

STATEMENT FOR THE RECORD BY DONALD K. SHERMAN, DEPUTY DIRECTOR
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SUBMITTED TO THE HOUSE COMMITTEE ON OVERSIGHT AND REFORM
SUBCOMMITTEE ON GOVERNMENT OPERATIONS
HEARING ON “THE ELEMENTS OF PRESIDENTIAL TRANSITIONS”

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Chairman Connolly, Ranking Member Hice, and members of the Subcommittee, thank you for the opportunity to submit this statement for the record on the importance of improving the presidential transition process. The peaceful transition of presidential power is a symbol of the endurance of American democracy and is critical to ensuring that an incoming administration is prepared to confront the immense challenges facing our new president when he or she takes the oath of office.

Unfortunately, the Trump Administration’s conduct in the days and weeks following the 2020 presidential election has exposed weaknesses in the mechanisms that govern the orderly transition of power. I write on behalf of my organization, Citizens for Responsibility and Ethics in Washington (CREW), today to underscore the need for prompt and thorough action to address these issues. CREW is a non-partisan non-profit organization committed to ensuring the integrity of our democratic institutions and promoting ethical governance. Given our expertise in the areas of ethics, transparency, and good governance, we say with confidence that leaving the problems exposed by the Trump administration and General Services Agency Administrator Emily Murphy unresolved places the integrity of our government and the public’s trust in our democratic system at risk.

It is hard to overstate the [significance](#) of a smooth presidential transition process to the functioning of our democracy. Transitions are critical to ensuring the continuity of our government operations, even when an [incumbent](#) president is re-elected. Following the election of a new president, however, the transition takes on added importance, as it is the period when the incoming administration develops and implements a robust [ethics](#) and [national security infrastructure](#). As scholar Martha Joynt Kumar [writes](#) in her book *Before the Oath*, “perhaps the most important organizational and policy element of a contemporary presidential transition is the national security piece.” Following the terrorist attacks of September 11, 2001, national security experts recognized presidential transitions as a point of vulnerability, especially due to the significant departures from the White House during a change in power. As a result, in 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 401 et seq), and in 2008, the Bush administration [tasked](#) the Department of Justice with working “with the Office of the President-elect in providing security clearances for appointees and staff of the incoming administration.” Despite Congress and past administrations’ recognition of the

importance of facilitating a smooth transition of presidential power, the Trump administration has failed miserably in this regard.

Last month, the American people elected former Vice President Joe Biden to be the 46th President of the United States. Because the novel coronavirus pandemic forced many more citizens to vote by mail than have in previous election cycles, a number of states took slightly longer than normal to count all the ballots cast on or before Election Day. On November 7, 2020, four days after Election Day, numerous media outlets, including the [Associated Press](#) and [Fox News](#), called the race for President-elect Biden, [after](#) “[l]ate-counted ballots in Nevada, Pennsylvania and Georgia continued to keep Biden in the lead and offered him multiple paths to victory.” Despite this fact, and breaking with decades of tradition, GSA Administrator Emily Murphy waited more than two weeks--until November 23, 2020--to officially begin the transition process by formally ascertaining that Biden was the apparent winner of the election.

Pursuant to the Presidential Transition Act of 1963 (3 U.S.C. §102 note), following a presidential election, the GSA is charged with ascertaining the apparent successful candidate for president. GSA’s ascertainment declaration releases crucial federal resources and funding to the incoming administration, which assists in building up their transition staff and housing them in federal office space. Crucially, [according](#) to President Trump’s Office of the Director of National Intelligence, it also frees the intelligence community agencies to begin giving the President-elect and the incoming cabinet classified intelligence briefings regardless of the orders of the incumbent President. While states must eventually certify their election results and the electoral college meets in December to formally elect the president and vice president, only the GSA administrator can ascertain the apparent winner of the presidential election for these purposes, effectively giving the administrator personal control over the start of the transition.

Historically, the GSA administrator has made its formal ascertainment declaration [without incident](#) and well before all states had certified their election results. For example, in 1992, 2008, and 2016, GSA released transition resources well before many states had officially certified their results. In 2016, GSA made its formal ascertainment declaration despite an ongoing recount in the critical state of [Wisconsin](#), requested by candidate Jill Stein, which lasted until December 12, 2016. Even in the [2000 election](#), then GSA Administrator David Barram [ascertained](#) the apparent successful candidate and formally began the transition once the Florida recount, which determined which candidate would cross the 270 electoral college threshold, was settled by the [Supreme Court](#) on December 12—days before California certified its results that year.

