going on and they thought it was untoward that the President-elect should be in that business.

I do not believe we are yet at a crisis point in the transition. We would have spent the last 3 weeks doing the enrollments, getting things set up, picking the Cabinet members, but we are reaching the point of crisis. I believe within the next half week to week and a half, we are at a point where action to basically define the apparent successful candidates will be needed if we're to have a successful transition and successful first year in government.

I should say that our primary concern at the Brookings Institution and at the Presidential Appointee Initiative which is housed at Brookings is the appointments process; that delays currently in the startup of the transition have a multiplier effect further on down the line. There will be no difficulty here with the President-elect, Vice President-elect, nominating and securing the confirmation of their Cabinet secretaries and senior-most officers. That's not the problem. The problem is not at the very top of the Federal Government in terms of the appointments process. The problem is at the second, third, fourth, and fifth vertebrae of the Federal hierarchy where you have an onslaught of positions that you need to fill in order to take firm hold of the Federal establishment. That is the deputy secretaries, under secretaries, assistant secretaries, and Administrators who occupy the neck of the Federal Government.

As I've said elsewhere, we are at risk not of having a headless Federal Government next year but a neckless Federal Government, meaning that we won't have the connections between the leadership of the Federal hierarchy and the career work force. I think that is a serious problem which should motivate us as we try to resolve this dispute.

In my testimony I take a look at the legislative record. I am not a legal scholar, I'm a legislative scholar. My reading of the record is that the Administrator could have made two choices last week, both of which would have been fine. He could have made the decision to allow the transition to begin. I believe that he had the statutory authority to do so, and I believe there's embedded in the statute and in the record appropriate support for deciding that there were apparent successful candidates that he could let the transition begin. I also believe that he could have denied the transition funding, as he did, but not for the reasons that have been embedded in the ongoing conversation of these last few days.

I do not believe it is an appropriate reason for denying transition support that we just have a close election; for in fact, the drafters of the statute had just been through one of the closest elections in American history, and Dante Fascell, every time the discussion turned to the issue of doubt about close elections, when the con-

versation turned to the issue of allowing the Administrator authority when he had a doubt to say no, Dante Fascell talked about the fact that there had only been three close elections in America in the whole of American history.

I believe by that statement the representative from Florida qualified the authority to deny funding in close elections. Closeness by itself did not create the presence of a demand that you not release the transition funds. It was closeness of a type. I believe the Administrator does have the authority to deny transition funds in the close election, but he needs to make painfully clear exactly what the conditions are in a way that does not allow future losing candidates to deny the transition funds by merely contesting an election.

That's not to say that the Gore contest is ill founded. It's to say that we need a definition of apparent successful candidates that does not put the power in the hands of the losing candidate to deny the beginning of a transition that the drafters of this bill felt was so important to taking hold of government. Thank you.

[The prepared statement of Mr. Light follows:]

IMPLEMENTATION OF THE 1963 PRESIDENTIAL TRANSITION ACT

TESTIMONY BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION,
AND TECHNOLOGY

PAUL C. LIGHT

THE BROOKINGS INSTITUTION

DECEMBER 4, 2000

Clight
CIT

Thank you for inviting me to testify before the Subcommittee regarding the recent decision by the General Services Administration to deny the release of funding under the 1963 Presidential Transition Act to representatives of the Bush-Cheney presidential campaign. There has been considerable confusion regarding the definition of just who are the "apparent successful candidates for President and Vice President" eligible for funding under Title 3, Chapter 2, Section 102 Notes.

Let me address six questions in an effort to clarify the meaning of the words "apparent successful candidates" under Title 3, Chapter 2, Section 102 Notes. Because the legislative reports accompanying H.R. 12479, the Presidential Transition Act of 1962, and H.R. 4638, the Presidential Transition Act of 1963, do not contain any definition of terms, my answers are based solely on the relatively brief June 25, 1963, floor debate in the House of Representatives.

1. What was the original purpose of the 1963 Presidential Transition Act?

There were two purposes of the 1963 Act, one primary, one secondary. According to Section 1, the act was primarily designed 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." The statute clearly warns that "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."

The act also had the secondary effect of sharply reducing the need for private money to support what Congress clearly defined as a public responsibility. As Florida Rep. Dante Fascell argued during the House floor debate on July 25, 1963, "It just does not seem proper and necessary to have [the President- and Vice President-elect] going around begging for money to pay for the cost of what ought to be legitimate costs of Government...." Congress clearly believed that the cost of presidential transitions should be borne by the public, not by what New York Rep. Benjamin Rosenthal called "special interests...anxiously coming forward to help pay government expense."

2. When did Congress want the transition funding and assistance to start flowing?

It is clear from all documents surrounding passage of the 1963 act and its later amendments that Congress intended to provide transition support to the winning candidates well before absolute certainty is reached by the Electoral College on December 18. The authors of the act understood the trade-off between absolute certainty and the need to begin the arduous transition to governing.

3. Who is responsible for determining the "apparent successful candidates?"

Congress was absolutely clear that the Administrator of the General Services Administration, not the President of the United States nor the White House Chief of Staff, would decide when and if to begin spending dollars and providing assistance under the 1963 Presidential

Transition Act. Congress believed that the decision was ministerial, not political, in nature, and viewed the General Services Administration as one of several federal agencies that would make such determinations as part of the ordinary exercise of discretion following even close elections of the kind the nation had experienced in 1960 when a mere 114,673 popular votes separated the winner from the loser. Indeed, the basic language regarding the apparent winner was drawn from Public Law 87-829, which allows the Secret Service to provide protection for the president- and vice president-elect.

4. Did Congress expect the Administrator's decision to be difficult?

Rep. Fascell clearly believed that the decision surrounding the declaration of the apparent successful candidates would not be difficult. Referring to Public Law 87-829, Fascell noted that "Secret Service and the Secretary of the Treasury have had absolutely no difficulty in determining who the President-elect or Vice-President elect might be, so far as carrying out the administrative duties under that law is concerned. Therefore, I do not see why the General Services Administrator should have any difficulty under the pending legislation." Earlier in the debate, Fascell had made specific reference to the 1960 election, noting that it was "as close as we would want to have an election and nobody had any trouble in deciding who was the apparent winner."

There are at least two explanations for Fascell's view. First, Fascell may have believed that the determination of the apparent successful candidates was easy because the winner would be easily identifiable through the projected electoral college vote. Second, Fascell may have believed that the determination was easy because most presidential elections result in absolute clarity regarding the outcome. There is some evidence in support of both positions. Fascell clearly believed that the apparent winner would almost always be easy to identify, but also recognized that there had been at least three elections in American history when transition assistance would not have been given.

5. Did Congress anticipate the current electoral impasse?

Congress accepted the possibility that the future might hold another very close election in which transition funds and assistance would be denied due to an "un-apparent" victor, as the General Services Administration recently described the current situation. At least according to Rep. Fascell, such elections would be rare, indeed: "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. In the whole history of the country, we have had only three close elections and I do not think there is any great problem." Although he did not define the three, Fascell almost certainly meant the elections of 1800, 1824, and 1876, but not 1888, in which Grover Cleveland won the popular vote, but lost the election to Benjamin Harrison in the electoral college.

The question is whether the election of 2000 falls into the narrow class of elections that would have given Fascell and his colleagues pause. Yes, the 2000 election produced an exceedingly

close popular vote, and, yes, only a few electoral votes will ultimately divide the winner from the loser. But close through it was and contested though it still is, this election did not produce a tie (1800), a plurality among multiple candidates (1824), or the presence of extensive fraud and voter intimidation (1876). As Fascell appeared to argue, transition funds and assistance can be released to the apparent successful candidates even in an exceedingly close election, whether measured by popular vote (e.g., 1960) or electoral vote (e.g., 1916, in which Woodrow Wilson won the presidency by a mere 23 electoral votes).¹ Viewed through this lens, “apparent successful candidates” appears to mean candidates who can lay legitimate claim to the number of electoral votes needed for victory.

6. *What if the Administrator of the General Services Administration has a doubt about the outcome?*

Although Rep. Fascell did not expect the determination of the apparent successful candidates to be difficult, he assured his colleagues twice that the Administrator would be free to withhold designation “if there is any doubt in his mind, and if he cannot or does not designate the apparently successful candidate.” The key instruction came late in the floor debate immediately after Rep. Fascell referred again to the potential for a close election.

In the whole history of the country, there have only been three close such situations [SIC]. 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.

Clearly, the current Administrator has a doubt about who won, as do many Americans. The question before this Subcommittee, however, is whether doubts based on continuing legal challenges are permitted as a reason for denying funds and assistance under the 1963 statute.

My answer is two-fold. First, the Administrator was given broad authority to withhold funding and assistance in close elections, particularly when doing so would give the presidential and vice presidential candidates what Iowa Rep. Harold Gross called “psychological and other advantages” that might influence independent, or faithless, electors. As Rep. Fascell explained, “in a close contest, the Administrator simply would not make the decision.”

However, Rep. Fascell tempered that discretion when he noted twice that there had only been three close elections in the whole of American history. Merely having a close or contested election is not enough to merit a denial of funds and assistance without further explanation as

¹ If Bush prevails in the current contest, he would win the electoral college by 4 votes; if Gore prevails, he would win by 46.

to how such an election is either similar to the three elections Rep. Fascell referred to, or would constitute the fourth election in Rep. Fascell's list.

Therefore, I believe the Administrator of the General Services Administration could have reached two equally plausible conclusions last Monday:

1. The Administrator could have concluded that the election of 2000, while close and contested, had still produced a presumed winner of the electoral college vote, and was not yet in the narrow class of three previous elections that allow doubt under the legislative record, limited though that record is. In the spirit of the 1963 Presidential Transition Act, the Administrator could have named the apparent successful candidates, and would have been well within his discretion in doing so.

2. The Administrator could have concluded that the election of 2000, while having produced a presumed winner of the electoral college vote, was either in the narrow class of three previous elections that allow doubt or constitutes a fourth election to be added to that class.² Despite the need for speed in transition planning, the Administrator could have explained how designation of the apparent successful candidates either would have bestowed "psychological and other advantages" on the designees or would have been a breach of his obligation to withhold assistance in the event of justifiable doubt.

Unfortunately, the Administrator of the General Service Administration reached neither conclusion. Instead, in a November 9 press advisory, his agency said that the losing candidate would have to concede before it could determine the "apparent successful candidates." In a November 27 press advisory, his agency dropped the concession requirement and said that continued legal challenges by both candidates rendered the election outcome "unclear and unapparent." Both definitions would give future losing candidates extraordinary authority to delay transitions through legal challenges, whether legitimate or frivolous.

Ultimately, the purpose of the 1963 Presidential Transition Act was to minimize the disruptions that might be occasioned by the transfer of the executive power. Time, not money, is the precious resource in a transition, which is why Congress allowed the Administrator to make a determination of the apparent successful candidates long before the electoral college meets. As New Jersey Rep. Joelson explained, the president-elect probably

²It is instructive to note that new research by political scientist James E. Campell concludes that the election of 2000 is, in fact, the closest election since 1828, ranking just ahead of the election of 1876. See James E. Campell, "The Curious and Close Presidential Campaign of 2000," unpublished paper, November, 2000.

makes more “fateful decisions” during the transition than after he is sworn into office. “The Gentleman from Iowa wants to know whom this bill benefits. I believe it benefits the people of America. It makes a good system perfect.”

