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## Midnight Rules: A Reform Agenda

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# MIDNIGHT RULES: A REFORM AGENDA

*Jack M. Beermann\**

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## INTRODUCTION

There is a documented increase in the volume of regulatory activity during the last ninety days of presidential administrations when the President is a lame duck, having either been defeated in a bid for re-election or being at the end of the second term in office. This includes an increase in the number of final rules issued as compared to other periods. The phenomenon of late-term regulatory activity has been called "midnight regulation," based on a comparison to the Cinderella story in which the magic wears off at the stroke of midnight.<sup>1</sup>

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1. See Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* 4 (Mar. 8, 2001) (unpublished manuscript), available at [http://mercatus.org/sites/default/files/The\\_Cinderella\\_Constraint\(1\).pdf](http://mercatus.org/sites/default/files/The_Cinderella_Constraint(1).pdf).

This Article looks closely at one species of midnight regulation—namely, midnight rules. This Article defines midnight rules as agency rules promulgated in the last ninety days of an administration. This Article focuses on legislative midnight rules (normally issued under the notice and comment procedures of the Administrative Procedure Act (APA)), because they are the most visible and often the most controversial actions taken in the final days of administrations and because they are usually the most difficult to alter or revoke among the various midnight actions taken by outgoing administrations. However, because late-term activity goes beyond legislative rulemaking, this report also discusses, to a lesser extent, other phenomena such as the issuance of non-legislative rules including interpretative rules and policy statements; non-rule regulatory documents, such as guidance documents and executive orders; and the use of other presidential powers, such as the pardon power and the ability to entrench political appointees into protected employment positions in the new administration.

This Article documents the existence of the midnight rules phenomenon both quantitatively and qualitatively, using numerical measures of the volume of rules and qualitative analysis of some rules as illustrations. The Article reviews various explanations for the existence of the phenomenon, ranging from the simple human tendency to work to deadline, to more complicated political factors that may affect the timing of rules. The Article also reports on interviews of officials involved in rulemaking to inform the analysis of the causes and effects of the midnight rulemaking phenomenon.<sup>2</sup>

This Article also addresses midnight rulemaking from a policy perspective, asking whether there are reasons to be concerned about the phenomenon. Midnight rulemaking and midnight regulation generally have been strongly condemned by commentators and media from across the political spectrum.<sup>3</sup> There are at least two possible sets of concerns regarding the increase in rulemaking at the end of an administration: first, midnight rules may be of lower quality than rules issued at other times during administrations, and second, midnight rulemaking may involve undesirable political consequences, mainly the unwarranted extension of an outgoing administration's agenda into the successor's term. It may be very difficult to arrive at firm conclusions on either of these potential objections

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2. For a list of the interviewees, with information on their experience and affiliations, see *supra* note \*.

3. For examples of negative commentary on midnight rulemaking of the last two transitions, see Michael Fumento, *Regulatory Freight Rolls On Unchecked*, WASH. TIMES, June 3, 2001, at B3 (attacking Clinton administration midnight rules as timed to avoid public scrutiny and not in the public interest); Matthew Blake, *The Midnight Deregulation Express: In His Last Days in Power, George W. Bush Wants to Change Some Rules*, WASH. INDEP. (Nov. 11, 2008), <http://washingtonindependent.com/17813/11-hour-regulations>.

to midnight rulemaking, but this Article will attempt to do so from various perspectives.

Because rulemaking often involves values and policy preferences that are not conducive to objective measurement for quality, it is very difficult to measure the quality of rules. Various metrics have been used to attempt to measure the quality of midnight rules, including length of time that the rules were reviewed at the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Another possible measure of quality is durability, relying on the premise that low-quality rules are likely to be less durable than higher quality rules. In addition to examining existing studies of the durability of midnight rules, this Article includes the results of an original empirical study of the durability of the midnight rules issued in the last three presidential transition periods as compared with rules issued by the same administrations in non-midnight periods.<sup>4</sup>

The political desirability of midnight rulemaking is also difficult to judge and views on it are likely to be controversial. There are no clear standards for judging whether midnight rules are politically undesirable. Arguments that midnight rules are politically undesirable center on three related factors: first, that the outgoing administration is projecting its agenda into the future; second, that midnight rules are timed to avoid accountability; and third, that the outgoing administration is placing a burden on an incoming administration to sift through the high volume of material left at the end of the term. This third concern is related to the prior two. The incoming administration is placed in the position of having to review rules adopted late in the prior administration due to the potential problems with midnight rules; they may be of lower quality if they were adopted pursuant to a hastier process than normal; they may not have been open to sufficient public scrutiny; and they may represent projection of a rejected political agenda that the incoming administration will not wish to carry out.

In many cases, however, midnight rules may not suffer from serious political problems and may actually be beneficial, both for the public and the incoming administration. Because of the politically innocuous human tendency to “work to deadline,” the pace of work will naturally pick up as

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4. A disclaimer is in order here. The study I conducted for the Report on which this Article is based includes comparative numerical counts of rules, but the data have not been examined for statistical significance or in light of potential external factors for which a more sophisticated study would control, such as economic factors or political factors not included in the study. In other words, it has not been determined whether the differences in numerical counts are statistically significant or could be explained by factors such as economic growth or distress. The reader should therefore be cautious when evaluating the original data reported in this Article.

agencies try to finish the tasks on their agendas as the end of the term nears. Assuming agencies are pursuing rulemaking (whether regulatory or deregulatory) that is generally in the public interest, the fact that it takes a deadline for agencies to finish their rulemaking is unfortunate, but it does not necessarily make the rules undesirable. Further, some midnight rules may help the incoming administration by finishing up the “old business” on the agenda so the new administration can focus on their “new business.” Further, there is the possibility that late-term rulemaking reflects the outgoing administration’s ability to rise above the political fray once the election is over and act in the public interest in ways that are less likely when interest group pressure is higher.

Regardless of the policy or political desirability of midnight rules, recent incoming administrations confronted with a high volume of last-minute regulatory output by the previous administration have employed common strategies to deal with midnight rulemaking. The goal of the strategies is to stop rulemaking activity until the new administration has taken control of the government by putting in place its appointees to high-level positions. Although the details vary, common elements of these strategies include an immediate freeze on the publishing of new rules in the *Federal Register*, withdrawal of rules from the *Federal Register* that are awaiting publication, and suspension of the effectiveness of rules that have been published but have not yet gone into effect. All of these actions are designed to halt regulatory activity until appointees of the new administration are in charge.

The administration of President George W. Bush was the first to take action aimed directly at its own midnight rulemaking. The President’s Chief of Staff ordered all agencies to stop issuing proposed rules after June 1, 2008, and to stop issuing final rules after November 1, 2008. While agencies did not universally meet this deadline, the volume of midnight rules during the George W. Bush (GW Bush) administration was reduced, even though the total volume of rules issued in the administration’s entire final year was not lower than for past outgoing administrations. The deadline apparently encouraged agencies to finish their work earlier in the administration’s final year, which would reduce the volume of midnight rules and also make the rules issued in the final year less amenable to rescission or alteration by the incoming administration or Congress.

This Article concludes with a series of recommendations concerning midnight rulemaking adopted by the Administrative Conference of the United States (ACUS). These recommendations include reforms aimed at the propensity of outgoing administrations to engage in midnight rulemaking and the powers of incoming administrations to deal with the midnight rules promulgated by their predecessors.

## I. EVIDENCE THAT THE PROBLEM EXISTS

The phenomenon of midnight regulation has received attention from politicians, academics, and the media during the last several presidential transitions. The first systematic look at the general phenomenon of midnight regulation was a research paper written by Jay Cochran under the auspices of the Mercatus Center at George Mason University.<sup>5</sup> Cochran chose a very simple metric of regulatory output: the number of pages published in the *Federal Register*. Cochran recognized that this metric is imprecise because it does not distinguish among the various regulatory documents that are published in the Federal Register and does not account for the relative verbosity of rule writers, blank pages, and other variations. However, as Cochran concluded, there is no reason to suspect the existence of systematic variations in the relationship between total regulatory output and pages in the *Federal Register*.<sup>6</sup> Further, all agency rules and many other important agency actions are published in the *Federal Register*. Thus, the number of pages in the *Federal Register* is a reasonably good proxy for overall regulatory output.

Cochran found that “[t]he daily volume of rules during the final three months of the Carter Administration—as approximated by page counts of the *Federal Register*—ran more than 40 percent above the level it had averaged during the same months of the non-election years 1977, 1978, and 1979.”<sup>7</sup> Cochran also concluded that the “midnight regulation” phenomenon was not new, and that going back to 1948, “regulations during the post-election quarter . . . increase roughly 17 percent, on average, over the volumes prevailing during the same periods of non-presidential election years.”<sup>8</sup> Cochran carefully tested for explanations of the midnight regulation phenomenon other than the simple “Cinderella constraint,” employing variables such as political party control of Congress and the Executive Branch, turnover in Cabinet membership, Gross Domestic Product (GDP), and congressional days in session. Cochran found that while some of the other factors have a small impact on the volume of regulation in the midnight period,<sup>9</sup> the predominant factor is the presidential election which brings about the Cinderella constraint.

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5. See Cochran, *supra* note 1.

6. *Id.* at 2 n.4.

7. *Id.* at 2.

8. *Id.* at 3.

9. Cochran found that “each one percent rise (or fall) in GDP generates about a 1.3 percent rise (or fall) in regulatory output.” *Id.* at 11. He also found that “[p]artisan effects for both the legislative and executive branches were positive but not significant,” and that for each day that Congress stays in session during the midnight period, midnight regulation increases .3%, which Cochran characterizes as statistically significant but small. *Id.* at 11–12. Cabinet turnover appears to be strongly associated with midnight regulation. The prediction

Ever since Cochran's study documented a consistent increase in regulatory activity at the end of presidential terms, there has been a working assumption that the midnight regulation phenomenon is real. Others have confirmed the existence of the phenomenon. For example, in 2001, Wendy Gramm, former head of OIRA, testified that there were over 26,542 *Federal Register* pages published in the last three months of the Clinton administration, eclipsing the Carter administration's record of approximately 24,500 last-quarter pages.<sup>10</sup> In 2005, Jason Loring and Liam Roth published a study of the durability of midnight rules, in which they detailed and compared the number of rules issued by three agencies (National Highway Traffic Safety Administration (NHTSA), Occupational Safety and Health Administration (OSHA), and Environmental Protection Agency (EPA)) during the midnight periods of the administrations of George H.W. Bush (GHW Bush) and Bill Clinton.<sup>11</sup> Although they did not focus on documenting the midnight rulemaking phenomenon, their study noted that the pace of rulemaking during the midnight periods of the two presidential transitions they studied increased somewhat as compared with the remainder of the administrations' last years in office.<sup>12</sup>

There have been additional studies of the pace of regulatory activity, all of which confirm the existence of the midnight rulemaking effect in different ways. For example, Veronique de Rugy and Antony Davies found:

[I]n non-transition quarters, pages are added to the *Federal Register* at a constant rate—roughly one-fourth of the pages added during a calendar year will be added each quarter. However, for quarters in

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is that when there is more turnover in Cabinet membership, there will be more regulation, because the transition to a new Department Head may bring new priorities and a change in views concerning pending initiatives. *See id.* at 12–13. Of course, the highest degree of turnover occurs when the incumbent or the incumbent's party is replaced, but Cochran observes an increase in regulatory volume in post-election quarters when the incumbent is reelected. Cochran suggests that this may in part be due to the change in Cabinet membership that often occurs after re-election. *See id.* at 13.

10. *Congressional Review Act: Hearing Before the H. Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, Comm. on Gov't Reform*, 107th Cong. (2001) (testimony of Dr. Wendy L. Gramm, Distinguished Senior Fellow Dir., Regulatory Studies Program, Mercatus Ctr., George Mason Univ.). Various reports on the number of *Federal Register* pages published during the Clinton Administration's last quarter are discussed in Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 948 n.2 (2003).

11. *See* Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005).

12. *Id.* at 1454 tbl.2 (40% of all rules issued by the EPA, OSHA, and NHTSA in last eleven months of the GHW Bush administration and 51% of all rules issued in last eleven months of Clinton administration were promulgated during final three months).



which a presidential election occurred, the number of pages added exceeded the 25 percent baseline 13 out of 15 times.<sup>13</sup>

De Rugy and Davies's study confirmed that the only valid explanation for the increase in regulatory activity during transition quarters is the fact of transition itself.<sup>14</sup> In another study using the same data set, the authors reported that "after 1970, the number of pages added to the *Federal Register* increased drastically after an election, especially in 1980, 1992, and 2000, when there was a switch between political parties. There was a smaller increase when the ruling party stayed in power, such as in 1988."<sup>15</sup>

In a more comprehensive study, Anne Joseph O'Connell has documented the yearly and quarterly pace of rulemaking activity from 1983 through 2009.<sup>16</sup> She found an increase in rulemaking activity in most administrations' last years, especially in cabinet departments.<sup>17</sup> More pertinent to this Article's definition of the midnight period, she found increased rulemaking activity in the last quarter of the Clinton and GW Bush administrations.<sup>18</sup> She characterized the data on the last quarter as follows:

In terms of presidential transitions, cabinet departments finished more important actions in the last quarter of President Clinton's Administration (83 actions) than in any other quarter in the data for that presidency (the next highest was the second quarter of 1996 with 55 actions). Similarly, cabinet departments and executive agencies promulgated more final actions (95 and 22 actions, respectively) in the final quarter of President George W. Bush's Administration than in any other quarter of his presidency (the

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13. Veronique de Rugy & Antony Davies, *Midnight Regulations and the Cinderella Effect*, 38 J. SOCIO-ECON. 886, 887 (2009). In some quarters the effect was relative mild, while in others, such as 1949 and 1961, the effect was striking. *See id.* fig.2. The only quarters in which the 25% baseline was not exceeded were in the Ford-Carter transition and after Reagan's re-election. *Id.*

14. Davies and de Rugy looked at alternative explanations such as inflation, unemployment, the misery index, congressional session days and differences in party control between the presidency and Congress. They found no statistical significance for any of these factors as a potential explanation for the increase in rulemaking during the midnight period. *Id.* at 889.

15. Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 168 (2009).

16. Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011).

17. "Cabinet departments under President Reagan and President George W. Bush and all types of agencies under President George H.W. Bush completed more rulemakings in the final year than in any previous year of those Administrations." *Id.* at 503. *See also* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 952 (2008).

18. O'Connell, *supra* note 16, at 505.

next highest were 72 and 20 actions in the third quarter of the final year for cabinet departments and executive agencies, respectively).<sup>19</sup>

O'Connell found no other factor than simple timing adequate to explain the increase in rulemaking in the last quarter of administrations.<sup>20</sup> O'Connell's study also documented an increase in initiation of rules at the end of administrations.<sup>21</sup>

Another study documenting the existence of the midnight rulemaking phenomenon is a Congressional Research Service (CRS) report written by Curtis W. Copeland.<sup>22</sup> The primary focus of Copeland's Report is the status of midnight rules issued by the GW Bush administration. The Report contains data concerning the volume of midnight rules in the GW Bush administration.<sup>23</sup>

The primary focus of this Article is on rules issued pursuant to notice and comment, not on interpretative rules, policy statements, guidance documents, executive orders, and other rule-like documents typically issued without notice and comment. Even if there is an increase in non-notice and comment activity during the midnight period, documents issued without notice and comment lack durability when compared to rules issued after notice and comment. This makes them both less problematic, because the incoming administration can revoke or alter them without notice and

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19. *Id.* at 504.

20. *Id.* at 501–07.

21. *Id.* at 498. O'Connell reports that GW Bush's administration proposed more rules during the third quarter of its final year than in any other quarter of its eight years. *Id.* at 498–99. In another study, O'Connell noted that three departments, the Departments of Transportation, Agriculture, and Interior, issued more NPRMs during the final quarter of the GHW Bush administration “than during any other political transition period.” O'Connell, *supra* note 17, at 948.

22. CURTIS W. COPELAND, CONG. RESEARCH SERV., R4077, “MIDNIGHT RULES” ISSUED NEAR THE END OF THE BUSH ADMINISTRATION: A STATUS REPORT (2009).

23. *Id.* at 2–3:

From November 1, 2008, through January 2009, federal agencies sent GAO a total of 341 ‘significant’ or ‘substantive’ final rules, a 51% increase from the number of such rules sent during the same period one year earlier (225 rules). During the same November 2008–January 2009 timeframe, the agencies sent GAO 37 major rules, compared with 23 during the same period one year earlier (a 61% increase). The surge in rulemaking at the end of the Bush Administration is also apparent in the number of significant final rules that OIRA reviewed pursuant to Executive Order 12,866. According to the Regulatory Information Service Center, from September 1, 2008, through December 31, 2008, OIRA reviewed a total of 190 significant final rules—a 102% increase when compared with the same period in 2007 (when OIRA reviewed 94 significant final rules).

*Id.* (footnotes omitted).

comment, and less likely to be done, because given easy revision, it may not be worth the effort to issue them at the end of the term.

Nonetheless, there is a noticeable increase in the issuance of non-notice and comment rule-like documents such as interpretive rules, policy statements, and guidance documents during the midnight period. Some agencies issue many more guidance documents than actual rules, possibly to avoid the rigors of the rulemaking process and the relatively stringent judicial review of rules.<sup>24</sup> Agencies are known to treat non-legislative rules as if they are binding law, despite the fact that the APA's notice and comment procedures were not employed in promulgating them.<sup>25</sup> Some late-issued guidance documents have been attacked as midnight regulation, but these attacks focus on a particular document rather than on the general phenomenon of guidance documents issued in the midnight period.<sup>26</sup>

To substantiate the increase in non-legislative rulemaking during the midnight period, I conducted a simple empirical study on the volume of interpretative rules, policy statements, and guidance documents during midnight and non-midnight periods in the last three presidential transitions:<sup>27</sup> GHW Bush to Bill Clinton, Bill Clinton to GW Bush, and GW Bush to Barack Obama.<sup>28</sup> The findings are that in each midnight period, the issuance of guidance documents, policy statements, and interpretative rules was higher than the non-midnight period in the prior year, and that the bulk of this activity comprised guidance documents and draft guidance documents. A significant number of the documents issued were policy statements and very few were interpretative rules in both midnight and non-midnight periods. The exact numbers are as follows:

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24. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 573–74 (2003); Peter L. Strauss, *The Rule-making Continuum*, 41 DUKE L.J. 1463, 1468–69 (1992).

25. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328–55 (1992).

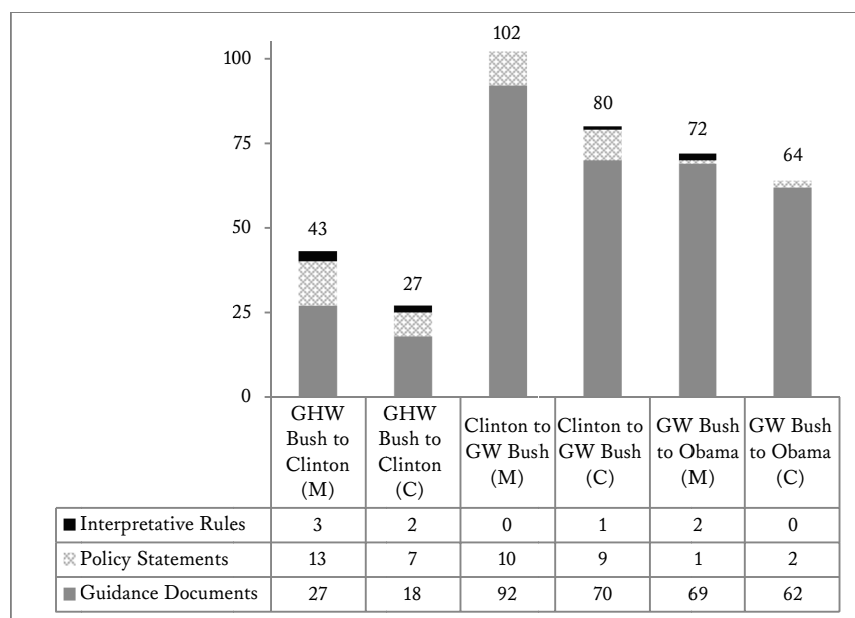
26. See e.g., Michael Bennett Homer, *Frankenfish . . . It's What's for Dinner: The FDA, Genetically Engineered Salmon, and the Flawed Regulation of Biotechnology*, 45 COLUM. J.L. & SOC. PROBS. 83, 130–31 (2011) (endorsing characterization of January 15, 2009, publication of FDA guidance document on genetically engineered animals as “midnight regulation”).

27. For a disclaimer concerning the data reported here, see *supra* note 4.

28. For the midnight period, I used October 20 through January 20 of the transition year, so that this study used the definition of midnight rule used throughout this report. For the non-midnight period, I used the same dates one year earlier. I searched the *Federal Register* database in Westlaw with a query designed to pick up all interpretative rules (and interpretive rules), policy statements, and guidance documents during the relevant periods. The search was as follows: TI(“INTERPRETATIVE RULE” “GUIDANCE DOCUMENT” “POLICY STATEMENT” “INTERPRETIVE RULE” “INTERPRETATIVE RULE” “GUIDANCE DOCUMENT” “POLICY STATEMENT” “GUIDANCE”) & date(aft oct. 20 xxxx) & date(bef jan. 20, xxxx).

During the 1992–93 midnight period, agencies under President GHW Bush published 43 non-legislative rules, comprising 27 guidance documents, 13 policy statements, and 3 interpretative rules, as compared with 27 non-legislative rules during the same period in the prior year, comprising 18 guidance documents, 7 policy statements, and 2 interpretative rules. During the 2000–01 midnight period, agencies under President Clinton issued 102 non-legislative rules, comprising 92 guidance documents, 10 policy statements, and 0 interpretative rules, as compared with 80 non-legislative rules during the same period in the prior year, comprising 70 guidance documents, 9 policy statements, and 1 interpretative rule. During the 2008–09 midnight period, agencies under President GW Bush issued 72 non-legislative rules, comprising 69 guidance documents, 1 policy statement and 2 interpretative rules, as compared with 64 non-legislative rules during the same period in the prior year, comprising 62 guidance documents, 2 policy statements, and 0 interpretative rules.

TABLE 1: NON-LEGISLATIVE MIDNIGHT RULES



The issuance of executive orders also increases during midnight periods.<sup>29</sup> One CRS report on presidential transitions found that “Presidents who were succeeded by a member of the other party signed ‘nearly six additional orders . . . in the last month of their term, nearly double the average

29. For a disclaimer concerning the data reported here, see *supra* note 4.

level.’<sup>30</sup> President GW Bush issued 10 executive orders after Election Day 2008, out of a total of 280 for his presidency.<sup>31</sup> His usual pace would have produced only 7.7 executive orders during the post-election period. Since 1977, the highest number of executive orders issued between the election and leaving office was by President Carter, who issued 36 executive orders after Election Day 1980, compared to 319 during his 4 years in office. This means that Carter issued executive orders at double the rate after the 1980 election as he had before, which is consistent with his then record-setting regulatory activity, as indicated by pages published in the *Federal Register*. However, 10 of these orders were issued on his last day in office to carry out his agreement with the Government of Iran to free 52 Americans taken hostage at the U.S. Embassy in Tehran.<sup>32</sup> President GHW Bush issued 14 executive orders after Election Day 1992, out of a total of 165 for his 4 years in office. At the rate for his entire presidency, Bush would have been expected to issue 8.8 executive orders during the 72 days after the election, or more than a third fewer than he actually issued. The increase in President Clinton’s rate of issuing executive orders was similar to Carter’s. Clinton issued twenty-two executive orders after the 2000 election, out of 363 in total for his 8-year presidency. Once again this represents a more than doubling of the rate of issuing executive orders as compared with his administration’s term as a whole. Had he maintained his previous rate, he would have issued between 9 and 10 executive orders after the election.

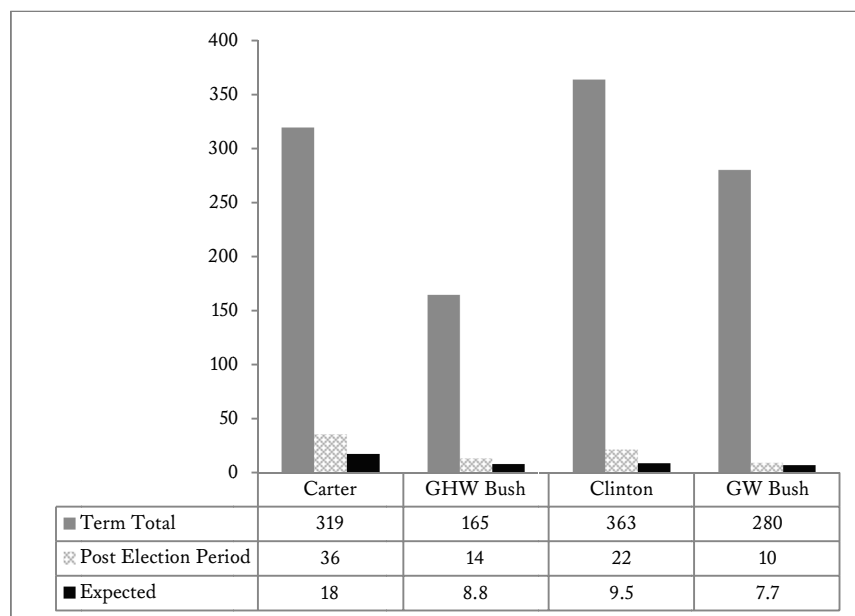
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30. L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 13 (2008) (alteration in original), available at <http://www.usdoj.gov/pardon/> (quoting Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 457 (1999)). In an article by William Howell and Kenneth Mayer, the authors perform a more qualitative analysis of the increased use of Executive Orders at the end of presidencies. William G. Howell & Kenneth Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 538–40 (2005).

31. The data for this discussion of Executive Orders is from the American Presidency Project’s list of Executive Orders. John T. Wooley & Gerhard Peters, *Executive Orders*, THE AMERICAN PRESIDENCY PROJECT, [http://www.presidency.ucsb.edu/executive\\_orders.php](http://www.presidency.ucsb.edu/executive_orders.php) (last visited Oct. 21, 2012).

32. *Id.* For a discussion of this episode, including President Carter’s actions as he left office, see Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303 (2001).

TABLE 2: EXECUTIVE ORDERS ISSUED



In addition to issuing midnight rules and other rule-like documents, administrations take other actions very late in their terms that raise questions concerning timing. The most widely-known example involves exercises of the President's clemency power, which includes grants of pardons, sentence reductions and commutations, remission of fines, and other forms of clemency.<sup>33</sup> Going back to President Truman, data published by the Department of Justice reveal that except for President Johnson, presidents have used their clemency power at a higher rate during their final four months in office than during other periods of their administrations.<sup>34</sup> The increases range from relatively small, such as Truman's increase from twenty-two per month to twenty-five per month during the midnight period, to dramatic increases, such as Clinton's increase from two per month to

33. The pardon power is granted in the United States Constitution. U.S. CONST. art. II, § 2, cl. 1 ("[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

34. HALCHIN, *supra* note 30, at 9 tbl.1 (citing *Office of the Pardon Attorney*, U.S. DEP'T JUSTICE, <http://www.usdoj.gov/pardon/> (last visited Jan. 7, 2012)). An incoming administration cannot undo the exercise of this power once the documents signifying the exercise of the power have been delivered to their intended recipient. *In re De Puy*, 7 F. Cas. 506, 509-511 (S.D.N.Y. 1869) (explaining that "[t]he law undoubtedly is, that when a pardon is complete, there is no power to revoke it," but that a pardon is not valid until delivery and is subject to revocation until delivery occurs).

sixty-five per month during his final four months in office.<sup>35</sup> For whatever reason, presidents tend to grant the bulk of their pardons and clemencies at the end of their time in office.

