

Transition Period

BACKGROUND

Importance of Orderly and Peaceful Transition

An orderly and peaceful transition of power between the sitting president and the president-elect is a hallmark of a functioning democracy. Since President George Washington peacefully transferred power to President John Adams, American presidents have handed over the keys to the machinery of government to their successors. This process allows for disappointed supporters of the losing candidate to accept the results of the election and for the next administration to begin preparations for governing. A peaceful transition is necessary for the stability of the country, national security, effective governing, and safeguarding of U.S. interests.

Laws Governing the Transition Period

A number of laws govern the transition period, which runs from election day through inauguration day, with some laws going into effect before election day. These laws include:

- **The Presidential Transition Act (PTA)**—Provides the transition with funding for operations and requires the government to support the incoming administration with information, expertise, and direct assistance. Also requires the General Services Administration (GSA) to provide the president-elect with the “necessary services and facilities,” including “suitable office space.”
- **The Federal Records Act (FRA)**—This statute requires that federal agency records in all three branches be created, retained, preserved, and accessible. The [Presidential and Federal Records Act Amendments of 2014](#) expanded the definition of federal records to include electronic records.
- **The Presidential Records Act (PRA)**—Establishes that all presidential records are automatically government property and that the administration is responsible for preserving and maintaining records created during its tenure.
- **The Logan Act**—This statute criminalizes foreign policy-making by private citizens. There is debate to what degree presidential transitions—especially the president-elect and the vice-president elect as individuals—are governed by the Logan Act, and substantial First Amendment concerns have been raised concerning the Logan Act. However, incoming presidents cannot undermine existing U.S. policy, sign treaties, or make secret deals with other countries. While the Logan Act, originally passed in 1799, has not resulted in any prosecutions, and its main purpose was preventing people from falsely claiming to represent the U.S. in an era long before instant global communications, it delineates the fact that foreign policy and diplomacy are conducted by the outgoing president and administration until noon on January 20 when a new president is inaugurated.

- **The Intelligence Reform and Terrorism Prevention Act of 2004**—This law allows for an expedited security clearance process for national security advisors of the president-elect. It also requires preparation of a detailed classified summary of “specific operational threats to national security, major military or covert operations, and pending decisions on possible uses of military force,” which must be given to the President-elect immediately following the general election.¹

The 2020 Transition Is Underway

In order to facilitate a smooth transition, transitions begin in earnest during the campaign, with coordination between candidates, the sitting administration, and the General Services Administration (GSA). Vice President Biden’s campaign began detailed transition work in March 2020, and has been coordinating closely with the GSA and the 20+ agencies in the Agency Transition Directors Council, which facilitates the day-to-day of transition. Thus far, career officials within the administration have hit all the necessary transition milestones—with material written, briefings prepared, and security clearances granted. This coordination should continue unimpeded.

ELEMENTS OF AN ORDERLY AND PEACEFUL TRANSITION

In addition to the laws enumerated above, there are long-standing norms of cooperation and collegiality between outgoing and incoming administrations, with the sitting president and administration offering broad access and assistance to the president-elect. The sitting administration should provide support, briefing materials, policy coordination, interagency coordination and in-person briefings to the incoming administration. The following actions—some governed by laws, others by norms and tradition—are indicators of an orderly and peaceful transition, and are key signs to look for during the transition:

- ✓ All agencies provide briefing materials for the incoming administration.
- ✓ All agency records are retained, preserved, and accessible for the incoming administration.
- ✓ All presidential records are retained, preserved, and accessible for the incoming administration.
- ✓ The GSA administrator independently ascertains the winner of the election based on the merits without political influence.
- ✓ Outgoing officials prepare a classified national security threat assessment for the president-elect and present it immediately after the general election is decided.
- ✓ Transition team members, especially national security advisors to the president-elect, receive security clearances in a timely fashion.
- ✓ The outgoing president grants the president-elect access to the President’s Daily Brief, the daily Intelligence Community Assessment that presidents receive.
- ✓ The Senate holds hearings as needed for some of the president-elect’s nominees prior to inauguration.
- ✓ The president-elect refrains from making official statements purporting to reflect current U.S. foreign policy.

¹ [2] PTA §3(a)(8)(A)(v).

POTENTIAL ILLEGAL OR IMPROPER ACTIONS

There are also telltale signs of illegal or improper actions during the transition, which could include but are not limited to:

- Politically motivated prosecutions or investigations by the Department of Justice of the president-elect, vice president-elect, or family or staff members.
- Politically motivated firings of career federal employees ahead of the inauguration.
- Destruction of White House or Executive branch documents, in violation of the PRA and FRA.
- Denial of access to briefings or preparation materials for landing teams, especially on issues of a time-sensitive nature for the incoming administration.
- Denial of access to physical spaces and/or agency officials and resources by the current administration, in violation of the PTA.²
- Delay or lack of delivery of transition resources by any agencies.
- Delay or denial of security clearances for president-elect's national security advisors without valid grounds.
- President-elect and transition team engage in foreign policy making, such as agreeing to a treaty or otherwise purporting to possess the authority to represent current United States foreign policy.
- Denial of President's Daily Brief (PDB) to president-elect.
- Senate departs from practice and refuses to grant pre-inauguration hearings as needed for the president-elect's nominees to enable some of them to be confirmed and in place right after the Inauguration.

² See PTA § 4(b) ("The President shall take such actions as the President determines necessary and appropriate to plan and coordinate activities by the Executive branch of the Federal Government to facilitate an efficient transfer of power to a successor President . . .").