That is why the denial of benefits should only occur under the most extreme and uncertain of circumstances. That is also why this Subcommittee should take action to clarify the terms governing release of transition funds and assistance in future campaigns. That may mean stating in no uncertain terms that a certified electoral college majority is enough to trigger release of funds and assistance under the 1963 Presidential Transition Act, or a dual release to both campaigns in the event of a contest. But there must be clarity. I urge this Subcommittee to provide it.

Thank you.

Mr. HORN. Thank you. Are there any questions? The gentleman from Texas, Mr. Turner.

Mr. TURNER. I was just reading Mr. Fascell's testimony or his remarks in the debate as you were referring to him there. And I may have missed a little bit of what you said, but it did strike me in reading the full description of the debate that one of the issues that was discussed in some detail was the concept raised by Congressman Haley that in fact under the Constitution, the President-elect and Vice President-elect are determined officially after the electoral votes are counted in the Congress.

And so it seems to me that one of the purposes of the 1963 legislation was to enable someone who was the apparent winner to begin to receive funds prior to that date. But it does also seem logical to assume that the use of the word "apparent" was designed to remedy what would otherwise be a problem if we said that we're going to provide transition funds to the President-elect, who is in fact only determined when the electoral votes are counted by the Congress.

So, and I read the reference that was mentioned with regard to there being only three close election situations that you referred to, but it was only a sentence after that where Mr. Fascell made the statement in which he said "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."

In another section of that debate the question is raised, which perhaps is the question that we haven't talked about here but is so obviously apparent, when Congressman Haley said, "And if there is any doubt in his mind, and if he cannot and does not designate the apparently successful candidate, then the act is inoperative. He cannot do anything. There will be no services provided, no money expended." Mr. Fascell says, "certainly."

Mr. Gross in this debate asked the question which I think is perhaps on all of our minds. He says, does not the gentleman—referring to Mr. Fascell—think that those designated as President and Vice President by the present Administrator of General Services would be given psychological or other advantages by designating them as President and Vice President? Mr. Fascell says, "I do not think so, because if they were unable at the 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."

So it seems just from reading the totality of the testimony that what the words "apparent President-elect" meant was that it would be apparent to one of common intelligence as to who the winner is; and if there was any doubt in the mind of the Administrator where there is discretion placed, then he would simply not make the decision.

Now, that may not be the best outcome, and I certainly agree with my colleagues who suggested that perhaps we ought to look at amending the act to allow some funds to flow to both candidates in this very difficult circumstance. But I certainly can understand

where Mr. Barram came up with his conclusion not to expend public funds in a circumstance as clear as this bill seems to be to me.

Thank you, Mr. Chairman.

Mr. LIGHT. I wish that Representative Fascell had not, after saying these things, said that there were only three such situations in history, because that then tempers his broad grant. Now, it's a thin brew we're dealing with here in legislative history. We don't have anything in the legislative record really, the Senate and House reports that accompanied this legislation, to really give clarity here. All I suggest is that the Administrator needs to come forward and say one of the following two things: He needs to say, look, the election of 2000 is like the elections of 1800, 1824, or 1876 in the following ways, and therefore meets the test of one of the such close elections, as Representative Fascell said; or it's unlike the very close election of 1960 in which Jack Kennedy won the Presidency by 114,000 votes; or it's unlike the election of 1888 in which we had a popular vote winner who lost the electoral college. That's all the Administrator need do.

The problem for Congress is that it's likely the Administrator would end up saying the reason why it's like this—you know, why we can declare this a close election as Fascell—as Representative Fascell said, is that the loser has filed a challenge, and that puts the power in—or the apparent losing candidate, or the possibly losing candidate, or that somebody has filed a contest, and you end up putting the power then in the hands of the person who may not be the winner to deny the transition funds.

I think you need to legislate on that so that in the future we don't create a situation where people who are behind by very large distance don't try to tie up the transition in an unfair or frivolous way.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. HORN. I might say just for the record, put in the word “apparent” from Random House Unabridged Dictionary, second edition, 1993, and that's about when you came to town, Mr. Administrator. And I'm going to give you this and see if you can find the way to, now that we have a court decision, that this fine facilities which GSA has, and has a lease on, and is there, could be utilized. So put that in the record, without objection, and give it to the Administrator.

It seemed to me—I know you're leaving the GSA and those were long plans that you had, and we wish you well on that. So don't go so far. You could make a lot of people happy if you just said hey, a new factor has been in and we ought to get this going, because otherwise we are going to be in a mess if we have to wait until the electoral college is coming up and that's certainly a major step in the road.

But I just make that as a suggestion, because there's got to be lawyers in the administration that say yes, because they sure said yes to a lot of things. And there are also the “no” type lawyers, and you know about that. So we need a “yes” lawyer as opposed to a “no” lawyer.

And anyhow, Mr. Light—

Mr. BARRAM. Are you suggesting a no lawyer policy?

Mr. HORN. I had long ago suggested that one. But I'm being delicate this morning.

Mr. Light, we appreciate all your thoughts on this. Mr. Turley has to leave here and I want to get him in before the last three witnesses. So, Mr. Turley, go ahead.

Mr. TURLEY. Thank you, Mr. Chairman. I apologize that I have a slight cold.

Mr. HORN. Put the microphone a little closer. And Mr. Turley is the Shapiro professor of public interest law at the George Washington University School of Law.

Mr. TURLEY. I appreciate the indulgence of the committee and the indulgence of my co-panelists in allowing me to go out of order. I am sorry that I have to leave the hearing. I am very honored to have the chance to speak to you on this subject. It's a subject, obviously, of considerable importance.

I'd like to start out by saying, as with many of the people at this table, I don't have a dog in this fight. I do have a considerable academic interest in its outcome. With regard to its outcome, I should note that I have the opinion of the Supreme Court here, which was faxed to me during these proceedings. The Supreme Court indeed did unanimously rule in favor of Governor Bush in the sense that it has reversed and sent this issue back to the Florida Supreme Court. That ruling was very narrow and it turns on the lack of clarity as to whether there's a Federal question in this issue. So it will be sent back to the Florida Supreme Court for a determination on that question.

What that means is that doubt will be prolonged as to who is the rightful President of the United States. Now, there has been great discussion about the transition to the Presidency, and I think that we're at a point today where we have to speak frankly on that subject. When we had our first transition in 1791 from George Washington to John Adams, the transition was a relatively modest affair. In 1800 there were less than 4,000 people in the executive branch. Today there's almost 6,000 people in the White House alone. There's over 3 million civilian employees and there's roughly 140 agencies. The incoming President has 11 weeks to try to fill the necessary vacancies in this government to carry out the mandate given to him by the people.

Governor Bush is at greater peril than Vice President Gore in this regard. Vice President Gore has the benefit of a continuity of policy and party. There are also great pressures upon Governor Bush because of the concerns raised as to the needs for reform, particularly when it comes to the White House. I have a recent article in Maryland Law Review detailing the many issues for transition that have to be looked at as to the White House alone. Those issues will largely stay in abeyance during this point of uncertainty.

Ultimately we are left with the Presidential Transition Act of 1963 and the language of an "apparent" successful candidate. This act is extremely curious and is possibly the worst statute I have ever read in my career. I direct a legislative project. If a student had handed me this statute, I would have sent the paper back without a grade in deference to that student.

Frankly it is bloody ridiculous to have a constitutional system that labors through checks and balances as to when we announce who the President is. We go through a bicameral process and various contingencies to guarantee in our system that these significant political questions are dealt with in the legislative branch. That's where James Madison wanted most things that divided us to be answered. But weeks before that decision is made in the electoral college, an unknown Federal official takes an intestinal check and determines whether he will announce one candidate is the apparent successor or another. I submit that's simply absurd. I have no idea why the law was written this way, except that the law was written for extremely good constitutional weather and terrain. Ironically, we have a Constitution that's built for the worst possible scenarios. It took Congress to write a statute to introduce a flaw into that system. That's what this statute represents.

I disagree to some extent with the statements made as to proper interpretation of this statute. Yet, I have great sympathy with the Administrator. I expect that he probably would have liked guidance and he would like to do anything to have this bitter cup pass from his lips.

I also am sympathetic with this subcommittee. This was not your drafting, and you are dealing with a problem that you inherited. It's a problem I hope that you will solve. I listed various possible changes that you can make in legislation to make this problem go away.

The reason the Supreme Court decision today is relevant is because the interpretation by the Administrator leaves you with one obvious question: When do extrinsic actions or rulings get to the point that an Administrator is satisfied as to the outcome? That's the problem here. We don't know if the Administrator is waiting for the Supreme Court. I expect that he isn't, because at issue in the Supreme Court is not a determinative question as to who is the President of the United States. I assume that he is not waiting for the ruling of the circuit court judge as to Leon County, and I assume he's not waiting for Seminole County. But that's the question: It's not clear what we're waiting for. That's the central flaw in the statute.

What is clear is that our present status is wholly at odds with the intent of Congress. Congress wanted to avoid these 11 weeks being frittered away when we have very serious business to get to. It also wanted to avoid the need to raise private funds. We have now realized both of those dangers in this crisis. I agree that you cannot divide up the funds. This Administrator does not have that authority given to him by Congress. If he makes the decision that he has made, it is not clear what the judicial review is. This is the first statute which I have searched to try to find a basis for judicial review. It's obvious that this would probably go to a fallback under the APA. But once you go to an APA review, I'm not too sure what the court would ask. Short of announcing that Ralph Nader is the apparent President of the United States, I don't see much of a basis for a court to reverse a decision, even a bad one by the Administrator.

I will quickly note the three suggestions that I have made in my written statement. First, this Congress should change the law so

that the GSA Administrator does not make this determination. The position of the Administrator has no relevant constitutional or legal function. It should rest either in the Attorney General or a specially designed commission.

Second, the Congress should lay out language that clearly sets forth how we deal with this type of controversy. It can do that in two ways. It can either allow for a dual-track transition, which is an easy issue and would be cost efficient. The government in such circumstance as this could give initial funding to start the transition. As an alternative, it could allow a candidate to spend private funds with the understanding that there is a qualified indemnification provision, so that, if you are in fact successful in your challenge, the Federal Government will in fact pay for those costs. We have that already in some analogous provisions dealing with litigation and executive branch officers. Either of those would alleviate out current problems.

Finally, the Congress needs to make these responsibilities mandatory, and not discretionary, so that we have meaningful judicial review. I am very encouraged that this subcommittee on a bipartisan level has recognized that we are in a rather absurd situation. That absurdity can be rectified. However, I would note that this is not a weakness in our constitutional process, which is remarkably strong; it's a weakness because we tried to improve upon it. We were acting in good faith, but we acted with the worst possible means. I strongly encourage you to enact legislation to correct these problems.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT

OF

JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY

COMMITTEE ON GOVERNMENT REFORM

THE UNITED STATES HOUSE OF REPRESENTATIVES

"THE IMPLEMENTATION OF THE PRESIDENTIAL
TRANSITION ACT OF 1963"

DECEMBER 4, 2000

PREPARED STATEMENT
OF
JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Thank you, Mr. Chairman.

Mr. Chairman, members of the Subcommittee, my name is Jonathan Turley. I am a professor at George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law.¹ I greatly appreciate your invitation to discuss the presidential transition and the implementation of the Presidential Transition Act of 1963.

Due to the fast-moving course of events in our election controversy, I was only asked on Thursday to appear before your Subcommittee. Accordingly, due to the limited time available, I have not been able to present a more comprehensive written analysis on a question that goes to the heart of much of my scholarship on “legisprudence” or the role and proper use of statutory interpretation.² Legisprudence is an academic area that

¹ As should be obvious, I appear today strictly in my academic capacity. The views expressed in this statement, and in the course of the hearing, are not made on behalf of CBS News or any other organization or client with whom I am currently employed.