Another category of midnight activity comprises personnel decisions. One common late-term action taken by outgoing administrations is converting the positions of political appointees to career status; this is referred to as “burrowing in” or “burrowing.”<sup>36</sup> Nina Mendelson reports the magnitude of this practice as follows: “In the last two years of the Clinton administration, one hundred political appointees moved to civil service positions . . . . In the administration of President George H.W. Bush, approximately 160 individuals made such career moves.”<sup>37</sup> There are legal requirements that must be followed to do this, and according to the Government Accountability Office, these requirements are often not followed.<sup>38</sup> Burrowing has raised alarms in Congress, but on at least one occasion, an official of an outgoing administration justified burrowing as a way to ensure continuity of leadership through the transition in the especially sensitive area of national security: “In a January 2008 report to the [Department of Homeland Security (DHS)] Secretary on the transition, the Homeland Security Advisory Council recommended that the department ‘consider current political appointees with highly specialized and needed skills for appropriate career positions.’”<sup>39</sup>

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35. HALCHIN, *supra* note 30, at 9 tbl.1 (citing data from United States Department of Justice, Office of the Pardon Attorney). President George W. Bush’s data, not included in the CRS report because the report was issued before GW Bush left office, show a dramatic increase in percentage with a comparatively small number of exercises of the clemency power. GW Bush averaged fewer than 2 pardons and clemencies per month during the non-midnight period and 8 pardons per month during his final four months in office. *See Pardons Granted by President George W. Bush (2001-2009)*, U.S. DEPT JUSTICE, <http://www.justice.gov/pardon/bushpardon-grants.htm> (last visited Dec. 31, 2012).

36. *See* BARBARA L. SCHWEMLE, CONG. RESEARCH SERV., RL34706, FEDERAL PERSONNEL: CONVERSION OF EMPLOYEES FROM APPOINTED (NONCAREER) POSITIONS TO CAREER POSITIONS IN THE EXECUTIVE BRANCH 1–2 (2008); *see also* Mendelson, *supra* note 24 at 559–61.

37. Mendelson, *supra* note 24, at 563 n.27 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-02-326, REPORT TO CONGRESSIONAL REQUESTERS: PERSONNEL PRACTICES: CAREER AND OTHER APPOINTMENTS OF FORMER POLITICAL APPOINTEES, OCTOBER 1998–APRIL 2001 2 (2002) [hereinafter GAO, 1998–2001 Personnel Practices]; U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-96-2, REPORT TO THE HONORABLE PATRICIA SCHROEDER, HOUSE OF REPRESENTATIVES: PERSONNEL PRACTICES: CAREER APPOINTMENTS OF LEGISLATIVE, WHITE HOUSE, AND POLITICAL APPOINTEES 5 (1995)).

38. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-381, PERSONNEL PRACTICES: CONVERSIONS OF EMPLOYEES FROM NONCAREER TO CAREER POSITIONS MAY 2001–APRIL 2005 4–5 (2006); *see also* L. ELAINE HALCHIN, CONG. RESEARCH SERV., RS20730, PRESIDENTIAL TRANSITIONS AND ADMINISTRATIVE ACTIONS CRS-2 (2001).

39. BARBARA L. SCHWEMLE, CONG. RESEARCH SERV., RL34706, FEDERAL PERSONNEL: CONVERSION OF EMPLOYEES FROM APPOINTED (NONCAREER) POSITIONS TO CAREER POSITIONS IN THE EXECUTIVE BRANCH 9 (2008) (quoting HOMELAND SECURITY

In addition to conversions from political to career status, outgoing officials make important appointments and promotions in the career service.<sup>40</sup> Mendelson acknowledges that outgoing administrations must fill positions to keep the government operating properly, but she concludes that some personnel decisions are made to “embed people with particular ideological or programmatic commitments . . . .”<sup>41</sup> This, she says, “seems to increase the prospect that a new President will face a resistant—even subversive—bureaucracy.”<sup>42</sup>

There are many more actions that presidents have taken as they leave office, including actions that protect federal land from development under various programs.<sup>43</sup> While these actions are often significant and sometimes irrevocable (or not easily revoked), they do not warrant separate sustained attention in this Article because they do not involve important policy commitments. They often elicit criticisms similar to those leveled at midnight rulemaking: they are hastily done, without adequate input from affected interests, and are contrary to principles of democracy and accountability. The field of international law and relations presents special issues concerning midnight actions, and these are not considered in this Article.<sup>44</sup>

In sum, the midnight regulation phenomenon is real and includes the production of midnight rules and other actions by outgoing administrations. In the final quarter of each administration, the volume of regulatory activity increases, including increases in agency rulemaking, issuance of agency guidance documents and other non-legislative rules, an increase in the issuance of executive orders, an increase in the use of the President’s pardon power, and an increase in the movement of politically appointed personnel to career positions.

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ADVISORY COUNCIL, U.S. DEPARTMENT OF HOMELAND SECURITY, REPORT OF THE ADMINISTRATION TRANSITION TASK FORCE 6 (2008) (footnote omitted).

40. See Mendelson, *supra* note 24, at 606.

41. *Id.* at 610.

42. *Id.* at 612.

43. Perhaps the most famous episode in this area is President Grover Cleveland’s midnight designation of twenty-one million acres of federal land as forest reserve to protect it from logging. Congress passed legislation overriding the designation, but Cleveland used his pocket veto against that legislation. The matter was not cleared up until after Cleveland’s successor took office. See Combs, *supra* note 32, at 331–32. President Clinton designated numerous national monuments, and expanded the boundaries of existing monuments, in his last year in office, including several in November 2000, and January 2001, after having designated none in his first seven years in office. See Beermann, *supra* note 10, at 973–76. This designation provides even greater protection than inclusion of the land in a national park or forest.

44. See generally Combs, *supra* note 32.



## II. NORMATIVE ISSUES SURROUNDING MIDNIGHT RULEMAKING

Since the phenomenon was first widely discussed after the publication of Cochran's study, midnight rulemaking has consistently provoked negative reactions in the media, in government, and among commentators. This Part asks why. Looking at the midnight rulemaking phenomenon from a normative perspective involves investigating why it occurs and asking whether there are categories of midnight rules that present special normative concerns not shared with other categories of such rules. The first Section looks at the political background of midnight rulemaking as part of the effort to discern a basis to construct a normative critique. The second Section lists the normative arguments that have been or could be made against midnight rulemaking and responses to those arguments. The third Section offers some conclusions on these aspects of this Report's investigation.

Many of the interviewees who were consulted for this Article shared a basic understanding of the nature of the midnight rulemaking phenomenon. In the view of most of the interviewees, midnight rulemaking results mainly from a rush to finish pending tasks and perhaps add a few tasks that might not have been performed but for the impending takeover by an administration with different policy views. The interviewees by and large did not see midnight rulemaking as an effort to sabotage the incoming administration or illegitimately project the outgoing administration's policy into the future in contravention of the apparent will of the electorate. These views are discussed further below.

### *A. Political Background of Midnight Rules*

To understand midnight rulemaking, and why it has been so widely criticized, it is important to construct a picture of the political background that leads to midnight rulemaking. The political background might also help evaluate whether midnight rules are likely to suffer from the quality concerns that some people have about them.

As discussed in my prior work, the increased output of agencies at the end of administrations can be thought of as arising largely from three overlapping but distinct phenomena—namely, hurrying, waiting, and delay.<sup>45</sup>

#### 1. Hurrying

“Hurrying” is the urge of an outgoing administration to get as much done as possible at the end of the term. Outgoing administrations may hurry not only because they need to finish tasks before the impending deadline, but also because they want to enact as many of their policies into

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45. See generally Beermann, *supra* note 10.

law as possible before an incoming administration with different views takes office, perhaps fearing that the incoming administration's policies will produce inferior results.<sup>46</sup>

The need to hurry to finish rules, even those that may not be particularly controversial, may arise, in part, from the tendency for rulemaking to slow down at the beginning of a new administration<sup>47</sup> while the incoming administration puts its appointees in place, a process that seems to be taking longer in recent transitions.<sup>48</sup> This delay at the outset of a new administration may now seem inevitable given the strategies that incoming administrations have adopted to deal with the problem of midnight rulemaking. Further, because all of the procedural steps and substantive analyses required in rulemaking take a long time, it should not be surprising that much rulemaking is completed very late in each administration's term, when officials hurry to finish work on rules that began earlier in the term.<sup>49</sup> Agency staff may also face the real possibility that the new administration will place a low priority on their pending rules and may never complete work on them, which also leads to hurrying to finish before the transition.

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46. As William Howell and Kenneth Mayer explain, at the end of a term, especially when the new President is of a different party, outgoing Presidents act to extend their policies into the future. See Howell & Mayer, *supra* note 30.

47. See O'Connell, *supra* note 16, at 501 ("[T]he first year of an administration is associated (in a statistically significant manner) with fewer rulemakings."). O'Connell reports that rulemakings that spanned more than one administration took, on average, more than twice as long as rulemakings that were completed during one administration. See *id.* at 514. Of course, as O'Connell recognizes, it's unclear which factor is the primary cause—due to the passage of time, a long rulemaking process is likely to span two administrations, and a rulemaking that spans two administrations is likely to take longer due to the slower pace of regulatory activity at the beginning of administrations. See *id.*

48. Anne Joseph O'Connell reports that on average it took Presidents Clinton and GW Bush more than six months to staff Senate-approved positions in cabinet departments and executive agencies. ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 10 fig.5 (2010). O'Connell reports that "the Obama Administration had in place 64.4% of Senate-confirmed executive agency positions after one year," compared to 86.4% in the Reagan administration, 80.1% in the GHW Bush administration, 69.8% in the Clinton administration, and 73.8% in the GW Bush administration. *Id.* at 2.

49. O'Connell characterizes the data as follows:

Cabinet departments under President Reagan and President George W. Bush and all types of agencies under President George H.W. Bush completed more rulemakings in the final year than in any previous year of those Administrations. President Clinton's cabinet departments, executive agencies, and independent agencies, and President Reagan's executive and independent agencies, all as groups, also increased their final actions in the final year from the preceding year.

O'Connell, *supra* note 16 at 503.

Hurrying occasionally involves initiatives that are started and completed very late in an administration's term, not simply to finish what's already on the agenda, but to do more to project the administration's policies into the future. An outgoing administration could conceivably initiate rule-makings to promulgate rules quickly before the end of the term. Although it is unlikely that the volume of such rules would be very high, this might be the type of midnight rule that would elicit condemnation as illegitimate and possibly of lower-than-normal quality.

Hurrying at the end of a term gives rise to the concern that rules issued during the midnight period will be of lower quality than rules issued at other times. There is some evidence that OIRA review is shortened during the midnight period,<sup>50</sup> and there are suggestions that some rules are rushed from proposal to completion near the end of Presidents' terms.<sup>51</sup> While the evidence supports the former claim, the latter suggestion lacks substantiation.

As discussed above, O'Connell's analysis of her data for her report on the duration of rulemakings suggests that generally, midnight rules are considered for a longer period of time than non-midnight rules, although there is a slight increase in relatively short rulemakings (180 days or less) among rules finalized during the midnight period.<sup>52</sup> An example of a midnight rule that went from proposal to promulgation very quickly involves a

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50. See Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time*, (Mercatus Ctr., George Mason Univ., Working Paper No. 08-40, 2008), available at [http://mercatus.org/sites/default/files/publication/WPPDF\\_Empirical\\_Tests\\_for\\_Midnight\\_Regulations.pdf](http://mercatus.org/sites/default/files/publication/WPPDF_Empirical_Tests_for_Midnight_Regulations.pdf) (concluding that the number of significant rules reviewed during midnight periods increases and the time OIRA spends reviewing them during midnight periods decreases); JERRY BRITO & VERONIQUE DE RUGY, FOR WHOM THE BELL TOLLS: THE MIDNIGHT REGULATION PHENOMENON 13-14 (Mercatus Policy Series, Policy Primer No. 9, 2008) (discussing implications of McLaughlin's study). REECE RUSHING, RICK MELBERTH & MATT MADIA, CTR. FOR AM. PROGRESS & OMB WATCH, AFTER MIDNIGHT: THE BUSH LEGACY OF DEREGULATION AND WHAT OBAMA CAN DO (2009). This OMB Watch report states that in the 2008-2009 transition, OIRA review was very short in some cases:

OIRA spent an average of 61 days reviewing regulations in 2008, but dispensed with many of Bush's Midnight Regulations far quicker. OIRA reviewed a proposed draft of the Health and Human Services Department's provider conscience regulation in just hours, and reviewed the final regulation in 11 days. OIRA approved the Interior Department's oil shale leasing regulation after only four days.

*Id.* at 4.

51. For example, Anne Joseph O'Connell cites a rule on Oil Shale Management issued on November 18, 2008, as having been issued just four months after it had been proposed. O'Connell, *supra* note 16, at 472 n.3 (citing Oil Shale Management—General, 73 Fed. Reg. 69,414 (Nov. 18, 2008) (to be codified at 43 C.F.R. pts. 3900, 3910, 3920, 3930)).