Denise Turner Roth, the administrator of GSA from 2015 to 2017, recently [explained](#) that during the 2016 election she and her staff monitored three areas before she ascertained the winner: election calls from major news outlets, vote counts coming from the states themselves, and the losing candidate’s concession. The only one of those factors missing between November 3, 2020

and the November 23, 2020 ascertainment was the third: President Trump's concession. However, in a tweet that same day, Trump said that GSA was "being allowed to preliminarily work with" the Biden-Harris team while he continued to pursue failed legal challenges to upend the election results. Trump did and, to date, has still refused to concede. These facts imply that Murphy was holding up the transition in large part because of Trump's own refusal to face reality and allow the transition to move forward.

Administrator Murphy's decision to delay the dispersal of post-election federal resources for the presidential transition not only undermined the will of the people, but it also had practical harms beyond eroding trust in our democratic institutions. Murphy's decision also prevented members of President-elect Biden's coronavirus advisory board from consulting federal health officials and accessing important medical data. That Administrator Murphy eventually relented does not mean that the transition process functioned as it should. Rather, Murphy's action revealed critical problems with the process set out in the Presidential Transition Act. It is incumbent upon Congress to take steps now to ensure that this type of conduct does not happen again.

First, Congress must demand transparency and accountability regarding the Trump administration's failures. This hearing is a useful first step in that process. However, the Oversight Committee should also conduct a thorough investigation into the events of the 2020 presidential transition, which was marked by inexplicable delays and opacity. The Committee should issue document requests and conduct transcribed interviews with senior leaders at the agencies crucial to presidential transition including, but not limited to GSA, DOJ, the Office of Management and Budget, and the National Archives and Records Administration. This investigation should examine how the Trump administration prepared for the presidential transition, why a White House attorney from the President's impeachment team was installed as GSA's general counsel days before the election, what legal guidance and criteria GSA Administrator Murphy applied to ascertain the apparent winner of the election, and how critical delays before and after the election impacted the transition, among other questions. In addition, the Committee should immediately ask the GSA Inspector General to conduct a review to determine whether Administrator Murphy followed appropriate processes and whether GSA has the necessary institutional controls for future administrators to appropriately fulfill its duty to ascertain the successful candidate in presidential elections.

Additionally, Congress should ask the Government Accountability Office (GAO) to conduct a review of how GSA's ascertainment decisions have been made since at least 1992, the last time an incumbent president lost their re-election bid and oversaw a transition to his general election opponent. In order to add transparency to the process of beginning a transition of power, Congress should consider whether GSA should be required to have clearly articulated and public criteria for how to ascertain the apparent winner of a presidential election, including guidance on how to handle situations where the election result is unclear shortly after Election Day, where

one candidate refuses to concede, or where a candidate or candidates contest multiple state results. Because of the important role the transition process plays in our national security, Congress may also want to consider adding procedural guardrails to ensure that the transition begins no later than a certain date--for example, releasing a certain proportion of the funds no later than a specified time following the election. Finally, after every presidential election, the GSA administrator should have to provide a public report to Congress announcing their ascertainment of the apparent successful candidates for president and vice president and describing the process by which they reached that decision. GAO's review should document best practices and potential pitfalls from prior presidential transition periods.

GAO should present its findings and submit specific and tangible recommendations for ways that GSA and Congress could reform ascertainment and other aspects of the presidential transition process to ensure they are initiated promptly, transparently, and without political interference. The public must not be kept in the dark about how any GSA administrator reaches the decision to initiate the presidential transition. As we saw in this cycle, based on Administrator Murphy's outrageous conduct, secrecy and incompetence in this process helps to undermine key government functions as well as public confidence in the integrity of our democratic institutions. When these shortcomings are combined with an outgoing president desperate to cling to power, the ascertainment declaration morphs from an important but uncontroversial decision into a partisan weapon that can be wielded to undercut an incoming administration.

The orderly and efficient transfer of power from one presidential administration to the next is a hallmark of American democracy: it builds public trust by serving as a period of civic reconciliation following a fiercely contested election and by ensuring that the American government continues to function effectively from one president to the next. While the Trump administration and GSA Administrator Murphy failed spectacularly in their mandate to facilitate a smooth transition, Congress now has the responsibility, and the time, to identify and oversee implementation of concrete policy changes to ensure that this situation never happens again. This hearing is a great first step, but more work is needed to move forward. We stand ready to assist in that effort.