² See, e.g., Jonathan Turley, A Crisis of Faith: Congress and The Federal Tobacco Litigation, 37 Harvard Journal on Legislation 433 (2000)

Testimony of Professor Jonathan Turley

Page 2

touches on constitutional and policy implications of statutory interpretation ranging from separation of powers issues to economic analysis of the law. I also have a long-standing interest in presidential power and the separation of powers as an academic³ and as a litigator.⁴ I do not, however, represent

(exploring constitutional and legisprudence issues surrounding the tobacco litigation); Jonathan Turley, Through a Looking Glass Darkly: National Security and Statutory Interpretation, 53 Southern Methodist University Law Review 205-249 (2000) (Symposium) (interpretation of statutes in the area of national security); Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 Hastings Law Journal 145-275 (1992) (interpretation of statutes in the area of transnational regulation); Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Northwestern University Law Review, 598-664 (1990) (same); Jonathan Turley, Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 Boston University Law Review 339-364 (1990) (same); Jonathan Turley, The Not-So-Noble Lie: The Nonincorporation of State Consensual Surveillance Standards in Federal Court, 79 Journal of Criminal Law and Criminology 66-134 (1988) (interpretation of surveillance statutes on the state and federal levels).

³ See, e.g., Jonathan Turley, Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege, 60 Maryland Law Review ___ (2000) (Symposium) (discussing the loss of presidential privilege during the Clinton presidency); Jonathan Turley, "From Pillar to Post": The Prosecution of Sitting Presidents, 37 American Criminal Law Review ___ (2000) (discussing the constitutional issues surrounding a prosecution of a sitting president); Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 Duke Law Journal 1-146 (1999) (discussing the constitutional issues relating to impeachment, including Article II issues); Jonathan Turley, The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies, 77 North Carolina Law Review 1791-1866 (1999) (discussing the constitutional issues relating to impeachment, including Article II issues); Jonathan Turley, Congress as Grand Jury: The

Testimony of Professor Jonathan Turley
Page 3

or consult with either the Bush or Gore campaigns or their respective political parties. To be blunt, I do not have a dog in this fight, though I have a considerable academic interest in its outcome.

This brief statement is intended to give the Subcommittee a general overview of my thoughts on the issues surrounding the Presidential Transition Act of 1963. I would be happy to supply further written testimony to address other issues that arise in the course of today's hearing.

As you know, the concept of a formal transition process with public support is a relatively new idea. Historically, American presidents were left to their own devices – and their own political coffers – in arranging for

Role of the House of Representatives in the Impeachment of an American President, 67 *George Washington University Law Review* 735-790 (1999) (Symposium) (discussing the constitutional issues relating to impeachment, including Article II issues); Jonathan Turley, Reflections on Murder, Misdemeanors, and Madison, 28 *Hofstra Law Review* 439-471 (1999) (Symposium) (discussing the constitutional issues relating to impeachment, including Article II issues); Turley, Through a Looking Glass Darkly, *supra*, at 205-249 (discussing the constitutional and jurisprudence issues relating to national security cases and statutes).

⁴ For the purposes of full disclosure, past cases dealing with presidential power issues or executive privilege include my representation of four former U.S. Attorneys General in opposition to “the protective function privilege” asserted by the Clinton Administration. In re Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998); see also Susan Schmidt, Starr Wins Appeal in Privilege Dispute; Secret Service Fears Dismissed by Court, *The Washington Post*, July 8, 1998, at A01; Meet the Press, NBC, July 19,

Testimony of Professor Jonathan Turley
Page 4

their entry and departure from office. This was certainly a modest challenge back in the 1797 transition from the administration of George Washington to that of John Adams. The size of the executive branch was smaller than the bureaucracies of many of our major cities. In 1800, the Executive Branch employed less than 4000 people in a handful of federal departments.⁵ Today, it holds more than 3 million civilian employees in over 140 federal agencies.⁶ As the size and complexity of the Executive Branch has grown, we have seen a steady increase in the expenditures and time needed for a responsible transition into office.⁷ New administrations were forced to seek campaign or party funds for such transitions, raising both practical and policy concerns in Congress.

In 1963, the Congress enacted the Presidential Transition Act of 1963⁸ to assist future administrations in taking or leaving office. Congress

1998 (exchange between Professor Jonathan Turley and former White House Counsels Jack Quinn and Leon Panetta).

⁵ See Jonathan Turley, "From Pillar to Post": The Prosecution of American Presidents, *American Criminal Law Review* (2000) (forthcoming).

⁶ Id. at n. 171.

⁷ For example, in 1992, the Clinton Administration processed 20,000 resumes for new positions in its transition efforts. Charles W. Holmes, Agency that Frustrates Transfer of Power is Caught in Middle, *The Atlanta Journal and Constitution*, November 29, 2000, at 8A.

⁸ P.L. 88-2777, March 4, 1964; 78 Stat. 153; 3 U.S.C. 102.

Testimony of Professor Jonathan Turley
Page 5

amended the Act in 1988 in the Presidential Transitions Effectiveness Act to increase the federal support for transitions. Recently, Congress enacted additional changes in the Presidential Transition Act of 2000, to allow for additional support from the General Services Administration (GSA).⁹ Taken as a whole, these enactments offer the President-elect and Vice-President-elect resources in the form of detailed federal employees, office space, computer systems, and other support needed to handle the massive task of laying the foundation for a new administration. Since this task must be carried out in a mere eleven weeks after the election, the federal law presupposes a fast track in implementing the transition process. However, the gatekeeper to this entire system of offices and support is a single political appointee, currently GSA Administrator David Barram, who has the sole authority to recognize the successful candidate in a presidential race under the Act. Given the current controversy, that discretionary decision has been withheld and, as a result, the elaborate machinery for transition sits idle. At the moment, a 90,000 square foot office with 500 computers, telephones, copying machines and other supplies sits empty as precious time

⁹ See generally Stephanie Smith, Presidential Transitions 1960 – 2001, Congressional Research Service Report, November 7, 2000.

Testimony of Professor Jonathan Turley
Page 6

ticks away toward inauguration day.¹⁰ This is more of a problem for Governor Bush than it is for Vice President Gore. It is easier for a sitting Vice-President to make the transition to the presidency due to the continuity in party control and policy. This was reflected in part the Presidential Transitions Effectiveness Act of 1988, which called for \$250,000 to be returned to the Treasury when a sitting vice president is elected to the presidency.¹¹ For Bush, the loss of critical weeks in the transition is a legitimate matter for concern, if not alarm. The loss of the critical period for transition creates a likelihood that the new administration would have widespread vacancies in federal positions as it tries to carry out significant changes in policy. Even with a smooth transition period, we have seen such a steady increase in the nomination and confirmation of federal appointees.¹² Particularly with an evenly divided Senate, the transition period is of paramount importance to a Bush Administration.

¹⁰ Holmes, *supra*, at 8A.

¹¹ §6(a)(2) (“any amount appropriated pursuant to this paragraph in excess of \$1,250,000 shall be returned to the general fund of the Treasury in the case where the former Vice President is the incumbent President.”). In part, this reduction reflects the decreased cost of shipping and travel of a Vice-President to his home state or chosen new residence.

¹² Even with the Act being implemented fully in the first Clinton Administration, the average appointee was confirmed over eight months into the new Administration, up from a mere 2.4 months in the Kennedy

Testimony of Professor Jonathan Turley
Page 7

The federal law governing the transition period was always viewed as a mere administrative measure that delineates the proper responsibilities and resources for assisting the entering and departing administrations. For that reason, until this controversy, there has been virtually no academic attention to this previously uncontroversial act. Upon review, however, the legislation presents some rather curious and troublesome elements. While there is some indication that a few members contemplated a contested election in the consideration of the original legislation, the language of the statute treats the question of determining a successful candidate as presumptively self-evident and easily ascertainable.

The Act creates a unique power in the hands of the Administrator of the General Services Administration. Ironically, our constitutional system has struggled with the proper determination of the winners in presidential elections, including protracted controversies in such elections as the Hayes/Tilden election in 1876.¹³ We have intricate bicameral provisions in both the Constitution and federal law for addressing various contingencies

Administration. Larry Wheller, White House Transition Will Be Difficult, Gannett News Service, November 29, 2000, at 1.

¹³ Jonathan Turley, History Shows Ballot Fights Can Wound Presidents, USA Today, November 13, 2000, at 31A.

Testimony of Professor Jonathan Turley
Page 8

in selecting a president and vice-president. All of these contingencies involve political judgments and debate to guarantee an open and deliberative process on a question of tremendous national significance. Yet, before the electoral college even meets, a single, relatively unknown federal officer has been given the discretionary authority to determine to his own satisfaction who is the legitimate winner in a presidential election. This one official then bestows some of the official trappings of office upon a candidate, including detailed federal employees, mailing privileges, and other official resources. It is this official who will declare a winner, a task left in the Constitution to Congress. While it is true that this declaration only relates to certain financial and administrative benefits, it is troubling to see such a significant symbolic and practical act performed on the basis of the “ascertainment” of one political appointee. This is not a constitutional defect as much as a troubling anomaly within our system.

The Act offers no guidance as to how this one official is to make such an important decision. The Act simply states that

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 the President and Vice

Testimony of Professor Jonathan Turley
Page 9

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 2.¹⁴

This leaves no cognizable basis for judicial review of a discretionary judgment of a single political appointee who holds a position without any relevant constitutional or legal qualification. Short of a designation of Ralph Nader as president, it is hard to see how a court would view the decision of the Administrator.

Consider the current circumstances. The Administrator has withheld his designation of the President-elect due to pending litigation surrounding the Florida electoral votes. However, the Florida Secretary of State has certified Florida's votes as going to Governor Bush. The Administrator, therefore, is basing his decision on his own judgment as to the merits of litigation to challenge that certification. This creates a dangerous precedent. There is always a chance for litigation and many states have "contest" periods after certification of the final votes. In this case, the Administrator is effectively stating that he is satisfied that the legal claims of Vice

¹⁴ § 3 (c).

Testimony of Professor Jonathan Turley
Page 10

President Gore have sufficient merit to withhold his statutory designation of the winner for purposes of the Presidential Transition Act. Such a judgment could be arbitrarily made in any case in which lawsuits are brought against a certified winner. The Administrator is only required to designate "the apparent successful candidates," a remarkably ill-defined and subjective standard.

The decision of Administrator David Barram is particularly troubling because the Congress clearly considered it to be in the national interest that a transition begin soon after the election. Congress could have easily set the date for the beginning of the transition after the formal voting of the electoral college but viewed time to be of the essence for a modern transition to begin. This decision is critical in the interpretation of the statute. 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. Thus, if a candidate

**Testimony of Professor Jonathan Turley
Page 11**

or a voter brings a substantive legal action in California, any election short of a landslide could be placed into doubt – resulting in a delay of presidential transition.

It is unclear what results the Administrator is waiting to confirm in the litigation over Florida's election. Obviously, the Administrator cannot wait for the vote of the Electoral College without defeating the purpose of the Act. Yet, if the judicial rulings are viewed as decisive, it is difficult to judge a point at which the Administrator would be clearly satisfied.

Currently, it is unlikely that the Supreme Court will clearly designate a winner in this dispute. Rather, the outcome of the Florida challenge will rest with the Florida courts and ultimately the Florida legislature. Will a negative ruling against the Gore campaign by the circuit judge in Leon County be sufficient or will the Administrator wait for review by the Florida Supreme Court? How about Seminole County and the collateral legal actions by Gore supporters? Each of these cases could conceivably flip the state, and its electoral votes, for Vice President Gore.