52. See O'Connell, *supra* note 16, at 517 tbl.1. See also *id.* at 519 ("There is, however, still a quickening in the rulemaking process in the midnight quarter.").

regulation governing inter-agency cooperation under the Endangered Species Act.<sup>53</sup> This rule was proposed on August 15, 2008, with a 30-day comment period.<sup>54</sup> The comment period was extended for an additional 30 days<sup>55</sup> and then the final rule was promulgated with minor modifications on December 16, 2008, only 4 months after the initial proposal.<sup>56</sup>

Another example of a relatively short process for promulgating an important rule involves the Clinton administration's midnight rule on air conditioner and heat pump efficiency. This rule was proposed on October 5, 2000,<sup>57</sup> and promulgated as a final rule in the Federal Register on January 22, 2001,<sup>58</sup> after a sixty-day comment period and a public hearing held a little less than a month after the Notice of Proposed Rulemaking (NPRM) was issued. This was a complex and lengthy rule that Susan Dudley says, "hurtled through the regulatory process at lightning speed."<sup>59</sup> However, as with many rules, including midnight rules, the regulatory process did not begin with the issuance of the NPRM. In fact, this rule had a lengthy procedural history that included a congressionally-mandated 1994 deadline and then, after that deadline was missed, a 1995 congressionally-mandated delay, a conference on the issues in 1998, and an Advance Notice of Proposed Rulemaking issued in 1999.<sup>60</sup>

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53. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76,272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402).

54. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47,868 (proposed Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402).

55. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 52,942 (proposed Sept. 12, 2008) (to be codified at 50 C.F.R. pt. 402).

56. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. at 76,272. A partial impetus for this rule was apparently a 2004 GAO Report concluding that certain aspects of interagency consultation under the Endangered Species Act needed clarification. See Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. at 47,869. There is nothing in the record that explains why the administration waited until the midnight period to promulgate the revisions. Another example of a rushed regulatory process is the August 2008 proposal concerning OSHA risk assessment. See *infra* note 148.

57. Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 65 Fed. Reg. 59,590 (proposed Oct. 5, 2000) (to be codified at 10 C.F.R. pt. 430).

58. Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 7170 (Jan. 22, 2001) (to be codified at 10 C.F.R. pt. 430).

59. See Susan E. Dudley, *Midnight Regulation at All-Time High*, HEARTLAND INSTITUTE (March 1, 2001), <http://heartland.org/policy-documents/midnight-regulations-all-time-high>, quoted in Howell & Mayer, *supra* note 46, at 551. Dudley states that the rule was issued "[o]ver the objections of other administration officials, and contrary to many public comments . . ." *Id.*

60. For the complete history of this regulation, see *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 188–91 (2d Cir. 2004), discussed *infra* Section IV.B.2.b. The Abraham decision rejected the GW Bush administration's efforts to rescind the rule promulgated in the waning days of the Clinton administration. *Id.* at 206.

However, it appears that short regulatory processes are the exception rather than the rule, even with regard to midnight rules.<sup>61</sup> The published scholarly articles and media reports criticizing midnight rulemaking cite only a few examples of rushed rules. One article cites the GW Bush administration's midnight rule on shale oil development as having been proposed only four months before it was finalized.<sup>62</sup> While it is true that the NPRM was issued on July 23, 2008, slightly less than four months before the final rule, an Advance NPRM had been issued in August 2006<sup>63</sup> with another notice extending the comment period issued in September 2006.<sup>64</sup> The agency also held "listening sessions" with representatives of governors of affected states in 2006 and 2007.<sup>65</sup> Thus, this rule had been under consideration for more than two years before it was issued, hardly a last-minute rush job.

There are reasons to believe that hurrying is unlikely to result in rules of substantially lower quality than rules issued during other periods. For one, attention to any individual rule during the long rulemaking process is likely to be episodic. In this regard, Sally Katzen, OIRA Administrator during the final days of the Clinton administration, reported in an interview that during the midnight period of that administration (which produced a high volume of Midnight Rules), the administration did not rush rules through, but rather performed multiple steps simultaneously that at other times would have been performed seriatim.<sup>66</sup> Each rule is likely to

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61. OMB Watch claims that comment periods were shortened during the 2008–2009 midnight period:

The administration proposed a handful of rules between July and September 2008 that it wanted to finalize by year's end. Agencies allowed only 30 days for public comment for several of those rules. (The public comment period usually lasts 60 days.) . . . In October, the Interior Department proposed stripping Congress of its power to prohibit mining on federal lands in emergency situations—a power that Congress had used in June to prohibit uranium mine leasing near the Grand Canyon. Interior allowed only 15 days for public comment on the rule. An Interior Department official defended the shortened comment period, saying the public already had been given a chance to comment on an earlier draft of the rule that was released in 1991.

RUSHING, MELBERTH & MADIA, *supra* note 50, at 4–5 (footnote omitted).

62. See O'Connell, *supra* note 16, at 472.

63. Commercial Oil Shale Leasing Program, 71 Fed. Reg. 50,378 (proposed Aug. 25, 2006) (to be codified at 43 C.F.R. pt. 3900).

64. Commercial Oil Shale Leasing Program 71 Fed. Reg. 56,085 (Sept. 26, 2006) (to be codified at 43 C.F.R. pt. 3900).

65. Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,415 (Nov. 18, 2008) (to be codified at 43 C.F.R. pts. 3900, 3910, 3920, 3930).

66. Telephone Interview with Sally Katzen, former Administrator of OIRA and current Senior Advisor, Podesta Group, Government Relations and Public Relations Professionals (Nov. 3, 2011).

receive attention at particular moments and then get passed along to the next step, so the question isn't how long the rule has been pending, but rather, how much attention the rule received during the time it was under consideration. Further, even during non-midnight periods, many rules must be rushed through the process to meet statutory and other deadlines. Moreover, judicial review ensures that agencies cannot relax quality standards to an extent that survival on judicial review is thrown into question.

Despite these reasons for questioning whether midnight rules are actually rushed through, O'Connell suggests that the timing of rulemaking activity may make it more likely that the agency's ultimate decision is found "arbitrary and capricious."<sup>67</sup> She raises this possibility with regard to midnight rules actually issued and to agency withdrawal of rules shortly after a new President takes office.<sup>68</sup> O'Connell apparently believes that courts are likely to be more suspicious of agency action taken during the midnight period and at the outset of an administration, perhaps due to the increased role that politics may play at such times.

## 2. Delay

The second general category of reasons that rulemaking might increase at the end of the President's term is "delay." Delay is related, in many instances, to the factors that produce hurrying. The production of rules may be delayed by factors both internal and external to the administration. Delay includes apparently innocuous procrastination, when other priorities make particular rulemaking proceedings seem less urgent until the deadline of presidential transition approaches. The intrusion of other priorities may have led to delays, such as delays in rulemaking that resulted from the need for multiple agencies to respond to regulatory issues that arose in the wake of the attacks of September 11, 2001.<sup>69</sup> There are also obvious cases of externally imposed delay, for example, when Congress (via appropriations riders) prohibited the Department of Labor from issuing its ergonomics rule until the final year of Clinton's term.<sup>70</sup> The rule on efficiency of air

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67. See O'Connell, *supra* note 48, at 526–27 (citing Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1201–02 (2009)).

68. See *id.*

69. See *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 159 (3d Cir. 2002) (describing OSHA's reliance on need to focus attention on September 11 attacks as one reason for delay in promulgating rule).

70. See Beermann, *supra* note 10, at 960–61 (discussing appropriations riders that made it impossible for the Department of Labor to issue its ergonomics rule until the final year of the Clinton administration). Appropriations riders also affected the timing of rules related to mining during the Clinton administration. See Andrew P. Morriss, Roger E.

conditioners and heat pumps at issue in *Abraham* was also delayed by Congress during the Clinton administration.<sup>71</sup> Judicial decisions requiring attention to one rule may divert resources away from others.

Delay in completing rulemakings also results from factors built into the rulemaking process. As mentioned above, at the outset of a new administration, there may be delays in putting key personnel in place to oversee the rulemaking process. However, the effects of this should be minimal in the eighth year of an administration, when midnight rulemaking usually becomes an issue. By the administration's final year, complex analytic and procedural requirements are likely to contribute much more to lengthy rulemaking processes than personnel vacancies. If a rule is politically controversial and if interest groups are arrayed in various positions concerning the agency's rulemaking plans, time is needed for the agency to arrive at the best rule that is also politically tenable.

### 3. Waiting

The final general political explanation for midnight rulemaking is "waiting." Waiting involves an outgoing administration waiting until the midnight period, usually so that rules can be promulgated after the election when political accountability is lower. To some, this is viewed as the most problematic sort of midnight rulemaking, because it seems to exacerbate accountability problems inherent in the administrative state. However, there are difficulties in and disincentives to waiting that make it somewhat less likely to occur than it might be assumed. The main reason that waiting is not likely to explain midnight rulemaking is the reality that virtually every midnight rule has been publicly proposed well before the election.<sup>72</sup>

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Meiners & Andrew Dorchak, *Between a Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 580–83 (2003).

71. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 188–91 (2d Cir. 2004).

72. Amy Goldstein, 'Last-Minute' Spin on Regulatory Rite; Bush Review of Clinton Initiatives Is Bid to Reshape Rules, *Wash. Post*, June 9, 2001, at A1, quoted in Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 *Duke L.J.* 1015, 1039 n.91 (2001):

[V]irtually all the regulations finished by federal agencies shortly before Clinton left office had been developed over years, according to government documents, outside policy analysts, and officials of the Bush and Clinton administrations. Some had been delayed by lawsuits or because Republican-led Congresses of the mid- to late-1990s had explicitly forbidden federal agencies to work on them.

Moreover, the regulations completed during Clinton's final weeks in office were in step with a brisk pace of regulatory work throughout his two terms—and with a longstanding practice in which presidents of both political parties have issued many regulations just before they departed.

As Professor Jim Rossi has stated, “Midnight Regulations often reflect the culmination of a lengthy rulemaking process, a process that is sometimes held up against the agency’s wishes for political or budgetary reasons.”<sup>73</sup> There are not many instances of rules proposed just before or even after the election. Thus, the outgoing administration’s intentions are normally known to the public well before the election.

There are also strong disincentives to waiting. For one, waiting until after the election means that the political benefit enjoyed by the outgoing administration will be muted. Further, waiting until after the election to promulgate a rule reduces the value of the rule because it might be rescinded or revised by the new administration, and even if it is left intact, it might not be enforced with enthusiasm by the incoming administration. Waiting also entails a risk that the rulemaking process will not be completed before the transition, and the rule will never be issued<sup>74</sup> or will be issued so late that the incoming administration can prevent it from being published in the *Federal Register*.

Despite these reasons for suspecting that waiting is not a serious problem, critics have accused midnight rules of being timed to fly under the political radar. For example, the outgoing Reagan administration was accused in a magazine article of holding off on some initiatives until after the election so that regulatory actions were not held against Vice-President GHW Bush in his campaign to be President.<sup>75</sup> One example cited is a rule promulgated soon after GHW Bush was elected that subjected transportation workers to random drug testing.<sup>76</sup> The Teamsters Union had endorsed Bush for President, and the article contains speculation from a trucking lobbyist that the endorsement might have been affected if this rule had been issued before the election.<sup>77</sup> Scholars have accused the Clinton administration of waiting until after the election to promulgate controversial mining regulations, although the authors’ only evidence was the timing of the issuance of the final rules.<sup>78</sup>

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73. Rossi, *supra* note 72, at 1039.

74. This happened, for instance, with regard to the OSHA risk assessment proposed rule, discussed above, that was ultimately withdrawn by the Obama administration. *See infra* note 148.

75. *See* Ronald A. Taylor et al., *Here Come Ronald Reagan’s ‘Midnight’ Regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11, *cited in* Anne Joseph O’Connell, *supra* note 16, at 479 n.29.

76. *Id.* at 11. *See* Control of Drug Use in Mass Transportation Operations, 53 Fed. Reg. 47,156 (Nov. 21, 1988) (to be codified at 49 C.F.R. pt. 653).

77. Taylor et al., *supra* note 75, at 11.

78. *See, e.g.,* Morriss et al., *supra* note 70, at 583 (“Under the terms of the appropriations rider, BLM could have issued the regulation at any time after January 30, 2000 (i.e., the end of the required comment period following the NAS report under the appropriations rider). Even allowing time for consideration of the comments that BLM received during the



Waiting may be a more logical strategy when the incumbent hopes or expects the next President to be of the same political party.<sup>79</sup> It may help explain the timing of deregulatory action in the midnight period of the GW Bush administration. Given that the need for stricter regulation following the 2008 financial crisis was a campaign issue, perhaps the outgoing Bush administration did not want to burden Republican candidate John McCain with the necessity of explaining why deregulation was still appropriate.

Waiting may also explain some presidential actions not involving rule-making, especially pardons and related clemencies. Presidents tend to increase the use of their pardon power during the midnight period, perhaps to avoid political consequences for controversial pardons.<sup>80</sup>

#### 4. Other Elements

There are additional elements of the political background of midnight rulemaking that are not completely captured by the discussion of hurrying, waiting, and delay that may help explain the phenomenon. One of the common criticisms of midnight rulemaking is that it has negative effects on presidential transitions in two ways. First, a high volume of midnight rules diverts the incoming administration's time and energy from moving forward with its agenda to looking back on the midnight rulemaking of its predecessor. Due to concerns over the quality of midnight rules and the possibility that midnight rules will undercut the new administration's policies, incoming

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final round of public comment, the almost eleven-month delay before the regulations issuance suggests that the post-election timing was not accidental.”).