Alternatively, the Administrator may view his function as “handicapping” the odds on the outcome for either candidate. Yet, in such a calculation, the odds greatly favor Governor Bush since his party controls both the Florida

Testimony of Professor Jonathan Turley
Page 12

legislature and at least one house of Congress. Governor Bush holds the determinative “end game” options, if his party exercises its options correctly and not prematurely.

I am not without sympathy for Mr. Barram in his matter. He may have preferred greater guidance in the statute to avoid such a suddenly high-profile role in this controversy. My concerns are not directed at Mr. Barram’s motives or integrity. Rather, the current federal law creates an unacceptable and potentially destabilizing power in the hands of a single official without meaningful guidance or opportunity for judicial review. At a minimum, the Congress should consider a different system with more concrete provisions to handle election controversies. With the caveat that these are only initial thoughts, I would like to suggest a few possible considerations for the Subcommittee.

First, the Administrator of the General Services Administration is a bizarre choice to make any designation of an apparent winner in a presidential election. Such authority should rest with an office with a more relevant constitutional function, such as the Attorney General, or with a bipartisan commission designated for this task. The Administrator should then be given a certification by that office or commission to release the

Testimony of Professor Jonathan Turley
Page 13

funds and resources. This duty on the Administrator to release the funds and support should then be made mandatory, not discretionary.

Second, any designation of an apparent winner should be based on criteria that is objectively ascertainable and allows for meaningful judicial review. Any certification of votes before December 12, 2000 can always be subject to challenge. However, the Presidential Transition Act is premised on the need for a fast-track implementation that starts immediately after the election – to fully utilize the mere eleven weeks available for transition. Regardless of whether the new authority to designate a presumed winner is held by the Attorney General or a commission, the Congress should make a designation mandatory upon the certifications of the votes in each state, and not any anticipated successful challenge to such certification.

Third, the Congress should allow for controversies like the present circumstance. Two alternatives are possible: a dual-track transition process or a qualified indemnification provision. Under the first option, it is possible for Congress to allow for dual-track transition offices where neither candidate has received a majority of votes in the electoral college or a given state's votes remains in controversy. Pending a vote under the Twelfth Amendment or a judicial ruling, precious time would be lost to

Testimony of Professor Jonathan Turley
Page 14

both candidates. In such rare circumstances, it may be cost-efficient to allow for some public resources for both candidates to lay the groundwork for their possible administrations. The appropriation of an additional one or two million dollars in such circumstances would be cost-justified. Alternatively, the Act should make it clear that a candidate can spend privately raised money for transition in anticipation of a final legislative or judicial judgment. This money would be reimbursed if the candidate is ultimately successful in assuming the presidency. Candidates who are challenging certifications would then proceed at their own risk and expense.

No federal law will entirely erase concerns during electoral controversies. It is inherently problematic for any candidate to receive a federal designation as the apparent winner before the meeting of the electoral college and subsequent joint session of Congress. However, the current law could not have handled this problem in a more ill-suited manner. The casual language for a single official to designate a winner based on his "ascertainment" of an "apparent" success is maddening. It is also in sharp contradiction to traditional approaches to issues of public controversy. Our Constitution often funnels controversies into the

Testimony of Professor Jonathan Turley
Page 15

bicameral legislative branch.¹⁵ Framers like James Madison assumed the worst in terms of factional disputes and creates a process for majoritarian resolution. However, where our Constitution is based on worst-case scenarios, this law appears designed for only the best electoral conditions and terrain. The open-ended discretion given to this largely unknown federal official reflects an assumption that the successful candidate will be either self-evident or that the Administrator's decision will be generally accepted. In fact, in any contested election, such a decision will inevitably become a political milestone for the candidates and political parties. Yet, in a system renown for its redundant safety values and checks, this one law allows for an unchecked and potentially unreasoned decision with significance to the entire nation.

The flaws in this law have remained dormant for 37 years. Unfortunately, the reason that this law has attracted no prior academic interest is that it deals with a matter that arises only every four years and rarely involves serious dispute. Regardless of how we resolve the current controversy, I hope that the Subcommittee will act to correct this legislative error and not leave the problem for a later, unwitting Congress to address.

¹⁵ Jonathan Turley, [A Vote of Congress May Offer Real Political](#)

Testimony of Professor Jonathan Turley
Page 16

It is inevitable that we will discover design flaws in our laws under the intense pressure of an election crisis. It is important that we correct those flaws to better guarantee a smooth transition of power in the future. There is no margin for ad hoc or casual decisions in a presidential transition. Our statutory laws must buttress our constitutional process, not introduce instabilities that were never contemplated, let alone intended, by the Framers. This is a flaw that we introduced and it should be our highest priority to remove it from our political process.

I would be happy to answer any questions that the Subcommittee may have on my testimony.

Mr. HORN. Mr. Turley, I'd be delighted to have any language you wish to submit. We won't grade it.

Mr. TURLEY. I would be delighted to submit it, sir. Thank you. Mr. HORN. If you can get it to us this week, we're going to move on it, or this next 24 hours, so we would appreciate it.

Mr. TURLEY. I will get it to you within a couple of days, sir.

Mr. HORN. OK. All right. Thank you. And I know your colleagues will be handing this up here.

And our next speaker is Todd Zywicki, the associate professor of law at George Mason University School of Law.

Mr. ZYWICKI. Thank you Mr. Chairman, distinguished representatives, it's a pleasure for me to be here to speak on the Presidential Transition Act of 1963. I'm just a law professor, I've never participated in a transition like some of my colleagues have, and if the price tag is \$10,000 to \$60,000, I doubt my wife will ever let me undertake such a situation. So I'm going to just talk on the law.

And as I interpret the Presidential Transition Act of 1963, unlike some of the other people that have spoken today, I don't see any ambiguity in this act. I think that it is my opinion that under the facts of the current situation, the Administrator's refusal to release the transition resources to the Bush-Cheney transition team is inconsistent with the language, the policies, and the scope of the discretion afforded the Administrator under the act.

We've heard reference to some of these things, but I think it's worth fleshing them out to understand this. As you said, the plain language of the act is that the Administrator is supposed to release the funds to the apparent successful candidates. "Apparent successful candidate" is not a defined term in the statute. But there are some things that are clear from the statute and are clear from the congressional debate surrounding enactment of the statute. First, it is obvious that the mere fact that contingencies may intervene that may mean that the apparent candidate is not the actual winning candidate at the end of the day does not change the fact that the apparent successful candidate is still the apparent successful candidate. The legislative history and debates are peppered with discussions about what happens, for instance, if you have faithless electors, electors that pledge to vote for one candidate, and on the day vote for another candidate. Does that undermine the fact that when they pledge to elect the President, that this is the apparent successful candidate? No, it does not. The fact that they may switch their vote does not undermine the fact that it is in fact an apparent successful candidate.

As was discussed during the debates, Congressman Fascell remarks on the close election point, "The gentleman previously pointed out in the last election 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." During the 1960 election, of course, my understanding is that Richard Nixon had litigation going in several States, I think I've read as many as 11 States after the election, recounts were ongoing for weeks if not months. Florida—or Hawaii didn't complete their recount until late December. There was litigation and recounts ongoing for weeks after the 1960 election. And Congressman Fascell says nobody had any difficulty

determining that John Kennedy was the apparent successful winner in that election.

You can imagine all kind of different contingencies that might arise in addition to recounts and litigation. You can imagine, as I said, court challenges, faithless electors, any variety of contingencies could intercede that would make it such that the apparent successful winner does not actually turn out to be the actual winner.

Second, I think under a functional interpretation of the policies, I don't think we need to dwell on this, but it's obvious that the apparent successful winner is in fact the Bush-Cheney team. There are two policies that are embedded in here. First is for an orderly and speedy transition. Second is to insulate the process from the appearance of impropriety arising from having to rely solely on private funding.

Clearly as to the first one, an orderly and speedy transition, this suggests that there is a one-way street built into this legislation, that money can be replaced, time cannot. So that the idea is that there is a reason why we swiftly and promptly determine who the apparent successful candidate is and release the money.

Second is concerns about reliance on the private funds. My understanding is that the Bush-Cheney team has undergone heroic actions well exceeding what is provided for under the law in order to prevent that from happening, from actual influence being a problem. But the perception is what the drafters were concerned about first. And second they were concerned about the fundamental unfairness of this—this is a governmental function. They defined it, the transition, as a governmental function. It is simply unfair and inappropriate to have that be held hostage purely to private funds.

So what this all means is that if you look at the legislative history and the plain language, it is clear what they have in mind is a majority of pledged or certified electors is sufficient and mandatorily triggers the apparent successful candidate provisions of the statute, and the fact that might later be reversed does not change that result.

Finally, there's been question about the scope of the Administrator's discretion. I think if you read the statute in its full context, and the legislative history is clear what we are talking about, is very, very narrow—narrowly circumscribed and limited discretion to make a predicate factual finding that one candidate is the apparent successful candidate. Under standard—this isn't a court of law, but under standard legal principles, a factual finding of that sort must be supported by substantial evidence. There is really—there is certainly no substantial evidence that anybody other than Governor Bush is the President-elect. And there is no substantial evidence that Governor Bush is not the President-elect, given that he has 271 pledged and certified electoral votes.

Also, the Administrator is clearly a primarily ministerial actor, under this act at least. It is simply absurd to think that Congress would define the Administrator's obligations under this act as being ministerial in scope and then give gigantic discretion on the front end to determine when he has to release the funds. It is simply in this—to some extent is related to what Professor Turley said. It is simply not a reasonable understanding of the statute to think

that they meant for the Administrator to have sort of a free-ranging portfolio to make that sort of determination.

I see I'm over time, but I might ask if I could have leave for a minute or two just to comment on some of the other arguments that have been made with respect to the law.

First, I do agree that regardless of whether or not Governor Bush is named the President-elect, Vice President Gore cannot be called that. I don't think there's any basis for that, which would respond to Congressman Ose's question about whether or not we could release funds to both. I checked, and in fact for the Vice President, in response to your question, Mr. Chairman, the time period does begin 30 days. It was amended in the 1988 version.

There's an interesting colloquy in the legislative history that specifically talks about a question to Mr. Fascell was posed: What if we have a candidate who is three or four votes shy in the electoral college? And Congressman Fascell specifically replied "no," if they're basically three or—if they don't have the majority of the electoral college, there is no basis for considering such a candidate to be the President-elect. The clear implication being if they do have a majority, that it would be appropriate.

Finally on these isolated bits of legislative history that have been taken out of context, I believe, with respect to what it means—with respect to a close election, first, I cited the specific recognition that the 1960 election, where in fact we had a lot of litigation and other recounts that threatened to upset the result, was not considered to be the sort of thing that interfered with the designation of an apparent winner. Most importantly it's a standard technique of statutory construction that floor statements, especially isolated floor statements taken out of context, cannot contradict the plain language and the reasonable construction of the statute.

I think if you look at the full legislative history in historical context of this statute, I believe that the Administrator's reliance on those provisions that he relies on is simply unfounded. First is the reference, as I said, the question was posed: What if we have a candidate who's three or four votes shy of having majority? The response was, Mr. Fascell's response that the—in that situation the Administrator would have no discretion to release the funds.

The second one that is relied upon is the one on page 13348, the reference to a close election there, if you read the question that was posed to that, it had special historical significance; which is the question that Mr. Fascell was responding to, was a question of Mr. Gross which says we apparently have a situation growing up in certain States of the Union whereby there may be independent electors. That is a clear reference to the 1960 election and the situation in the early 1960's.