79. See *Reagan Readies 451 Regulation Changes before Leaving Office*, CHI. TRIB., Sept. 18, 1988, at 8.

80. For example, after issuing very few pardons during most of his 8 years in office, President Clinton exercised his power to grant pardons and clemency 176 times on his last day in office. He also granted approximately 60 pardons in December 2000, for a total of approximately 236 uses of the pardon power in the last two months of his presidency. President Clinton granted two of his most noteworthy pardons at the end of his term, to Mark Rich, a wealthy democratic financier who was a fugitive from justice at the time the pardon was granted, and to Patty Hearst, the granddaughter of the late media mogul William Randolph Hearst, who was kidnapped by a revolutionary group with whom she participated in an armed bank robbery, apparently of her own free will. The large number of end-of-term pardons, and the fact that some of the pardons were controversial, supports the inference that President Clinton waited to exercise the pardon power until he was about to leave office so that neither he, nor his Vice-President, who was running to succeed him, would suffer political heat due to the pardons. See *Pardons Granted by President William J. Clinton (1993–2001)*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/pardon/clintonpardon\\_grants.htm](http://www.justice.gov/pardon/clintonpardon_grants.htm) (last visited Nov. 29, 2012) (listing all of President Clinton's pardons including 141 granted on the last day of his term). See also Amy Goldstein & Susan Schmidt, *Clinton's Last-Day Clemency Benefits 176; List Includes Pardons for Cisneros, McDougal, Deutch and Roger Clinton*, WASH. POST, Jan. 21, 2001, at A1 (“Just two hours before surrendering the White House, President Clinton gave parting gifts that lifted 176 Americans out of legal trouble . . .”).

administrations have no real choice but to review midnight rules upon taking office. If the volume of midnight rules is very high, this can constitute a serious impediment to a smooth transition. Second, politically controversial midnight rules can place the incoming administration in an awkward position, requiring it either to expend political capital to reverse the prior administration's rule, or to enforce a rule that is contrary to the incoming administration's political preferences and those of the electorate.

Some midnight rules involving internal governmental operations may also have their own special political background, which may be related to the transition issues discussed above. This category includes inter-agency consultation requirements and rules involving enforcement of restrictions on the use of federal funds. Midnight rules that change governing law in these areas beg the question: why now and not years earlier so that these new requirements would have governed the outgoing administration's conduct? Given enforcement discretion and discretion over the range of intergovernmental consultation, it is difficult to imagine a good reason for midnight rulemaking in these areas. In the consultation area, for example, if consultation requirements are being increased, the outgoing administration likely had sufficient discretion to engage in the consultations anyway, and now wants to impose the requirements on its successor. Conversely, if consultation requirements are being eased, the outgoing administration probably had the discretion to simply ignore the input from the consultations it now wants to eliminate. Why not leave that determination to its successor?

An example of a midnight rule involving consultation is a rule issued on December 16, 2008, by the Departments of Commerce and the Interior, governing consultations for certain projects under the Endangered Species Act.<sup>81</sup> This rule eliminated some consultations with habitat managers and biological experts, and it prohibited global warming as a factor in some remaining consultations.<sup>82</sup> Being issued so late in the GW Bush administration meant that the earliest projects governed by the new consultation requirements were likely to be undertaken by the Obama administration. Without any explanation for why this consultation requirement was not removed when projects by the GW Bush administration were undertaken, the timing raises concerns.

Midnight rules governing the enforcement of restrictions on the use of federal funds raise similar concerns. This is an area of great enforcement discretion, and midnight rules here seem designed primarily to limit the incoming administration's options or force it to act to rescind the rule. An

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81. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76,272 (December 16, 2008) (to be codified at 50 C.F.R. pt. 402).

82. *Id.* at 76,280, 76,282–83.

example from the Clinton administration, which was technically not a midnight rule since it was issued in July 2000, involved the standards governing enforcement of the statutory prohibition on federally-funded family planning clinics against using abortion as a method of family planning. The Clinton administration had suspended the Reagan administration's so-called "gag rule" in February 1993, but did not promulgate a substitute until July 2000.<sup>83</sup> Without a rule in place for more than seven years, the Clinton administration operated in a legal limbo, perhaps unable to enforce the statutory prohibition. Only when political transition was looming did the administration find it desirable to promulgate a substitute regulation. Another example, also related to abortion, raises similar timing concerns. On December 19, 2008, the Department of Health and Human Services promulgated a rule requiring recipients of federal health care funds to certify that they would allow their employees to refuse to provide medical services they find contrary to their moral or religious values.<sup>84</sup> This new, controversial, funding requirement would be enforced by the incoming Obama administration, which was likely to have different views on the subject.<sup>85</sup>

William Howell and Kenneth Mayer offer another political explanation for midnight rulemaking and other midnight action by outgoing administrations. They argue that because a lame duck President's political capital with Congress is reduced, the President must act unilaterally to get anything done.<sup>86</sup> During the midnight period, Congress has no incentive to cooperate with a President who will not be running again, especially when the incumbent's party has just lost the White House. Howell and Mayer theorize that during periods when the President is unlikely to convince Congress to enact his priorities, he is more likely to act unilaterally through executive orders and in ways that require cooperation only from within the executive branch, such as agency rulemaking.<sup>87</sup> Thus, midnight regulation might partly be the result of the President's inability to enact his policies legislatively.

When the incoming President is of a different political party than the incumbent, another factor that may contribute to midnight rulemaking is the desire of the outgoing administration to make the transition more difficult for the incoming administration. Dealing with midnight rulemaking is

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83. See Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 65 Fed. Reg. 41,270 (July 3, 2000) (to be codified at 42 C.F.R. pt. 59).

84. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices, 73 Fed. Reg. 78,072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

85. This rule was rescinded in part by the Obama administration. See Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011).

86. See Howell & Mayer, *supra* note 30, at 538-43.

87. See *id.*

time-consuming and politically costly. Given the familiar pattern of regulatory freezes, extensions of effective dates, withdrawals of rules proposed late in outgoing administrations, and withdrawals from the *Federal Register* of final but not-yet published rules, midnight rulemaking imposes known costs on incoming administrations. Simply put, midnight rulemaking forces administrations to look backward, even when looking back at midnight rules may have negative political consequences, at the time when they would much prefer to be moving forward on their own agendas.<sup>88</sup>

For example, in what is perhaps the most widely-reported instance of an incoming administration revisiting a midnight rule, the GW Bush administration faced serious public criticism when it delayed the effectiveness of a midnight rule reducing the acceptable level of arsenic in drinking water.<sup>89</sup> There was concern among senior officials in the incoming GW Bush administration that this rule had been rushed through and that it would be very expensive for many municipal water systems, especially in western states. Due to these concerns, on the rule's original effective date of March 23, 2001, the EPA issued a notice delaying the effective date of the rule for sixty days.<sup>90</sup> This action provoked a substantial public outcry with accusations that the new administration was rolling back important environmental protections. The GW Bush administration's next step was for the EPA to issue a notice of proposed rulemaking on April 23, 2001, to delay the effective date of the rule for an additional nine months to allow further study.<sup>91</sup> The comment period was open for two weeks, and on May 22, 2001, the EPA promulgated a rule delaying the effective date of the arsenic rule for the nine months proposed.<sup>92</sup> In the final rule delaying the effective date

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88. See Nina A. Mendelson, *Quick off the Mark: Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464, 465–66 (2009); Morriss et al., *supra* note 70, at 557–578; Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1255 (2006).

89. Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976 (Jan. 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142). See BRITO & DE RUGY, *supra* note 50, at 5.

90. Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 16,134 (Mar. 23, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142). The Notice contained the GW Bush administration's typical reasons for acting without notice and comment and with no delay in the effective date of the action—namely, that it is exempt as a rule of procedure, that notice and comment would be impracticable and contrary to the public interest, and that the imminence of the effective date provides good cause for making the delay effective immediately.

91. Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 20,580 (proposed Apr. 23, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142).

92. Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 28,342 (May 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142).

of the arsenic rule until February 2002, the EPA stated that the National Science Foundation was studying the health issues related to arsenic levels in drinking water and the National Drinking Water Advisory Council was studying the compliance cost issues related to the rule. When the National Science Foundation's study supported the new standard,<sup>93</sup> the EPA announced that the rule would go into effect as promulgated.<sup>94</sup>

### B. Normative Views of Midnight Rulemaking

Many people from different political perspectives react negatively to the phenomenon of midnight rulemaking.<sup>95</sup> Although the Constitution provides for a fully-empowered administration to remain in office for more than two months after the election, many observers, from both ends of the political spectrum, find fault when outgoing administrations continue to exercise all of their powers and indeed increase the pace at which they act after the election. This is especially so when the people have chosen a new President of a different party with a different regulatory philosophy. Midnight rulemaking has been criticized on many grounds ranging from principled objections to increases in regulatory activity by administrations as they leave office, to practical concerns over the quality of midnight rules. This Part sets out and analyzes the major criticisms that have been leveled at midnight rulemaking.<sup>96</sup> The discussion begins with objections based on principle and concludes with objections based on policy concerns. Many of these objections overlap in obvious ways.

1. The Principled Objection: For many, it seems that the root of criticism of midnight regulation is the view that, on principle, the President and agencies should not increase the pace of regulatory activity at the end of the term and, if anything, should slow down after the election and leave major decisions to the new President.

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93. See SUBCOMM. TO UPDATE THE 1999 ARSENIC IN DRINKING WATER REPORT, ARSENIC IN DRINKING WATER: 2001 UPDATE (2001), available at <http://www.nap.edu/openbook/0309076293/html/R1.html>. In fact, the National Science Foundation concluded that even the Clinton administration had underestimated the negative health effects of arsenic in drinking water. *Id.* at 14 ("The results of this subcommittee's assessment . . . suggest that the risks for bladder and lung cancer incidence are greater than the risk estimates on which EPA based its January 2001 pending rule."). For further discussion of the merits of the arsenic rule, see *Special Report: The Arsenic Controversy*, REGULATION 42 (2001), available at <http://www.cato.org/pubs/regulation/regv24n3/specialreport.pdf>.

94. See Press Release, EPA, EPA Announces Arsenic Standard for Drinking Water of 10 Parts per Billion (Oct. 31, 2001), available at <http://yosemite1.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/6d26c015b807156e85256af6007b9bed?OpenDocument>.

95. See O'Connell, *supra*, note 17, at 913 (noting that most commentary of midnight regulation and crack-of-dawn activity has been disapproving).

96. For a catalog of criticisms of midnight rulemaking, see BRITO & DE RUGY, *supra* note 50, at 7-8.

2. Projection of the Agenda: Perhaps the most important basis of the principled objection to midnight rulemaking is the perception that the outgoing administration is illegitimately attempting to project its agenda beyond its constitutionally prescribed term.<sup>97</sup> On this view, once an election has intervened, the agenda of the incoming President should be paramount.

3. Accountability: Midnight rulemaking is often criticized because it occurs during a period of reduced accountability. After the presidential election, the incumbent President's accountability is almost non-existent, especially with regard to a two-term President who is extremely unlikely to ever again stand for election to any position.

4. Democracy and Participation: Closely related to the accountability objection is the argument that midnight rulemaking is contrary to principles of democracy. Once the people have elected a President of an opposing party, they have in effect rejected the outgoing President's policies and have opted for the policies of the incoming President, and it is undemocratic for the outgoing President to continue to act in accordance with the policies espoused by the losing party in the presidential election. The democracy objection is stronger when the various steps of the rulemaking process that allow for public input and influence are rushed to meet the Inauguration Day deadline.

5. Political Motivations: Midnight rulemaking is sometimes criticized as being overly political, done to score political points for the party that is leaving office, cause political pain to the incoming President and the incoming President's party and reward the outgoing President's political allies. While all regulatory action is political to some extent, the balance between policy and political concerns is worse during the midnight period.

6. The "Unseemly" Objection: Midnight rulemaking has been criticized as "unseemly" and tending to discredit the government and the regulatory system as a whole.<sup>98</sup> Because many people find midnight rulemaking distasteful, episodes every four or eight years of this conduct reduce people's respect for the law and government regulation.

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97. For example, Mendelson has stated that "the agency's choice in the last few weeks to proceed regardless of the new President's views suggests an unsatisfied craving for power." Mendelson, *supra* note 24, at 564.

98. See, e.g., Jay Cochran, *Clinton's "Cinderellas" Face Regulatory Midnight*, USA TODAY, Dec. 13, 2000, at 17A ("Respect for the law erodes when it changes for no other apparent reason than the fact that an administration's drop-dead date draws near."), *cited in* O'Connell *supra* note 16, at 527 n.179.

7. The Transition Objection: Another objection to midnight rulemaking is that it makes the transition between administrations difficult<sup>99</sup> because it distracts the incoming administration from its forward-looking agenda, forces it to expend time and effort reexamining midnight rules, and forces incoming administrations to incur political costs to revise or rescind midnight rules.

8. Midnight Rulemaking is Wasteful: Given that a substantial proportion of midnight rules are reexamined and many important ones will be revised or rescinded, midnight rulemaking is wasteful.<sup>100</sup> Resources could be saved if outgoing administrations would coordinate their regulatory activity with the incoming administration during the midnight period.

9. The Quality Objection: Midnight rules are criticized as likely to be of lower quality than rules issued during non-midnight periods.

These criticisms of midnight rulemaking are far from universally shared. In fact, in the interviews conducted for this Article, most of the current and former government officials interviewed did not agree that midnight rulemaking is a serious problem. These interviewees included people from both major political parties who served during midnight periods or during the beginning of administrations. Their views included answers to all of the criticisms of midnight rulemaking discussed above. Further, many of the published criticisms of midnight rulemaking focus more on the substance of the rules than their timing.

The defenders of midnight rulemaking begin from the premise that there is nothing illegitimate when the President continues to govern throughout the constitutionally-prescribed term, including the increased volume of rulemaking during the so-called midnight period. Most of the interviewees found hurrying to finish at the end of the administration an inevitable and defensible feature of government and they did not see nefarious motives in the increased regulatory activity at the end of the term. The defenders of midnight rulemaking find outgoing administrations' desire to project their agendas into the future as an expected feature of our political system and conclude that incoming administrations have adequate tools to deal with the problem.

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99. For a general look at presidential transitions, see Beermann & Marshall, *supra* note 88.