In the 1960 election, a number of independent Democratic electors were named who then voted for Harry Byrd rather than John F. Kennedy for President. It is clear what he was talking about is electors who are not pledged or certified to any particular candidate but are running on a position that they have independent discretion to vote their conscience; the idea being that then the southern States could then use them to broker a deal with either the President of either party to throw their electors to whichever

one they thought would give them what they wanted on the obvious issues that were dividing the country at that time.

Clearly what this is, again, is a reference to a situation where you cannot predict that any candidate has a majority of electors. Both of those situations are references to situations where no candidate has a majority of pledged or certified electors. So I think that reference to those close elections is taken out of context. Read in full context, it supports a reading that the Administrator is mistaken in this situation and that the plain language and the policies of the statute further support that conclusion.

Thank you.

[The prepared statement of Mr. Zywicki follows:]

**STATEMENT OF PROFESSOR TODD J. ZYWICKI
GEORGE MASON UNIVERSITY SCHOOL OF LAW**

3401 N. FAIRFAX DR.
ARLINGTON, VA 22201
703-993-8091

**TESTIMONY ON THE
PRESIDENTIAL TRANSITION ACT OF 1963**

Presented to the
Subcommittee on Government Management,
Information, and Technology of
the Committee on Government Reform

December 4, 2000

Bio

Professor Todd J. Zywicki is a recognized expert in constitutional law, constitutional history, and commercial law at George Mason University School of Law in Arlington, VA. Prior to joining the faculty, Professor Zywicki practiced with Alston & Bird in Atlanta, Georgia and taught at Mississippi College School of Law in Jackson, Mississippi. He is the author of over 25 published articles law reviews and peer-reviewed economics journals.

Professor Zywicki has appeared on PBS's The NewsHour With Jim Lehrer, CNN's Burden of Proof, NPR's Dianne Rehm Show, Bloomberg News, and numerous national and regional newsradio programs. His columns and comments have appeared in many national newspapers, including *USA Today* and *Christian Science Monitor*. Professor Zywicki has testified on before committees of the United States Senate and the United States House of Representatives on issues of constitutional law and commercial law reform.

Professor Zywicki received his J.D. from the University of Virginia, a Master's Degree in Economics from Clemson University, and his undergraduate degree cum laude with distinction in his major from Dartmouth College. After graduating from law school, he clerked for the Honorable Judge Jerry E. Smith on the United States Court of Appeals for the Fifth Circuit.

12/15/00 Zywicki
SJK

The Presidential Transition Act of 1963

Distinguished Representatives, it is an honor to testify before you today on the issue of the Presidential Transition Act of 1963 (the "Act"). The Act provides 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"). For FY 2001 GSA is authorized a total of \$7.1 million for the upcoming transition: \$1.83 for the outgoing Clinton Administration; \$4.27 million for the incoming administration; and \$1 million for GSA to provide additional assistance as required by the recently-enacted Presidential Transition Act of 2000.

George W. Bush and Richard Cheney have requested that the Administrator of GSA (the "Administrator") order the release the resources that are allocated to be made available for the incoming administration. The Administrator has refused to release those funds to any incoming administration, including the Bush-Cheney transition team, "until the results are clear, and as long as both sides are going to court, the results are not clear yet." It is my opinion that under the facts of the current situation the Administrator's refusal to release transition resources to Bush-Cheney transition team is inconsistent with the language, policies, and the scope of discretion afforded to the Administrator under the Act.

Plain Language

Section 3 of the Presidential Transition Act of 1963 authorizes the Administrator, upon request, to provide to the President-elect and Vice-President "necessary services and facilities" to effectuate the transition of the President-elect to become President. The current debate centers 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. (emphasis added)

The refusal of the Administrator to release the transition resources to Bush-Cheney apparently derives from his determination that they do not satisfy the definitional criteria for being named the President and Vice-President elect in that they are not yet the "apparent successful candidate" for those positions.

The Act does not define the phrase "apparent successful candidates" but the plain language of the statute and standard principles of statutory construction provide some evidence of the statute's meaning. 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 clearly contemplates and calls for disbursement as early as the day after the general election if an apparent successful candidate can be identified.

Clearly then, the statutory language indicates that the use of the term “apparent” means something distinct from the “actual” or official winning candidate.

The most plausible understanding of when a candidate has become the “apparent successful candidate” is when one candidate has secured a sufficient number of certified or pledged electors so as to meet the constitutional requirements for being elected President. This state of affairs accurately describes the situation with the Bush-Cheney transition team. 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. See <http://www.nara.gov/fedreg/elctcoll/2000certa.html#begin>. 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. Thus, under the plain language of the Act, Governor George W. Bush is the “apparent winning candidate.”

It is also evident that by using the term “apparent” Congress recognized that it might be possible that some contingency might intervene that might cause 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, ranging from the death of President-elect during the transition period, electoral fraud that overturned an election, ballot recounts that change the result after the initial general election, or “faithless” electors who violate their pledge and vote for a different candidate than the one for whom they promised to vote. Any of these contingencies could occur in any Presidential election; there is no reason to believe that they are intended to upset the designation of an apparent successful candidate when one can be identified.

The Administrator’s office has stated that it will not release the transition resources until “the results are clear” and that the results will not be clear until all contests relating to the Florida election has been 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 there. 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. Given that Governor George W. Bush has received a sufficient number of electoral votes no question remains that he is, in fact, the *apparent* winning candidate.

This crucial distinction between the apparent and actual successful candidate is evident in the legislative discussion surrounding the enactment of the Act. Floor exchanges, of course, are a disfavored form of legislative history. Nonetheless, they can be helpful in amplifying the plain language of the statute, although they cannot be used to contradict the plain language. One floor exchange during the debate is especially illuminating, and so is reproduced 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 case 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.

Congressional Record – House (July 25, 1963), p. 13349 (emphasis added).

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* successful candidate after the Congress counts the ballots in the electoral college. Congressman Haley and Congressman Fascell also recognize 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.” *Id.* Where, for instance, no candidate has earned sufficient pledged and certified electoral votes to be elected President, it is obvious that there is no apparently successful candidate and the Administrator may not designate one.

But this hypothetical situation is not the case here. In the current case, Governor Bush in fact *does* have 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.

Congress certainly believed that the inquiry generally would be routine and would be amenable to resolution by objective facts of the type present in this case. 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 [1960 Presidential election] 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.” Congressional Record – House (July 25, 1963), p. 13348 (emphasis added). In the 1960 Nixon-Kennedy Presidential election ballot recounts and court challenges continued throughout the country for a substantial period of time after election day. But even though the *actual* result of the election remained in question for a great deal of time, Congressman Fascell observes that “nobody had had any trouble deciding that [Kennedy] was the apparent winner.” The mere possibility that Nixon’s challenges might later overturn the original results was not sufficient to cast doubt upon Kennedy’s obvious status as the apparent winner.

Under the plain language of the Act it is evident that the designation of Florida’s electors by the Florida Governor made Governor Bush the “apparent winning candidate” of the election by giving him 271 certified and pledged electors. It is certainly possible to imagine numerous scenarios that might result in Governor Bush not being the actual winning candidate. For instance, some electors could conceivably turn out to be faithless electors, breaking their pledges to vote for Governor Bush and thereby throwing the election into Congress or giving a majority of electoral votes to Vice-President Gore. Or, ballot recounts or post-election litigation might result in Governor Bush losing electoral votes that were previously pledged or certified to him. Nonetheless, these contingencies do not change the fact that he is obviously the *apparent* winning candidate, even though he may not turn out to be the *actual* winning candidate of the election.

Functional Analysis

A functional analysis confirms the conclusion that the Act requires the Administrator to release transition resources to the Bush-Cheney transition team. First, 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 be released immediately to the Bush-Cheney transition team.

The primary purpose of the Act is “to promote the orderly transfer of executive power in connection with the expiration of the term of office of a President and the inauguration of a new President.” Presidential Transition Act of 1963, §2. The Act arose from a bipartisan study conducted during the Kennedy administration, which recognized the importance of an orderly and 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. As the Act provides, “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*.” *Id.* (emphasis added).

Disruption or delay in effectuating a transfer of power to the apparent 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 would substantially handicap a new President's ability to govern and pursue policy objectives during the first year of his term. Indeed, news reports indicate that this concern explains some of the recent difficulties on Wall Street and in the economy generally. 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. The harm feared by Congress in enacting the Act is 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 that delay in 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. By contrast, releasing the funds to the apparent successful candidate will not create irremediable 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 history of the Act indicates a second policy goal that suggests the need for the Administrator to promptly release the transition resources to the Bush-Cheney transition team. 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 in the nature of a governmental or quasi-government expense that should be funded by the federal government, rather than by political parties or private donors. See Statement of Mr. Rosenthal, Congressional Record – House (July 25, 1963), p. 13346; Statement of Mr. Monagan, *id.* at 13347. 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."

Id. at 13346. The purpose of this bill 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 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.” *Id.* at 13346. 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 the 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 . . .” *Id.*

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 indicate that this is exactly the choice that confronts the Bush-Cheney transition team today. Unable to gain access to the funds designated by the federal government to effectuate a transition, the Bush-Cheney transition team has been forced to turn to private donors for money to fund their transition. It should be stressed that it appears that the Bush-Cheney transition team has taken every possible step to insulate the transition from improper influence arising from this need to rely on private donations and I certainly do not want to be understood as suggesting that there is anything improper with their decision to seek private financing of their transition. Given the difficult situation in which they find themselves, they have chosen the responsible course of action of undertaking the transition, even though it must be done with private funds. It is also obvious that they have everything possible to prevent private donors from influencing the transition process. Published reports indicate that they have complied with all of the statutory regulations governing use of private donations for transition efforts, including limiting donations to \$5,000 or less. They have also self-imposed rules even stricter than those required by the law, including a flat ban on donations from corporations and political action committees and counting in-kind contributions against the statutory cap. There is no doubt that they have acted legally, ethically, and responsibly with respect to all aspects of their transition as it relates to this area.

But 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 function. 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 be released immediately to the Bush-Cheney transition team as the apparent successful candidates so that they can effectuate their transition appropriately.

It is evident that the policies animating the Act – the need for a smooth and speedy transition free from potential special-interest influence – would be satisfied only by releasing the transition resources to the Bush-Cheney transition team as the apparent successful candidates in the election.

The Scope of the Administrator's Discretion

The Act commands the Administrator to release the transition resources once 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 the Bush-Cheney transition team.

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 only discretion afforded to the Administrator is the *factual* determination of whether one of the parties is the apparent winner. *See* Congressional Record – House (July 25, 1963), p. 13348 (Statement of Mr. Fascell). It is evident that the Administrator has no discretion in this case to engage in legal interpretation of the type described by the *Chevron* doctrine. 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. 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.” *Id.* But his discretion is limited to this narrow factual finding.

Under established rules of administrative procedure, factual determinations of an administrative officer must be supported by “substantial evidence.” Although those rules may not expressly apply to this case, they provide guidelines for understanding the reasonableness of the Administrator's factual findings. In particular, the Administrator's discretion in making the factual determination of the apparent winner is quite circumscribed and must be justified by objective facts and reasonable interpretations of those facts. For instance, it would be an obvious abuse of the Administrator's discretion to designate Ralph Nader or Harry Browne the President-elect under the statute because such a determination would lack substantial evidence to support it. But it is an equally inappropriate exercise of his discretion under the statute to withhold the President-elect designation from the apparent successful candidate in the face of objective facts to the contrary.

The Administrator lacks substantial evidence for his finding that Governor Bush is not the apparent successful candidate of the presidential general election. Governor Bush has 271 pledged or certified electors, a sufficient number of electors to be declared President when the electoral college votes. As discussed above, the mere possibility that some electors may prove to be unfaithful or the mere possibility that there may be a later contest regarding electoral slates does not upset the reality that Bush and Cheney are the apparent successful candidates. By contrast, the Administrator's belief that Bush and Cheney are not the apparent successful candidates appears to rest solely on his idiosyncratic and subjective understanding of the facts and the relevant law.

It is true that there remains some uncertainty about the identity of the eventual *actual* winning candidate of this election, pending court challenges, ballot recounts, the possibility of faithless electors, and other possible scenarios. But that does not upset the fact that the *apparent* winning candidate is clear and there is simply no substantial evidence to suggest that there is any uncertainty regarding the identity of the *apparent* winning candidate. Lacking substantial evidence to support his belief that Bush and Cheney are not the apparent winning candidates, the Administrator has plainly abused his discretion in making the factual determination that there no apparent winning candidate in the 2000 general election. Once Bush and Cheney are recognized as the apparent winning candidates in the election, the Administrator must exercise his purely ministerial responsibilities under the Act to release the transition funds to the Bush-Cheney transition team.

This interpretation of the scope of the Administrator's discretion 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 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. 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 ministerial agent. There is nothing in the statute to suggest that the Administrator has been delegated the unreviewable discretion to hold up the disbursement of the funds based on his subjective concerns about the eventual outcome of the election when there is no substantial evidence to support this delay.

Conclusion

Reviewing the language, structure, and purposes of the Act, it is evident that Governor George W. Bush and Richard Cheney are the apparent successful candidates of the 2000 general election. By failing to designate them as the apparent successful candidates and thereby to fulfill his ministerial duties release the transition resources, the Administrator has abused the narrow discretion afforded to him under the Act. Under the terms of the Presidential Transition Act of 1963, therefore, the Bush-Cheney transition

team is entitled to receive the funds authorized by Congress for the purpose of Presidential transitions.

Mr. HORN. Thank you. Do any of the other members and especially the Administrator have any thoughts about Professor Zywicki's testimony? Does it give you some new guidance, Mr. Administrator.

Mr. BARRAM. No. I mean, am I going to change at this moment where I have been in the last few days? No. I listened to him very carefully and disagree with him on some issues. I don't think we want to get into that kind of a discussion right now. He's a law professor, I'm just a business guy.

Mr. HORN. Modesty does not fit. OK. I'll give you the same invitation I gave to Mr. Turley. If you want to get us some language in the next 24 hours, we'll be glad to have it.

Mr. ZYWICKI. I think the statute is fine the way it's written.

Mr. BARRAM. I will make one comment if I can, Mr. Chairman. I don't know how important this is, but I do recall in 1960—and I am old enough to remember that election—that Richard Nixon was saying, well into the night, if present trends continue, you know, John Kennedy will win. I believe he conceded the next morning or middle of the morning.

Mr. INK. He did.

Mr. BARRAM. I think that's a fairly significant event.

Mr. HORN. I think you're right on that one. I'm not aware of all those other cases they cited. They must have been State Republican parties because President Nixon's view, which I do not intend to contend even though we knew Illinois, New Jersey, and a few other States where there were major fraud. The Senate Committee on Rules did send an investigator to Chicago, and when they opened the ballot box carefully labeled, Kennedy 80, Nixon 2, and there were no ballots at all in the box. So, just the tally. And I'll never forget that one. The Rules Committee in the Senate isn't often working on a lot of things, but this one was fascinating.

Mr. Ink, is that your recollection?

Mr. INK. Yes.

Mr. ZYWICKI. My understanding is that the litigation did continue apace just as the Seminole County litigation in Florida is not a Gore litigation situation, it's a State litigation brought by voters in Seminole County but threatens to upset the election. My understanding, that there was several States in which litigation did proceed apace and recounts proceeded at pace, including Hawaii changing their designated electors, and there was an extremely close election, that those things did not, in Congressman Fascell's judgment, upset the ease with which one could be designated—that John F. Kennedy could be designated the apparent successful candidate in that election.

Mr. HORN. Mr. Gerson, do you agree with Mr. Zywicki's testimony?

Mr. GERSON. In part; and in other parts we might disagree a bit. I mean, Nixon did act in the way that you described, and the two contests that might have mattered, Illinois and West Virginia, were withdrawn as a result of what Mr. Nixon instructed his lieutenants to do at the time. But I don't know that detracts from the main argument. I don't agree that the statute is sufficient at this time for the reasons that we're all discussing.

On the other hand, Professor Zywicki and I do agree that the Administrator shouldn't have unfettered discretion. And we also agree that we believe he reached the wrong decision with the discretion that he has, because "apparent" is a conditional term. And one can say, I believe correctly, that Governor Bush apparently has 271 pledged electors. I think that's a fair appraisal of where Professor Zywicki and I might agree and disagree. I think we probably agree more on the material aspects of his testimony. I certainly don't agree this is the worst statute I have seen, though.

Mr. ZYWICKI. Not my position.

Mr. HORN. Well, I thank you.

We now go to the penultimate witness, Norman J. Ornstein, resident scholar, American Enterprise Institute for Policy Research.

Mr. ORNSTEIN. Thanks very much, Mr. Chairman. I might note at the start that I spent most of the last couple of years and intend to spend the next several months codirecting the Transition to Governing Project done with AEI Brookings and also in conjunction with the Hoover Institution. We've been geared up to facilitate a speedy transition. It's been a frustrating process, to be sure.

I think we have three basic questions here today that we've had to deal with. The first one, on which we've just had some lengthy discussion, and which we've just had some lengthy discussion of whether the Administrator appropriately exercised his ministerial function. I want to weigh in on that one also. Then come to two very relevant questions: What can be done about this situation now; and what, if anything, can be done to improve the law for the future that will extend beyond this election to the next ones?

I come down on the side that the Administrator did appropriately exercise his ministerial function. I've read the history and read the language and I believe—and here I take slight issue, which is unusual for me, with my colleague Paul Light, too. I think that the Congress was very concerned with the notion of a political judgment being made by a nonpolitical figure at a delicate time. It was actually I think something more on the minds of Republicans at the time, partly because you had Democrats running everything in 1963. Certainly it was H.R. Gross' concern, the idea that by making a judgment when there was still a question, a serious question, a real question that could provide some psychological or other advantages to a candidate, inappropriately so.

Now, as Paul said, Dante Fascell tried to draw a line. He said it wasn't going to happen. It doesn't happen very often. It has happened before clearly in three elections: 1800, 1824, and 1876. And the question we have today is partly if we're going to consider those examples and that judgment and what Congress was talking about, is this election closer to 1800, 1824, 1876, or is it closer to, say, 1960?

To me there's no question that it's much closer to the former three than the latter. Partly, as we just said, in 1960 you had a concession; you did not have a candidate pursuing challenges. And if they had, challenges had been pursued, it is true that 1960 was a close election in popular vote terms, but where it matters in electoral votes, it was not one State it was several States. It would have required a parlay from several States.

We know from our history that Richard Nixon considered whether or not he would carry out a challenge. For a variety of reasons, some pragmatic, some ideological, some related to his basic sense that it would be bad for the country, he decided not to. The patriotic reasons were a part of it as well. It would have required a number of challenges with very iffy outcomes.

What we have here is an election, in which at the moment we have one candidate with 271 apparent electoral votes, the other with 267 but with 25 of those electoral votes hanging in the balance of between one-fiftieth and one one-hundredth of 1 percent of the votes in a State with challenges going forward. That is not comparable I think to 1960. By all of the commentary we have around us, it certainly has its parallels in the past, although it's also unique. So I think the Administrator acted in a reasonable fashion, even if he might have acted differently or if he had discretionary authority to act differently.

Whether it should be handled differently in the future, I can't for the life of me see why turning this over to the Attorney General is better than turning it over to the Administrator of the General Services Administration, when the whole point of this was to make a judgment not about who the President was but about when you begin a transition process. It seems to me it's an appropriate place in which to go.

Now, what do we do about this situation in the more practical vein? I would urge to you take one action, and that is this: We now have, I think, a strong desire in the country and in Washington to move in a bipartisan direction, however we go. I would urge Mr. Horn and Mr. Turner, when this hearing ends, to call up Speaker Hastert, Minority Leader Gephardt, also Majority Leader Lott and Minority Leader Daschle. With Congress around and people here this week, it seems to me that you can get an easy amendment to this act, or ought to be able to within a day or so—I would guess you would have the President willing and eager to sign it—that allocates these funds immediately to candidates. Do it now, give them space.

Mr. HORN. That's why we've given the 24 hours bit.

Mr. ORNSTEIN. I think we can act more swiftly than Congress usually acts now, because it seems to me there is an overwhelming consensus that ought to be done now and into the future; that it is in the Nation's interest to beginning a transition early.

Let me just very quickly address a couple of issues, and I won't go long. I've done it before in front of the committee and the subcommittee, and I hope we can do it again. I hope after this is over or during the remaining weeks of this session in preparation for next time, you will take an even broader look at this act. You did some very commendable things in the last Congress, and I think they are going to have a strong positive impact.

But I believe we ought to be encouraging a climate in which transitions begin before the election, in which we not only encourage but almost mandate the candidates to begin a transition process before the election is over, to begin a formal transition process. Right now, and through this contest, despite a lot of what we hoped to get out there in the dialog in the country, it's still considered presumptuous to talk about or to act or to move in different ways

before the election is over. We should start that process and make sure it can continue.

I would also urge you to look at the possibility of codifying an action that Attorney General Reno very commendably took, or at least announced that she would take, just a couple of days ago. And that is to make sure that the FBI field investigations of prospective nominees take place, begin before those nominations are formally made. It seems to me there is an easy way to do this, if a President-elect, or even in a situation like this where there may be even the slightest question, puts forward a list of potential nominees with the approval of those people—you don't want investigations going on for the wrong reasons—that the FBI should know clearly in advance that it can begin that process, so that we can minimize the delays going forward.

I would hope what would flow from that as well is we would do a full-scale investigation of all the impediments in place to get Presidential appointees into those offices as early as possible. We have a lot of suggestions out there on the table, some of which go back a few years to the 20th Century Funds Task Force, some of which I and my colleagues have made and you could do no greater service to the country than to move on those as well.

Thank you very much.

Mr. HORN. Thank you. I ask the gentleman from Texas, the ranking member, Mr. Turner, if he has some questions of the panelists.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. Ornstein, obviously from being here and hearing my remarks, you know that I concur with your analysis regarding the authority of the Administrator and what the statute directs him to do or not to do. The one thing that did pique my interest about your suggestions for the future—and I certainly concur that we could amend the statute immediately—be able to fund both candidates in transition under these types of circumstances and should do so. But you have suggested that we go further and provide some transitional funding for candidates prior to the November election day. I'm not sure I understand why you think that is as critical or appropriate as funding the successful candidates, or the candidates, both of whom may be successful after election day.

Mr. ORNSTEIN. Well, just briefly, Mr. Turner, I think what happens now is that for all kinds of reasons, Presidential candidates don't want to take the time or feel it's inappropriate to talk about or to plan, other than surreptitiously, a transition in advance. Now we do have the candidates pick transition directors. They tried to operate below the radar screen. What ends up happening is a President-elect often doesn't really start thinking about this process until the day after the election, or sometimes later, and at point at which he's entirely exhausted, when there is no other strong incentive to really move rapidly.