100. See O'Connell, *supra* note 17, at 913–14. O'Connell poses two somewhat contradictory reasons why midnight rulemaking hurts social welfare. The first reason is that it is wasteful because it imposes procedural costs on the new President or Congress when they act to rescind it. The second reason is that even if a midnight rule is a good one from the social welfare perspective, because it is a midnight rule, the incoming administration may reflexively act to rescind it, thus forgoing the social welfare benefits of the rule. *Id.*

The accountability objection is met with the reply that virtually all agency action completed during the midnight period had been on the agenda for years. There is no evidence that administrations wait until after the election to avoid accountability in a substantial number of cases. There may also be a positive aspect to the reduced accountability that exists after the presidential election, when Presidents, perhaps concerned with their legacies, may take beneficial actions that interest group pressures might have prevented before the election.

Defenders argue that the democracy objection may be met with the rather formalistic response that the outgoing President was elected to serve the complete four-year term and thus actions taken, even at the end, are consistent with norms of democracy. There is also the more practical response that the incoming administration has tools to deal with midnight rules.

As is discussed further below, there are several replies to the charge that midnight rules are excessively political. First, all rulemaking and other regulatory activities are political to a certain extent, but even in the midnight period, most rulemaking is routine and driven by the same considerations that motivate rulemaking during non-midnight periods. Second, judicial review and normal analytic standards that apply to agency action ensure that raw politics cannot displace the usual considerations that govern agency action in all periods. Third, incoming administrations have adequate tools to deal with ill-considered or unwise midnight rules.

As far as the charge that midnight rulemaking is “unseemly,” it would not appear so if people understood that most midnight rulemaking is routine and they were not influenced by sensationalized accounts of major last-minute regulatory initiatives.

The defenders of midnight rulemaking can answer the transition-based criticisms by observing that first, the problem is not really so bad, and second, that with constant, ongoing political competition, outgoing administrations should not be expected to smooth the transition for a President of the other political party.<sup>101</sup> In fact, because so much regulatory activity, even at the very end of an administration, is routine, driven by statutory requirements and deadlines, and conducted by career officials, most midnight rulemaking is beneficial to the incoming administration if only because without midnight rulemaking, the new administration would be confronted with an enormous amount of work on which to catch up. This would more seriously impede the transition than the relatively few controversial midnight rules that the incoming administration is likely to reexamine upon taking office.

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101. See Beermann & Marshall, *supra* note 88, at 1267–68.



Defenders can respond to the charge that midnight rulemaking is wasteful by noting that only a very small number of midnight rules are actually reversed by the new administration. Also, because most midnight rulemaking is necessary to keep the government moving forward, it is no more wasteful than rulemaking at any other time.

On the issue of personnel burrowing, despite the problems associated with this practice, Mendelson concludes that personnel burrowing can have positive effects that may be sufficient to justify at least some of its uses. She sees the same benefits in some examples of midnight rulemaking, which she refers to as “policy burrowing.” Her basic point is that policy burrowing can fuel a healthy debate on issues that might not have been particularly salient during the election campaign<sup>102</sup> and that personnel burrowing can help ensure a diversity of viewpoints within agencies so that policies are genuinely tested by debate before they are adopted.<sup>103</sup> Mendelson believes that in both cases the quality and democratic legitimacy of agency action, including rulemaking, can improve because the agency’s proposals will be influenced by a greater diversity of viewpoints. Her view depends on her conclusion that presidential elections do not necessarily mean that the electorate has approved every policy espoused by the new President or his party or rejected every policy espoused by the outgoing President or his party.

The final issue is quality—are midnight rules of lower quality than rules promulgated at other times? This is a difficult question to answer. Some midnight rules are promulgated more quickly than rules in non-midnight periods and some rulemaking steps, such as OIRA review, are performed more quickly at midnight than at other times. It may be true that rules promulgated in less of a rush would be of higher quality, but most midnight rules are under consideration for a fairly long time and they go through the usual steps. As noted in Section II.A.1, Katzen explained that the rulemaking process was accelerated by performing multiple steps simultaneously rather than by skipping or truncating any of the normal steps for promulgating rules. Judicial review and reexamination by the incoming administration are adequate to deal with any small number of rules that might have been rushed out too quickly.

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102. Mendelson, *supra* note 24, at 627. Mendelson cites the policy debates that occurred in the early days of the GW Bush administration over the Clinton administration’s “roadless areas rule” and the rule reducing the permissible level of arsenic in drinking water as debates that benefited from the midnight timing of the rules. *Id.* at 619–32.

103. *See id.* at 641–42.

### *C. Summary*

Based on the above analysis and the interviews I conducted in connection with this Report, it appears that midnight rulemaking predominantly results from hurrying to complete work that has been pending since well before the November election, which agency officials fear might be scuttled or delayed by the transition. There is also a sense that outgoing administrations are motivated by a belief that their policies are superior to those of the incoming administration and that this adds to the motivation to finish as much as possible before the transition. There are no more than isolated instances of delay (other than the common delay caused by the usual rigors of the rulemaking process) and little evidence that waiting to avoid the political consequences of rules is a widespread occurrence.

## III. EVALUATING MIDNIGHT RULES

This Part of the Article discusses the quality of midnight rules. The question is whether there is any reason to believe that midnight rules are likely to be of lower quality than rules issued at other times. Performing this analysis faces the virtually insurmountable problem of measuring the quality of rules. It may be possible to identify qualitative problems with some rules anecdotally, but there is no simple, agreed-upon metric for determining the quality of agency rules. The quality of rules is likely to be in the eye of the beholder, informed heavily by political views and policy disagreements. One observer's regulatory disaster may be another observer's great regulatory victory.

Without a direct measure of the quality of rules, some analysts have employed surrogate measures that are plausibly linked to the quality of rules. The two principal surrogates involve the length of time midnight rules are under consideration and whether the rules are rescinded or amended by the successor administration. These measures are undoubtedly imprecise and possibly of little value. However, given the difficulty of constructing more precise apolitical measures of quality, they may be the best measures available. The first portion of this Part of the Article discusses the published scholarship that attempts to measure the quality of midnight rules.

The second portion of this Part discusses the results of the empirical study of the durability of midnight rules that I conducted in conjunction with preparing the Report upon which this Article is based. The study looks at the OIRA-reviewed midnight rules of the last three transitions from one party to the other and measures the likelihood that each administration's midnight rules would be revised or rescinded by the subsequent administration. The midnight periods are compared to the same periods on the

calendar one year prior to the transition, as a control. The third portion of this Part looks at the quality of midnight rules in a different way, by asking whether certain categories of midnight rules are likely to suffer from the normative defects that many observers find in midnight rulemaking generally. In light of all of the published attacks on midnight rulemaking in recent years, this Part analyzes whether some midnight rules should be criticized even if it is generally very difficult to agree on a measure of quality that would serve as a basis for criticizing the bulk of midnight rules. This Part of the Article also summarizes interviews of government officials and observers on the subject of midnight rulemaking.

### *A. Measuring the Quality of Midnight Rules*

Midnight rulemaking has been under attack at least since 2001, when Cochran published his quantitative look at the regulatory output of administrations as they left office. In addition to principled objections to midnight rulemaking, there has been concern expressed that the quality of midnight rules may be lower than the quality of rules issued without the pressure of the firm deadline presented by the change in administrations.<sup>104</sup> It is, however, very difficult to measure the quality of rules. Analysts' views on the quality of rules are likely to be colored by their politics.

In the interviews I conducted in late 2011 and early 2012 in connection with the ACUS Report upon which this Article is based, I asked each interviewee<sup>105</sup> whether they thought that midnight rules were of lower quality than rules issued at other times. Most interviewees did not believe that quality is a serious issue with regard to midnight rules. However, some interviewees expressed concern that in some cases OIRA review was done hastily and that some other rulemaking steps might have been rushed as well. GW Bush administration officials did not find quality problems with the EPA's midnight rules, except for concerns about one rule that is discussed below. One interviewee thought that there were many rushed midnight rules in the GW Bush administration and that these rules were of lower quality. At least one official involved in the OIRA review process acknowledged that during the midnight period, OIRA may not go as deeply into some issues as it would if it had more time. Although there was some concern expressed that overly political rules without the usual basis in policy might be pushed through during the midnight period, the principal concern expressed by interviewees from both inside and outside government was that the normal review process might be rushed and thus not as effective as usual in preventing problematic rules from being issued. One

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104. See Loring & Roth, *supra* note 11, at 1448.

105. See *supra* note \* for a list of the interviewees with information on their experience and affiliations.

interviewee with lengthy experience in government stated that midnight rulemaking is not as serious of a problem as it once was because the review processes in place today are much better at preventing problematic rules from being issued. Thus, although some concerns were expressed, there was not a strong consensus that midnight rulemaking leads to lower quality rules.

Due to the impossibility of constructing objective measures of the quality of rules, analysts have employed surrogate measures to attempt to shed light on whether midnight rules are likely to be of lower quality than rules issued at other times. The two primary surrogates employed are length of time under consideration and durability. The premises underlying the use of these as surrogate measures of quality are that lengthier consideration means more thorough consideration, which means higher quality, and that a durable rule is likely to be of higher quality than a rule that has been amended or rescinded. These premises are obviously subject to serious doubt. An administration can take its time and promulgate a low-quality rule and can hurry and promulgate a high-quality rule. A rule might be amended or rescinded because the subsequent administration disagrees with value laden policy aspects of the rule, not because the rule was of low quality. Thus, although these surrogates may be the best available, it is not clear that they are strongly indicative of quality.

In terms of overall length of consideration, an analysis conducted for this Article by O'Connell<sup>106</sup> of her data reveals that, on average, midnight rules are not under consideration for a shorter period of time than rules issued in non-midnight periods.<sup>107</sup> O'Connell looked at the 16,826 completed rulemakings in her database (drawing from the Unified Agendas from the fall of 1983 through the spring of 2010)<sup>108</sup> where both the NPRM and final action were issued between the start of the Reagan administration and the end of the GW Bush administration. She labeled rulemakings that had their final action between November 1 and January 20 of the final year of an administration as a midnight rulemaking, a slightly different definition of midnight rule than used in this Article.

The average duration of rulemakings that did not end in the midnight period was 461.6 days. The average duration of rulemakings that did end in

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106. The author of this Article thanks Anne Joseph O'Connell for conducting this analysis of her data especially for the report on which this Article is based.

107. E-mail from Anne Joseph O'Connell, Professor, University of California, Berkeley, School of Law, to author (Dec. 29, 2011) (on file with author).

108. The Unified Agenda is the list of all pending and planned regulatory and deregulatory action by federal agencies. It is published twice per year, in Spring and Fall. See *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eAgendaMain> (last visited Oct. 20, 2012).

the midnight period was 487.7 days. The average duration of all these rulemakings was 462.8 days.<sup>109</sup> This is not much of a difference and to the extent there was a difference, rulemakings that ended in the midnight period were under consideration longer than non-midnight rules.

O'Connell then narrowed her database to rulemakings that started and ended in the same administration. Among these rulemakings, the difference in duration between midnight rules and non-midnight rules was more pronounced. Rulemakings that finished before the midnight period took 351.3 days on average, whereas rulemakings that finished in the midnight period took 428.7 days on average. This pattern holds for every administration going back to the Reagan administration.

O'Connell then checked her data to see whether there is an increase in rules of very short duration during the midnight period. Of the nearly 17,000 final actions in her database, 4,664 of them (or about 25 percent) took 180 or fewer days.<sup>110</sup> Of those 4,664 processes, 4,448 finished outside the midnight period and 216 finished within the midnight period. With 112 total quarters and four midnight quarters, equal distribution of these short duration actions would produce about forty per quarter or 160 midnight rules. This means that there were proportionally more short-duration actions that ended during midnight periods (54 on average versus forty expected) than during non-midnight periods, with a total of, at most, 56 additional short duration midnight rules since the Reagan administration than would exist if all short duration completions were evenly distributed.

What does O'Connell's analysis tell us about whether midnight rules are rushed through the process as compared to rules issued at other times? It appears that the data disprove the hypothesis that midnight rules are rushed. The data make it appear that midnight rulemaking is much more about completing work on rules that have long been under consideration than it is about rushing new initiatives out the door before the transition. The fact that rules issued during the midnight period were under consideration on average longer than other rules suggests that some of these rules may have been of lower priority than other rules and that some of these rules may have been more difficult to complete, perhaps because they were complicated or controversial. This does not mean that there are no cases of rushed midnight rules. In fact, the greater than expected results for rules issued after being under consideration for fewer than 180 days during mid-

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109. See generally O'Connell, *supra* note 16, at 513–18 (providing more information on duration of rulemaking proceedings).

110. O'Connell notes that the Unified Agenda lumps all final actions into one category whether they are rules or something else, so the data include completed proceedings that did not produce rules.

night periods suggests that there may be a slight tendency to rush a small number of rules through the process.

Brito and de Rugy focused on one step of the process leading to rule-making: review at OIRA.<sup>111</sup> Their premise is that “[t]o the extent we believe that regulatory review is beneficial, midnight regulations are problematic because they undercut the benefits of the review process.”<sup>112</sup> They fear that at the end of administrations, “[i]f the number of regulations OIRA must review goes up significantly and the man-hours and resources available to it remain constant, we can expect the quality of review to suffer.”<sup>113</sup> To prove their point, Brito and de Rugy do not look at the actual duration of OIRA review of individual regulations. Rather, they merely considered the overall volume of rules.<sup>114</sup>

The principal pieces of circumstantial evidence that Brito and de Rugy examined are the resources available to OIRA to conduct regulatory review and the number of rules reviewed by OIRA. In their view, because OIRA operates today with fewer resources than in the past<sup>115</sup> and because those resources are not augmented to help it cope with the flood of midnight rules submitted for review, it is logical to conclude that “the amount of time and attention OIRA devoted to each regulation reviewed [is] considerably less during midnight periods.”<sup>116</sup>

To support their conclusion, Brito and de Rugy relied on a study conducted by Mercatus Center researcher Patrick A. McLaughlin.<sup>117</sup> McLaughlin conducted a detailed study of OIRA review during midnight periods, in part, due to doubts that pages in the *Federal Register* is a good measure of the volume of regulatory activity.<sup>118</sup> McLaughlin’s study revealed an increase in the number of economically significant<sup>119</sup> rules submitted to OIRA for

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111. For an insider’s history of centralized review of regulations, see Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37 (2011).