A lot of things could be in place earlier. And not only that, I think it's good and important for the country to recognize that a transition is a meaningful exercise. It isn't just something we watch idly as we see a new person begin to ease into the Presidency, but involves serious, tangible steps for governing.

We need to focus more on governing during the campaign. Candidates should focus more on governing. And it's useful to find ways structurally to build that into the process. I think, given what we know, given that the last couple of Presidencies, the number of months that it takes just to get the Senate-confirmable appointees in place when you start just the day after the election, we need to cut that back. If we can begin to hit the ground running even before the election, it wouldn't hurt.

Mr. GERSON. May I dissent slightly from something Mr. Ornstein just said? I think this committee will be able to come up with suitable language that deals with the situation post-election that we have today, as I have. I reiterate that and urge the committee, the subcommittee, to do so. But I think you are running into great danger if you extend that sort of license to a time before the election. We've had third parties in the last two elections that have had a meaningful effect on the outcome. And I hesitate to want to ever be involved in the kind of litigation that one would face as to preelection funding of such an operation, especially when some third-party candidate might allege that his or her campaign is the linchpin future policy.

And from a theoretical standpoint, I think it would be unwise for the legislative process in terms of funding to supplant what the parties properly should do in advance of the election in defining the direction of their candidate, or the candidate in defining the direction of the party.

And so, while I think Mr. Ornstein's suggestion is laudable from election day on, where we have a suitably close race, that one can say rationally that there is at least the potentiality for alternative candidates ultimately to become President, I wouldn't go beyond it.

Mr. TURNER. Mr. Light.

Mr. LIGHT. I would say back in 1988 we did have provisions in the Presidential Transition Effectiveness Act for doing exactly what Norm is suggesting. We had—the U.S. Senate passed a bill that as part of the act would have given the major parties, committees as defined under the Federal Election Campaign Act, \$250,000 each to do some preelection transition planning sort of personnel kinds of things, inventories of positions. And it happened at a table here in conference where we just had a problem dealing with the amount of money that would be wasted. And it was dropped because there were some members of the conference committee who felt it was a waste of money to give a losing candidate \$250,000 for preelection planning.

To this day, I think it was a mistake. And no disrespect intended to the giant in the portrait above your shoulder. I think it would have been a good investment. And the parties would have continued that activity after the election and would have built the capacity—a small investment that might have yielded a big result. I guess I would say on this side that we came close, but no cigar. No disrespect again.

Mr. HORN. Well, I want to get Dwight Ink into this. I was just really looking at the lawyer questions to try to wind that one up. And Mr. Ink has, I think, served seven Presidents, he's testified before Congress over 50 years, and he has been acting GSA Administrator. And so—

Mr. INK. Twice.

Mr. HORN. Once.

Mr. INK. Twice.

Mr. HORN. Or twice. I'd like to get some of his thoughts in, particularly if they relate to the legal drafting here and what you think—who should do it; should the Controller General do it, or whoever?

Mr. INK. Thank you, Mr. Chairman. Having had that experience that you talked about, I feel very strongly that a transition has much to do with the success or failure of a new Presidency, particularly in the first year, sometimes throughout a whole Presidential term. We saw, of course, what happened to the Kennedy transition in the national security area where that vacuum directly led to the Bay of Pigs and then later to the Cuban nuclear missile crisis.

But there are many other things that are much less dramatic that have a considerable impact on the success or failure of a Presidency. Without going into the details, my own view is that the flavor of much of the hearing today considerably understates the importance of the transition and considerably understates the problems that we're already accumulating in this particular transition.

Mr. Sununu talked about some of them. The new budget people are going to have to start virtually from scratch to pull together a new budget. You cannot do that scattered around in law offices around the town. You cannot do that. It's almost impossible to do it under the very best of circumstances. Policies, new initiatives, have to be developed in such a way that they're workable. We saw the problem with President Clinton's health care plan there, which the workability dimension was not addressed during the early period.

There are a whole series of things that need attention, and we're already behind schedule. And much of the perception today, which I agree with, nevertheless was from the perspective of White House people and the outside media, not from the perspective of the agencies and the departments where the impact of these delays can be very, very serious. And I think we're already seriously behind schedule.

I agree that, by the way, that I think the GSA staff—June Huber I think has done very well. And I think that they have tried very hard within the framework of the law as they have had it interpreted for them.

With respect to the law, I think one can make, as has been done here, a legal argument that funds could have been released or could now be released by the General Services Administration. I think there's a very strong counterargument to that. But what I think we need to keep in mind is the public policy dimension. To what extent would the general public accept the notion that an agency head, head of GSA, has determined their next President? My own view is that is wishful thinking. I do not think in a political public policy sense, it would be accepted. I think we have to have some legislative action.

I think we need to amend the Presidential Transition Act. With the litigation that's been spawned in this election, that is likely going to create I think much more litigation in the future than we've had in the past.

I have one possible suggestion. Probably there are better ones. But in my testimony I suggest, as one example, that if 5 or 10 days, whichever you want, after the election, no candidate has clearly won, GSA should then make available the assistance now authorized under the law on an equal basis to each candidate until a clear winner is determined by such means as a concession or the legal processes have run their course. Admittedly, the amount received by the eventual winner would be reduced. Or, and what I would prefer, is that supplemental funds would be made available but held in reserve for such an eventuality. So that is one suggestion I would suggest that the committee take under consideration in the next 48 hours. I think without waiting to see how that happens, I believe that this committee should move forward, as Mr. Ornstein has suggested, I think to look at much broader than just this provision I've talked about, which is something I would suggest be done immediately and see what else can be done. And I do support the thoughts of Paul Light and Norm Ornstein on developing some way to have some advance funding in advance of the election.

Mr. Chairman, beyond the transition legislation, however, I think we also need to look at the need for reform of election laws and regulations. This current situation is weakening the confidence of the public in our election process and it is exposing the United States to ridicule around the world. I suggest a bipartisan commission to look at opportunities for removing the types of election problems we're now experiencing, perhaps a commission co-chaired by former Presidents Ford and Carter, with a composition drawn heavily from former State and local officials. I'm not suggesting that this commission review the electoral college concept, because I think that gets us too quickly into partisan issues that would overshadow everything else. I do not suggest that a commission should attempt to set standards for States. I think it could bring State and local groups together to examine the election problems, compare approaches that they found useful, and consider reforms that States might find useful, and it might even spawn some State commissions, such as the Hoover Commission did, in spawning little Hoover commissions in the 1950's.

So, Mr. Chairman, to summarize, I think the transition problem is not a national crisis, but I think it's much more serious than much of what has been described here today. And I do recommend specific legislation, specific amendments for the Presidential Transition Act, and I recommend a bipartisan commission in looking at our election laws.

Mr. BARRAM. Mr. Chairman.

Mr. HORN. Thank you for that. Yes.

Mr. BARRAM. For what it's worth, and not having cleared this with the White House—but I endorse to any notion of within 10 days, and I would think there ought to be a supplemental budget available. I think that would be fine. We would have to figure out how to find additional space rather than split it in half, but that's a small price to pay for the kind of transition that we ought to have.

Mr. HORN. Yes. Mr. Zywicki.

Mr. ZYWICKI. If I may just have one brief comment. Which is, it strikes me—again my view is that the Administrator’s discretion is virtually nil under this statute that’s triggered by the electoral college count. But if you disagree with it, it seems like there’s really two directions you have to go.

One is either to provide for some sort of—after that, a judicial review or some sort of administrative review of the standards that the Administrator is using, if we are going to interpret this such that it gives them discretion, you have got to have some mechanism for reviewing that. Alternatively, you can clarify the language to make it clearer to remove the discretion and create more of a bright line rule, which is what I’m proposing it does already. The statute creates a bright line rule that relieves the Administrator of most of his discretion, but it seems like the current situation of unreviewable discretion on no articulated basis seems to me to be the worst of all worlds.

Mr. HORN. Well, unlike you in the discussion here, what individual or holder of a position in the executive branch should be asked to do that? Any thoughts, other than the GSA Administrator?

Mr. ZYWICKI. I don’t necessarily have any problems with the GSA Administrator doing it in a way such that it triggers, say, the APA protections and is subject to judicial review. So you could have a situation where you clarify he has discretion to make this call, but then say that it is a factual interpretation that is subject to judicial review under the standards or the mechanisms that we review discretionary judgments by administrative agents, and that seems like it could be done in a relatively expedited basis in Federal courts.

Mr. HORN. Mr. Gerson.

Mr. GERSON. I would respectfully disagree with that. I think your questioning, Mr. Horn, implies a much better way to deal with this. There is no problem in the abstract with the Administrator of GSA exercising some level of supervision, but the idea—and even though I talk about APA compliance as one way to look at reviewability, if we are in exactly the same situation we are in now, which is one thing, we want to diminish the number of cases like this that go to court. We do not want the judiciary serving as the archons for decisions that belong in the body politic or in the legislature. So I think that is not a good idea.

The much better idea, the one that you describe, is either to tone up the definition of “appearance” in the statute or, better than that, deal on a prospective basis in the way that you are just describing, that I think everybody would like to see you act, that when you have a race of sufficient closeness, which ought to be defined to eliminate fringe candidates from this discussion altogether, that if somebody is within 10 percent of the number of electoral votes that you need, or whatever it might be, that the Administrator is authorized to fund those candidates subject to the sorts of considerations that you are describing now.

That’s a way that the problem can be worked out in an intelligent political sense without burdening the courts or imposing an imperial judiciary on a process where it doesn’t belong at all. This idea that we keep hearing that these challenges to the election are all within the rights of the candidates, true enough, and so this is a great thing. It is not a great thing.

Mr. HORN. Let me ask you all about the 271 electoral votes. Were they real? I am told the opposition to the Governor have been making phone calls all over America trying to get electoral votes to change. How would you define it if those electors, 1 or 2 weeks earlier, note a majority, and at that point, could the GSA Administrator make a decision or not? Is it on this topic or have you got a substitute?

Mr. ORNSTEIN. No, it is on that topic. It seems to me that you can't set a specific set of criteria that will govern all the time. If you look at 1800, 1824, 1876, the classic examples, this one is different. The next one is going to be different than these. What could you do is lay out some of the criteria you would want to use, and it would seem to me the absence of a concession, an election where one State, or perhaps two, are within a small margin of error, where the electoral votes themselves would change the outcome, and there are legal processes in place being pursued by the candidate who is behind, are certainly reasonable criteria.

But one should note, Mr. Chairman, that just imagine if the circumstances between the two candidates today were reversed, if Vice President Gore had 271 electoral votes to 267 at the moment for Governor Bush. Imagine that it came down to Florida with a margin of one one-hundredth of 1 percent and legal processes were going on, and a GSA Administrator of the same party as the Vice President preempted the process early and said, I'm going to declare that the Vice President is a President-elect, we would have had a firestorm of controversy. That, it seems to me, is just what H.R. Gross, among others, wanted to avoid, and, you know, if you consider that context, you can find a way to inject yourself into the political process. We didn't consider it this time, because you have the opposite political parties, but boy, as we have seen in other places in the country, you can have people in the same party and it creates a cloud.

Mr. LIGHT. I think the issue about what H.R. Gross intended in his debate has to be measured by what Dante Fascell and the authors of the statute in Congress did eventually conclude in the statute, which was, it did not wish to wait for absolute certainty here. They wanted to start the transition. I'm very comfortable with the Administrator of the GSA retaining the discretion to make the apparenly decision. If he can't make it within a date certain, then let him begin parallel transitions, then the big debate, and one that I'm sure that this Administrator doesn't want to engage in is whether you are going to put one at 1800 G Street, and the other down at the Navy Yard and what that battle is going to be for the best space.