112. Brito & de Rugy, *supra* note 15, at 183.

113. *Id.*

114. *Id.* at 186.

115. *Id.* at 183–84 (“[I]n real terms, OIRA’s budget has decreased since its inception.”).

116. *Id.* at 186. See also Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 PUB. CHOICE 395, 409 (2011) (finding that, on average, review time was twenty-five days shorter during the midnight period).

117. See McLaughlin, *supra* note 50.

118. McLaughlin posits that the number of pages published in the *Federal Register* may not reflect the actual volume of regulatory activity because of the possibility that deregulatory action and other non-regulatory documents may inflate the page total. McLaughlin views the number of economically significant rules reviewed by OIRA as a potentially superior measure of the actual volume of regulatory activity.

119. Executive Order 12,866 section 3(f) defines as “significant” any regulatory action predicted to “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition,

review during midnight periods of about six regulations per month or about 7%.<sup>120</sup> McLaughlin also found that the ratio of economically significant rules to all regulations increased and that the increase is due to a higher number of economically significant rules submitted, rather than a decrease in the review of non-significant rules.<sup>121</sup> McLaughlin also found a significant decrease in the amount of time midnight rules are under review at OIRA: “[W]hen controlling for the number of economically significant and significant rules as well as differences across administrations, the mean review time decreased during the midnight period by an astonishing twenty-five days. That is a 50 percent decrease relative to the mean review time over the entire period.”<sup>122</sup>

McLaughlin acknowledges that it is not possible to draw the inference that faster review at OIRA reduces the quality of rules. As he notes, we don’t really know whether OIRA was operating at full capacity at any time and whether shorter total time under review actually indicates reduced scrutiny. As he states, “there is no way of knowing whether a rule that was ‘under review’ by OIRA for twenty days was actually being worked on for twenty days or sat on someone’s desk for nineteen days and was worked on for one day.”<sup>123</sup> We also do not know how much OIRA review actually contributes to the quality of rules.<sup>124</sup> All we really know is that during midnight

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jobs, the environment, public health or safety, or State, local, or tribal governments or communities[.]” See Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 745 (2006), and 5 U.S.C. § 601 app. at 108 (Supp. IV 2010).

120. McLaughlin, *supra* note 50, at 16. McLaughlin’s analysis of the data eliminates any explanation other than timing, such as political party of the President, for the increase during midnight periods.

121. See *id.* at 17–19. McLaughlin found that this ratio increased by 42% during the entire period studied (1981–2007) and by 55% during the midnight periods from 1994 to 2007.

122. *Id.* at 21–22. McLaughlin also found that an increase in the ratio between economically significant rules and non-significant rules also causes a decrease in review time. Although this finding is impressive, McLaughlin may not be completely correct in his apparent assumption that the volume of rules is what causes reduced time for review. As McLaughlin seems to understand, the transition between administrations is treated as a deadline for finishing work on regulations, especially now that all incoming administrations impose regulatory freezes upon taking office. See *id.* at 25–26. The reduced review time at OIRA during midnight periods may be due more to the impending deadline than to the fact that OIRA has more rules to review without increased resources. Even if only a single midnight rule were submitted to OIRA on December 15 of a transition year, it would be expected that this rule would be reviewed quickly to allow the rule to be promulgated before the end of the term on January 20. In fact, if volume were the only consideration, it would be expected that review time would increase with a higher volume of rules to review rather than decrease.

123. *Id.* at 19.

124. As McLaughlin states, “Is the quality of regulations affected by midnight regulations and other election cycle phenomena? While this question seems important, it also seems unanswerable without some good definition and consistent measure of regulation

periods, review by OIRA is abbreviated as compared with review during other periods.

Another study, by McLaughlin and Jerry Ellig, used the Mercatus Center's Regulatory Report Card project to examine how OIRA review affects the quality of regulatory impact analysis generally and of midnight rules in particular.<sup>125</sup> Because they were looking only at rules proposed and issued in 2008, they defined midnight rules as "any proposed regulation that had its OIRA review completed after June 1, [2008], in accordance with the Bolten memorandum,<sup>126</sup> and that became a final rule during the period between Election Day and Inauguration Day, in accordance with the traditional definition of *midnight regulations*."<sup>127</sup> They found that although the midnight rules in their small sample were not under review for a shorter period of time at OIRA, the quality of regulatory analysis of midnight rules based on a score on twelve factors—four of which involve openness, four of which involve quality of analysis, and four of which involve the use of the analysis—was lower for what they called prescriptive rules, which are rules that regulate conduct (as opposed to transfer rules, which are rules that

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quality . . . . If more OIRA review time leads to higher quality, then outbursts of regulatory activity such as those of midnight periods may lead to lower quality regulations. Of course, it is entirely possible that OIRA review time does not have any effect on regulation quality, but that does not eliminate the question. Also, even if OIRA review does improve regulation quality, it is not necessarily the case that the number of days a regulation is 'under review' actually correlates to a more thorough review." *Id.* at 26–27.

125. See Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. (SPECIAL EDITION) 179 (2011) [hereinafter *Does OIRA Review*]. The Mercatus Center's Regulatory Report Card is a study by McLaughlin and Ellig that analyzed regulatory analyses performed in 2008 and scored them on 12 factors involving openness, quality of analysis, and use of the analysis. The four openness factors are accessibility of relevant documents, data documentation, model documentation (how verifiable the models and assumptions are used), and clarity of the analysis. The four quality of analysis factors are whether the outcomes identified are desirable, whether the analysis identifies systemic problems, how well the analysis assesses alternatives, and how well the analysis assesses costs and benefits. The four use of analysis factors are whether the agency used the analysis in its decisionmaking, whether the agency maximized net benefits or explained why it chose not to, whether the rule establishes verifiable measures and goals, and whether the agency indicated what data it will use to assess the regulation's performance. See Jerry Ellig & Patrick McLaughlin, *The Quality and Use of Regulatory Analysis in 2008* (Mercatus Ctr., George Mason Univ., Working Paper No. 10-34, 2010), available at <http://ssrn.com/abstract=1639747>.

126. The Bolten Memo instructed agencies not to initiate any new rulemaking proceedings after June 1, 2008, and to complete all rulemaking proceedings by November 1, 2008. Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Exec. Dep'ts and Agencies and the Admin. of the Office of Info. and Regulatory Affairs (May 9, 2008), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cos\\_memo\\_5\\_9\\_08.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cos_memo_5_9_08.pdf). This Memorandum is reproduced in the Appendix to this Article, available at <http://www.mjealonline.org/documents>.

127. *Does OIRA Review*, *supra* note 125, at 196.



involve only revenue).<sup>128</sup> While this study is interesting, its narrow focus and small sample render it of limited value in understanding the midnight rulemaking phenomenon. In particular, lower scores on the Mercatus Center's Regulatory Report Card may not translate into lower quality rules, and the small number of rules proposed and completed between June 1, 2008, and the end of the GW Bush administration may not be representative of midnight rules generally.

Jason Loring and Liam Roth conducted a study aimed at another possible proxy for quality of rules: durability.<sup>129</sup> Durability of a rule refers simply to whether a rule is still in effect. The assumption is that lower durability is correlated with lower quality. This is, of course, not necessarily a valid assumption. There are many reasons unrelated to quality that may result in the repeal or amendment of a rule, including policy differences, obsolescence, and statutory changes in Congress. However, without a direct measure of quality, durability may provide some indication of the quality of rules, or at least an indication of whether it was worthwhile for the outgoing administration to promulgate midnight rules.

Loring and Roth defined the midnight period as the period between the election and the inauguration of the new President. In their study of two transitions, GHW Bush to Clinton and Clinton to GW Bush, they identified all regulations promulgated by three agencies (EPA, OSHA, and NHTSA) during each midnight period, and they sorted them into significant and non-significant categories pursuant to Executive Order Nos. 12,291 and 12,866.<sup>130</sup> Using the *Federal Register* database in Westlaw, they then determined whether each rule had been amended or rescinded. They considered a regulation as "accepted" by the subsequent administration if it was not amended or rescinded, even if it had been briefly delayed for further review pursuant to the common practices of incoming administrations.<sup>131</sup>

Loring and Roth found that the three agencies issued twenty-three final rules during GHW Bush's midnight period, ten of which were significant.<sup>132</sup> The same agencies published thirty-three regulations during the Clinton Midnight Period, sixteen of which were significant.<sup>133</sup> In both administrations, EPA was the most prolific issuer of midnight rules, followed by NHTSA in the GHW Bush administration, and OSHA in the Clinton administration. The ratio of significant to non-significant rules in each administration was similar.<sup>134</sup>

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128. See *id.* at 198–202.

129. Loring & Roth, *supra* note 11.

130. *Id.* at 1451–52.

131. *Id.* at 1452.

132. *Id.* at 1455 tbl.3.

133. *Id.* at 1455 tbl.3.

134. *Id.*

The two incoming administrations reacted differently to their predecessors' midnight rules. The Clinton administration accepted 43% of the GHW Bush administration's midnight rules, amended 48% of the rules, and rescinded 9% of them.<sup>135</sup> The GW Bush administration accepted 82% of the Clinton administration's midnight rules, amended 15%, and rescinded only 3%.<sup>136</sup> The Clinton administration was more aggressive in amending and rescinding significant midnight rules than midnight rules overall. It accepted only 30% of the GHW Bush administration's significant rules from the three agencies, while amending or repealing 70%.<sup>137</sup> The GW Bush administration's reaction to significant midnight rules was slightly more aggressive than its reaction to midnight rules generally, accepting 75% of significant rules and amending or repealing 25%.<sup>138</sup>

Loring and Roth were struck by the low rate at which each administration rescinded midnight regulations (9 percent by Clinton and 3 percent by Bush), as opposed to amending them.<sup>139</sup> They posited the Supreme Court's decision in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance*<sup>140</sup> as the explanation for this. They characterized *State Farm* as holding that "even deregulation requires a reasoned justification, using the same 'arbitrary and capricious' standard under which a passed regulation must qualify."<sup>141</sup> They also posited that *State Farm* may explain the GW Bush administration's greater reluctance to even amend the Clinton administration's midnight rules:

Given President George W. Bush's anti-regulatory leaning, the administration may believe it faces an uphill battle in justifying partial reductions in existing, justified regulations. This would especially be the case in the area of health and safety, where deregulation may appear callous and prove more difficult to justify. This problem, however, would likely not be experienced by the pro-regulatory Clinton administration. Justifying an amendment that raised the regulatory bar on health and safety would likely be easier than justifying one tearing it down. This may explain the Clinton

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135. *Id.* at 1456 tbl.4.

136. *Id.* at 1457 tbl.5.

137. *Id.* at 1458 tbl.6.

138. *Id.* at 1458 tbl.7. Loring and Roth's study concludes with a useful appendix of all the midnight rules they looked at in their study, with information on whether each was significant or not and whether the incoming administration took any action to amend or repeal each rule. *See id.* at 1461–65 apps. A, B.

139. *See id.* at 1456–57.

140. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983).

141. *See Loring & Roth, supra* note 11, at 1457.

administration's willingness to amend nearly half (48%) of the [GHW Bush] administration's midnight regulations.<sup>142</sup>

*State Farm* is a plausible explanation for an overall reluctance to repeal or amend any final rule, but it is not plausible as an explanation for greater reluctance to repeal than to amend, or as an explanation for the difference in behavior between the Clinton and GW Bush administrations. Until *FCC v. Fox Television Stations*, some understood *State Farm* as imposing heightened scrutiny on regulatory changes as compared to initial regulatory decisions.<sup>143</sup> In other words, courts were thought to be more skeptical when agencies changed existing rules than when they promulgated a new rule in unregulated territory. This may have been the accepted understanding of the decision during both the Clinton and GW Bush administrations. But there is no support for Loring and Roth's apparent understanding that *State Farm* imposed a higher standard of review on rescissions than amendments and on deregulation than regulation. Moreover, *State Farm* does not explain why administrations would prefer amendment to repeal. According to its principal holding, amendment, just as repeal, must meet the same "arbitrary and capricious" standard of judicial review.

Perhaps Loring and Roth are correct about the GW Bush administration's perceptions, but again this would be a serious misreading of even the pre-*Fox Television* understanding of *State Farm*. *State Farm* imposed the same standard of review on deregulation as had always existed for regulation. The reading of *State Farm* that was rejected in *Fox Television* was that *change* required greater justification than initial regulation. There was never a suggestion that deregulatory change required greater justification than pro-regulatory change.

There is a simpler explanation for the preponderance of amendments over rescissions. Many statutes passed by Congress require agency regulations before they can have any effect. These laws, known as "intransitive laws," require action by others, usually agencies, to put them into effect. When confronted with midnight regulations promulgated under such laws, the incoming administration's only real choice is to accept or amend the rules, because repeal would leave the law unenforced and might violate statutory deadlines. This need to have regulations in place is a much more likely explanation for the tendency to amend rather than rescind regulations than Loring and Roth's unprecedented misreading of *State Farm*.

Loring and Roth also offer an explanation for the Clinton administration's greater willingness to revisit midnight rules than the GW Bush

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142. *Id.* at 1457 (footnotes omitted).

143. See *Robbins v. Reagan*, 780 F.2d 37, 45–46 (D.C. Cir. 1985); Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 361–62 (2009).

administration's. They raise the possibility that the Clinton administration started out very liberal, but became more moderate in its second term, so that GW Bush would be likely to accept more of the Clinton administration's midnight rules than would the Clinton administration accept those of GHW Bush.<sup>144</sup> This explanation is plausible but highly speculative. There are two alternative explanations that seem just as plausible: first, the very close election in 2000 meant the incoming Bush administration did not have a strong mandate for change, and second, the GW Bush administration was more interested in moving forward with its agenda than in revisiting the midnight rules of its predecessor.