But the Administrator does have the ability to make these decisions. You shouldn't put the criteria into the statute. Put the criteria as such into your legislative report and just create a trigger so that the Administrator can continue to use his discretion.

Mr. HORN. May I say on that last point, we faced the problem in the Federal courts if they don't care anything about reports, about colloquies on the floor or anything. It has to either be in the law or don't expect it to be administered.

Mr. LIGHT. But if you get too detailed, you lock yourself into a set of criteria. There was some discussion here today about who is

the GSA Administrator after all. Well, we can see him and it is a unit of government that has a strong record and has been an agency that has had good strong leadership, and we can allow that Administrator to have the discretion within appropriate bounds, I think.

Mr. HORN. Let me ask Mr. Zywicki.

Mr. ZYWICKI. On that point, I think it is crystal clear from at least the legislative history, if not the statute, but that they clearly understood that a majority of electoral votes was going to be the trigger here, because that is all they talk about is the scenario where if somebody is three or four votes shy in the electoral college, they cannot be the President-elect. They clearly contemplate that some of the electoral votes might have the possibility to change after an apparent winner was named, and that simply did not deter them in that situation. That seems to me to be, at least as originally constructed, a majority of the electoral votes is the trigger.

And I want to second something that Mr. Gerson said which is, I'm not calling for judicial review. I think that the best situation is to create some sort of bright line rule with respect to this because, although I'm sure Mr. Barram's doing his best in a difficult situation, I simply don't think there's any reason to believe that when they wrote this legislation, that they expected that the Administrator was going to wield this kind of discretion. It is clear that they thought it was going to be a bright line rule, an easy determined outcome based on electoral votes and that you're not going to have this sort of open-ended kind of inquiry or they would have provided for some sort of review of discretion if they'd intended to create that sort of open-ended inquiry.

Mr. HORN. Mr. Barram.

Mr. BARRAM. Mr. Chairman, I don't have any doubt in my mind that in the year 2004, we will know how to count votes electronically with technology so we don't have this stuff going on that is going on today. And if I may suggest to this committee, I think the most valuable thing for you to do is figure out how to get a supplemental appropriation, or some way where both campaigns can begin to spend government money on the transition activities. I believe that you can walk into—you could have a poll—every precinct in America could have a piece of technology where you made your choices, and a screen flashed up and said is this what you meant, you could push a button and now it is recorded.

The most significant problem we would have is making sure that none of that got out until 11 p.m. in the East. But with the machine count it would be very hard to ever say, well, I didn't mean it when I pushed the button "yes." The younger generation, who have grown up using video games, would find this particularly sensible. If we did it at every precinct, it would be easy for me to imagine people cleverly figuring out how you could do that over the Internet with the right kind of encryption, including absentee ballots. You could even walk into the polling booth with that little card that we've all seen a million times on television, punched, stick it into the device, and up would pop here's what you voted for, is that what you meant, Mr. So-and-so? You push a button "yes" and you are done.

So I think the solution to this is going to be much more technological and a better voting mechanism than it is, to not be disrespectful about it, but how many angels can dance on the head of a pin conversation that we can easily get into?

Mr. HORN. The gentleman from Texas, Mr. Turner, on questioning.

Mr. TURNER. Thank you, Mr. Chairman. I want to ask, maybe, if we could get your thoughts on one proposal here to that see if we could reach consensus. Obviously, if we are going to remedy this legislatively, in the near term, we have got to have something pretty simple, pretty straightforward, everybody understands, everybody agrees and signs off on, and I think Mr. Light, and I know Mr. Ornstein shared that view, that we don't want to put the Administrator of the GSA in the position of either actually picking or appearing to pick the President. And this suggestion, Mr. Zywicki, that this current law is a bright line, I don't view it as a bright line other than to say, as I think the legislative history would support Mr. Sell, if you don't know, an intelligent being can't really tell, you do nothing almost as if to say this is not any entitlement, this is Federal dollars we're talking about here, and if you can't figure it out, well, you just don't do anything, which is exactly what happened in the instance case.

So maybe, and let me ask each of you to respond to this, maybe we could leave the language alone regarding the apparent winner, because as I read from the dictionary you handed us, one definition of "apparent" as a synonym is "evident, obvious or patent; capable of easily being received or understood; plain, clear or obvious." And perhaps we could leave the statutory language regarding "apparent" alone for the moment, and simply say that if it is not determined within 10 days, then the two candidates at the top will divide the money. That means we don't disturb the discretion that is there for the GSA Administrator to decide, but if he doesn't, for whatever reason, then he's not in the position of actively choosing one over the other, or even choosing that there's not a winner. It would simply say this failure to act within 10 days will act in division of funds to the top two candidates. Now, I'd like each of you to respond to that.

Mr. Ink.

Mr. INK. Well, of course in principle, I think that's a great idea. I'm glad you suggested it. Because I think it gets the Administrator out of the role insofar as the public is concerned, the apparent role of having to choose a U.S. President, which is absolutely the wrong role for the Administrator of GSA. Whether you use the word "apparent" or "clear," I used the word "clear," I don't have a strong view on that, but the concept I strongly support. I think relying upon judicial remedies is the wrong road to go. You have got to minimize the uncertainty as much as you can. You have to minimize as much as possible the role of the courts in trying to determine when funds are going to be available for the transition.

Mr. TURNER. Mr. Ornstein.

Mr. ORNSTEIN. I'd only have one concern, Mr. Turner. I think congenitally I look at unintended consequences when I think about any of these changes, and you just need to think a little bit about that in terms of making sure you don't provide any incentive for

a candidate who's not in a position to win to avoid a concession to get a bundle of money to keep going for a period of time. So you still need to have a process here where you move toward declaring a winner, except under extraordinary circumstances.

I don't think you can specify all of those circumstances. I think that Mr. Barram is right, we are going to move to a very different voting system and the electronic aspect of it; the touch screen aspect of it will take away some of these problems, but I will also tell you we are moving very rapidly toward vote by mail, vote by Internet, people not voting in the voting places, and that is going to bring us back to a kind of corruption that we had before we had the Australian ballot and the secret ballot in the voting booth after 1884 where we will have other kinds of problems that will emerge. We can't tell them all. We can probably establish some guidelines. But I think you need to have some discretion here for an individual to make some of those determinations.

Mr. HORN. I take it that on this suggestion, which I am not opposed to if that was a President already in office he or she would not get any of that money, because I think H.R. Gross would say in that colloquy, "boy, that will really be some pizza party." So that's how he used to deal with this.

Mr. ZYWICKI. I think it raises a good idea, one that probably needs more study, more than we have the leisure now. One easy fix of the current situation would be to amend section 4(C) that was enacted in 1988 that gives us 30-day reach-back period for the Vice President and simply amend that, I presume do it retroactively, to say that trigger for the outgoing administration begins the day of the election, so that you could open that window and just release the money that Vice President Gore would be entitled to 30 days before the end of the term and just open it up. I don't see any reason why 30 days is a better rule than Election Day anyway. So that might be one easy way of—just very small tweak could resolve the issue that is currently going on.

Mr. LIGHT. I think you'd want to make sure you prorate the expenditures where you don't end up in a situation where you have spent all the money by December 18th. So you have to amend the statute to give the Administrator discretion to make sure the expenditures are reasonable and you are not outspending the moneys available. I think you could do that very easily in the statute. You will have near certainty with December 18th or—I mean, you have absolute certainty on January 20th. So you just have to roll back and make sure the money isn't gone.

Mr. HORN. Any other comments on this, Mr. Ink?

Mr. INK. My preference if we were to go this route, though, would be to do it in such a way that the winner was not handicapped, not having the amount of funds reduced. I think by having a supplemental amount that would be held in reserve for such an eventuality would be a very small price to pay for opening up the ability to move forward with a full-fledged transition.

Mr. LIGHT. Let me also suggest that in your drafting process that you make as a condition of accepting these funds in this sort of dual transition period full disclosure of any private funds being raised. I mean, I would just basically pull forward the requirements under the current 1988 amendments.

Mr. TURNER. That is current law, is it not?

Mr. LIGHT. Yeah, but, I mean, right now the Bush and Cheney transition have voluntarily agreed to abide by the disclosure requirements.

Mr. GERSON. The law would take care of it. The reason why the Bush-Cheney group is where it is is because it is not getting the funds in the transition. If it were, the disclosure provision would be triggered. So that I think that if you make those funds available and you continue what you have in 1988, it's—that's a nonproblem.

Mr. ORNSTEIN. Mr. Chairman, I would urge you to do this now in the simplest and most neutral way possible for now. Then you can go back when you have more leisure and think about whether the language that you've used would be more appropriate without unintended consequences for future elections.

Mr. TURNER. I agree with that. Did I understand all of you to agree with the basic concept of having the Administrator exercise his discretion within the first 10 days? If he fails to so exercise, and the funds shall be divided equally between the two top candidates, and subject to the refinements you mentioned such as ensuring that they are accountable for the funds. They don't spend it all at one time, and I assume such time as the apparent winner is determinable, then the funds would cease to the losing candidate, would that be an appropriate refinement as well?

Mr. GERSON. I think Mr. Ornstein made a very important point, though, and I want to subscribe to that particularly, which is, don't legislate for all times today and tomorrow. That's a bad way to put the meal down. Solve this problem. You have great consensus and very easy resolution. If you get into legislating for all time, you're not going to be able to push this thing through the short window that you have. I think Mr. Ornstein and I, as this discussion has progressed, are fairly close together on what you ought to do ultimately. There needs to be—to the extent the discretion resides in the Administrator or somebody else, there still needs to be some defining circumstances as to how he or she might exercise it. I think it ought to be pegged to the electoral vote or probable electoral vote more than anything else, given the Nation's history and the way the Constitution works, but that aside, I think you ought to solve the immediate problem now and then, in a more considerate way, deal with the ultimate solution to how that discretion might be exercised.

Mr. BARRAM. While you're solving the immediate problem, I would really urge you to seriously consider doubling the money or making more money available, especially now if you come up with a solution where we end up with having both campaigns with money, it is going to cost a little more than if we had 4 months to prepare for it. I just want you to know that so that we don't shortchange either group. You could just take a submarine out of one of the—

Mr. HORN. Let me thank the staff that put this rapidly together. J. Russell George; on my left, your right, is staff director and chief counsel of the subcommittee; Randy Kaplan, counsel; Bonnie Heald, director of communications; Earl Pierce, professional staff in back there; Elizabeth Seong, clerk; Rachael Reddick, intern; minority staff, Trey Henderson is counsel, and Jean Gosa is the minority

clerk. The overworked court reporters are Colleen Lynch and Melinda Walker, and we thank you both.

And I believe, Mr. Barram, in the decision of the Supreme Court of the United States, I would urge you to look at the request from Congressman Kolbe, the appropriator, and myself as chairman of the authorizers last week and I hope that there would be some ascertainment as quickly as possible as to who the apparent winner of this Presidential race is, and I would hope in the next few days that we would have some language that might solve the problem, but you can also stop the language if you take a look at what the Supreme Court's decision is today. I think you'd find nothing is going to happen until that decision is taken a look at, and I would hope you and your staff would go there and see if you can't change your mind on a lot of this because time, as one said, is going along and money isn't. Thank you. And we are now in adjournment.

[Whereupon, at 2:25 p.m., the subcommittee was adjourned.]