For the purposes of this Article, the Loring and Roth study illustrates that incoming administrations vary in the intensity of their willingness to revisit the midnight rules of their predecessors and that it is possible for incoming administrations to revisit, through amendment or repeal, a substantial proportion of the midnight rules they confront upon taking office.

Further information on the durability of midnight rules is contained in a CRS Report authored by Copeland on GW Bush administration midnight rules, which contains anecdotal evidence on the status of notable midnight rules. Copeland describes three rules that went into effect after postponement, including one rule issued under the Endangered Species Act that Congress legislatively granted the Obama administration permission to withdraw,<sup>145</sup> and twenty-five rules that, as of August 29, 2009, were under scrutiny. Many of these rules were not in effect, having been "delayed, stayed, amended, or rescinded."<sup>146</sup> This includes rules that were still under review by the Obama administration, were being considered for rejection by Congress, or were the subject of petitions for judicial review. This is not a particularly high number of rules in light of the total output of 341 rules

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144. See Loring & Roth, *supra* note 11, at 1441–42, 1456–58.

145. See COPELAND, *supra* note 22, at 6–7. See also Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658, (Jan. 15, 2009) (to be codified at 7 C.F.R. pts. 60, 65); Special Rule for the Polar Bear, 73 Fed. Reg. 76,249 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 17); Rail Transportation Security, 73 Fed. Reg. 72,130 (Nov. 26, 2008) (to be codified at 49 C.F.R. pts. 1520, 1580). As Copeland reports, The Omnibus Appropriations Act, 2009, enacted on March 11, 2009, granted the Secretary of the Interior permission for 60 days to withdraw the Polar Bear rule, but the Secretary decided to retain the rule, promising to closely monitor its implementation to decide whether additional measures are necessary to protect polar bears. See COPELAND, *supra* note 22, at 7. Another rule, on "Interagency Cooperation Under the Endangered Species Act" was withdrawn pursuant to Congress's permission. See *id.* at 26 tbl.1.

146. See COPELAND, *supra* note 22, at 7–27. Of the 25 rules, Copeland reports that as of the date of his report, 14 were fully or partially in effect, one was subject to a delay in its effective date, and the other 10 were not in effect due to agency or court-imposed delays or rescissions. See *id.* at 26–27 tbl.1.

that Copeland characterizes as midnight rules issued by the GW Bush administration, but it likely represents a higher percentage of rules than are challenged or revisited during non-midnight periods.

What do these studies tell us about the quality of midnight rules? Not very much. It seems likely that some midnight rules receive somewhat less scrutiny from OIRA than rules promulgated at other times, and midnight rules may be somewhat more subject to amendment and rescission than rules issued at other times. However, these tendencies are not very pronounced and it is not clear that these possibilities indicate that the rules issued are of lower quality.

The next qualitative issue is whether midnight deregulation is a special case; i.e., is there something different when the outgoing administration's midnight rules are deregulatory rather than regulatory in effect? As a matter of form, the GW Bush administration's midnight rules were similar to the midnight rules issued by other administrations. By and large, they had been on the table long before the November election, and because the Bolten Memo set an early deadline for the completion of rulemaking,<sup>147</sup> more of the administration's late-term actions were completed before the midnight period than had been the case in prior transitions.<sup>148</sup>

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147. See *infra* Section IV.C..

148. One noteworthy example of a rule that was published after the Bolten Memo's June 15 deadline was a proposal by the Secretary of Labor concerning risk-assessment by OSHA. This rule, which was not included in the Department of Labor's Regulatory Agenda until Fall, 2008, see *Requirements for DOL Agencies' Assessment of Occupational Health Risks*, OFFICE OF INFO. AND REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200810&RIN=1290-AA23> (last visited Oct. 20, 2012), after the proposed rule was published, was viewed by some as an effort to make it very difficult for OSHA to enact new standards protecting workers. The GW Bush administration allegedly had promulgated only one OSHA standard in its eight years, and that under court order. See Carol D. Leonnig, *U.S. Rushes to Change Workplace Toxin Rules*, WASH. POST, July 23, 2008, at A1. The proposal was first made public via an internet posting on OMB's website on July 7, 2008, *id.*, and the rule was proposed on August 29, 2008. *Requirements for DOL Agencies' Assessment of Occupational Health Risks*, 73 Fed. Reg. 50,909 (proposed Aug. 29, 2008) (to be codified at 29 C.F.R. pt. 2). That it did not appear on the Department of Labor's Unified Agenda until after it had already been proposed is unusual. Of the 29 rules listed as at the "Final Rule Stage" in the Department of Labor's Fall 2008 Unified Agenda, this was one of only two that had not previously been included. The other was a rule concerning a newly authorized payment to survivors of certain federal employees who died while serving in the armed forces. That rule was finally promulgated as an interim final rule nearly a year later by the Obama administration. See *Death Gratuity Under the Federal Employees' Compensation Act*, 74 Fed. Reg. 41,617 (Aug. 18, 2009) (to be codified at 20 C.F.R. pt. 10). The risk assessment rule was not finalized during the GW Bush administration and the proposal was withdrawn by the Obama administration one year after it was made. *Requirements for DOL Agencies' Assessment of Occupational Health Risks*, 74 Fed. Reg. 44,795 (proposed Aug. 31, 2009) (to be codified at 29 C.F.R. pt. 2).

There was a perception that the midnight rules issued by the outgoing GW Bush administration were predominantly deregulatory in nature.<sup>149</sup> This perception is only partly accurate. While there was a healthy amount of deregulatory midnight rulemaking by the GW Bush administration,<sup>150</sup> some of that administration's midnight rules imposed new regulatory burdens, not in terms of new health and safety requirements, but rather in the form of increased compliance burdens in line with the administration's ideological commitments.<sup>151</sup> In general, the GW Bush administration's midnight regulations reflected what one would expect based on the policies of the administration, deregulating in the environmental area and regulating labor unions and abortion providers more strictly.

From one perspective, midnight action removing or easing regulatory burdens may appear more problematic than midnight action imposing

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149. See Jack M. Beermann, *Midnight Deregulation in TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS 17* (Austin Sarat, ed., 2012); OMB WATCH, TURNING BACK THE CLOCK: THE OBAMA ADMINISTRATION AND THE LEGACY OF BUSH-ERA MIDNIGHT REGULATIONS (2009), available at <http://www.ombwatch.org/node/10496> ("Many of these so-called midnight regulations were deregulatory in nature, targeting public protections for the environment, workers, and the general citizenry."); Blake, *supra* at 3.

150. The OMB Watch report contains numerous examples. OMB WATCH, *supra* note 149. Here are two of them: on December 19, 2008, the EPA published a rule reclassifying certain fuel wastes that would allow them to be burned rather than disposed of in a more sensitive manner as hazardous wastes. Expansion of RCRA Comparable Fuel Exclusion, 73 Fed. Reg. 77,954 (Dec. 19, 2008) (to be codified at 40 C.F.R. pt. 261). This rule was withdrawn by the Obama administration. Withdrawal of Emission-Comparable Fuel Exclusion Under RCRA, 75 Fed. Reg. 33,712 (June 15, 2010) (to be codified at 40 C.F.R. pt. 261). On December 18, 2009, the EPA promulgated a rule exempting farms from the obligation to report emissions from animal wastes. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948 (Dec. 18, 2008) (to be codified at 40 C.F.R. pts. 302, 355). This rule apparently remains in effect.

151. For example, on January 21, 2009, a regulation promulgated by the GW Bush administration's Department of Labor imposed increased reporting requirements on Labor Unions. Labor Organization Annual Financial Reports, 74 Fed. Reg. 3678 (Jan. 21, 2009) (to be codified at 29 C.F.R. pts. 403, 408). This rule was rescinded by the Obama administration. Labor Organization Annual Financial Reports, 74 Fed. Reg. 52,401 (Oct. 13, 2009) (to be codified at 29 C.F.R. pts. 403, 408). On December 19, 2008, the Department of Health and Human Services promulgated a rule requiring health care providers receiving federal funds to certify that they will allow their employees to withhold services based on religious or moral grounds. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88). This rule was rescinded in large part by the Obama administration. See Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88). In the article cited above entitled "The Midnight Deregulation Express," two of the five rules discussed imposed new or increased regulatory burdens, including the health care rule discussed above and another rule increasing local governments' intelligence gathering powers. See Blake, *supra* note 3.

them, because it appears to be the product of waiting for a period of reduced political accountability, rather than the simple completion of pending tasks before the transition deadline. The passage of broad, public interest programs such as environmental regulation and consumer protection occurs contrary to public choice predictions that narrow interests opposing regulation are likely to dominate politically and prevent the imposition of regulatory burdens. Legislation or regulation with broadly enjoyed benefits and concentrated costs come about when the public demand for them is more intense than usual. During the midnight period, deregulation may reflect the narrow interests that were defeated when the regulation first went into effect. Although the accuracy of this portrayal is uncertain, it is how some portrayed the GW Bush midnight deregulation, and the ideological nature of the midnight rules imposing increased reporting and other regulatory burdens exacerbates this perception.

However, the relative desirability of midnight deregulation may simply be a reflection of one's views on the merits of regulation generally. From the perspective of many, a great deal of regulation is contrary to the public interest, so that any effort to ease regulatory burdens is consistent with the public interest. Under this view, midnight deregulation is more likely to reflect the public interest than midnight regulation. People with different views on the general wisdom of regulation may have irreconcilably different views on the desirability of midnight deregulation. Understood in this way, midnight rules reflecting a deregulatory policy are no different from midnight rules imposing additional regulatory burdens.

### *B. The Volume and Durability of Midnight Rules*

This Part reports the results of the study I conducted of midnight rules that looks at the durability of the midnight rules of the last three administrations.<sup>152</sup> While durability is a weak proxy for quality of midnight rules, using durability has another advantage. It tests whether incoming administrations are spending time reviewing and revising (or rescinding) midnight rules, which has implications for the general normative desirability of midnight rulemaking.

For purposes of this study, I have designated the final three months of each administration as the midnight period. This captures all rules issued from October 20th of the election year through Inauguration Day.<sup>153</sup> The

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152. For a disclaimer concerning the statistical validity of the data reported here, see *supra* note 4.

153. Despite the fact that much of the discussion of midnight regulation focuses on post-election activity, the three-month period, which includes two weeks before the election, is appropriate for several reasons. First, some of the studies already done, including Cochran's seminal work, used this measure. Using a different measure would reduce the

study takes all the OIRA-reviewed rules during the last three midnight periods and checks whether they have been suspended, rescinded or amended, (or whether amendments have been proposed).<sup>154</sup> It then takes the rules from three non-midnight periods one year prior to each studied midnight period, does the same analysis, and then compares the durability of non-midnight rules to the durability of midnight rules.

The methodology of the study involved first conducting a search for “final rules” using the OIRA official website<sup>155</sup> with the aid of three research assistants. I then searched and identified all amendments made to those rules during the succeeding presidential term using the Government Printing Office Federal Digital System database<sup>156</sup> and the Westlaw *Federal Register* database. The amendments were further distinguished by two categories: amendments that delayed the effective date of the final rule in order to give the agency more time to review it, and actual amendments in the form of proposed rules or final rules.

In order to assess the relative durability of midnight regulations, I set up three corresponding control periods for each midnight rule period. I selected the same period on the calendar one year prior to each midnight regulations period to serve as the corresponding control term (e.g., October 20, 2007, to January 20, 2008, served as the control period for the Bush to Obama transition). I applied the same three-step search method to identify the final rules and amendments for the control periods.

In selecting the control periods for this study, I considered which year within a presidential term is most likely to represent a “normal” sample of regulatory activity. Factors that may distort regulatory activity, like mid-

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utility of much of the earlier work on the subject or would require re-analysis of the data using the new period. Second, the proportion of the period before the election is relatively short, making it unlikely that including it will skew the results in any way. Third, while the most controversial practice may be to wait to promulgate important rules until after the election, rules issued earlier, for example, once the campaign is in full swing, are still problematic if they are timed for political reasons. If anything, there are good arguments that it would be appropriate to study regulatory activity throughout the election campaign. However, the three-month period at the end of an administration is a reasonable time period that focuses primarily on the post-election period but includes at least a small period of pre-election activity, during which the timing of regulatory activity might raise questions. The post-election period is obviously when political accountability is the most serious issue, but focus on that period should not be to the exclusion of considering whether actions taken in other periods are suspect.

154. Originally, this study was to include examination of whether the rules had been rejected, in whole or in part, on judicial review. However, this aspect of the study proved infeasible because of the volume of rules and the difficulty of discerning whether a particular C.F.R. section under judicial review was derived from a particular rulemaking.

155. *Historical Reports*, OFFICE OF INFO. AND REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eoHistoricReport> (last visited Oct. 19, 2012).

156. *Federal Digital System*, U.S. GOV'T PRINTING OFFICE, <http://www.gpo.gov/fdsys/> (last visited Oct. 19, 2012).



term elections, eliminated the second year following a presidential election as a potential control term. I disqualified the first year of a presidential administration as a control period because of the historical tendency for administrative overhaul in the early years of a presidential term. The year immediately preceding a midnight regulations year was chosen as the control period because it has the fewest potentially distortive external factors, and therefore reflects the most “normal” comparable period of regulatory activity.

The final rules, amendments, and judicial review actions were used to construct a comprehensive database of OIRA-reviewed rulemaking during the last three midnight periods and their corresponding control periods. The database is organized by agency name and displays the following information for each rule if it was available:

Rule name

*Federal Register* citation

*Code of Federal Regulations* citation

Date rule was published in the *Federal Register*

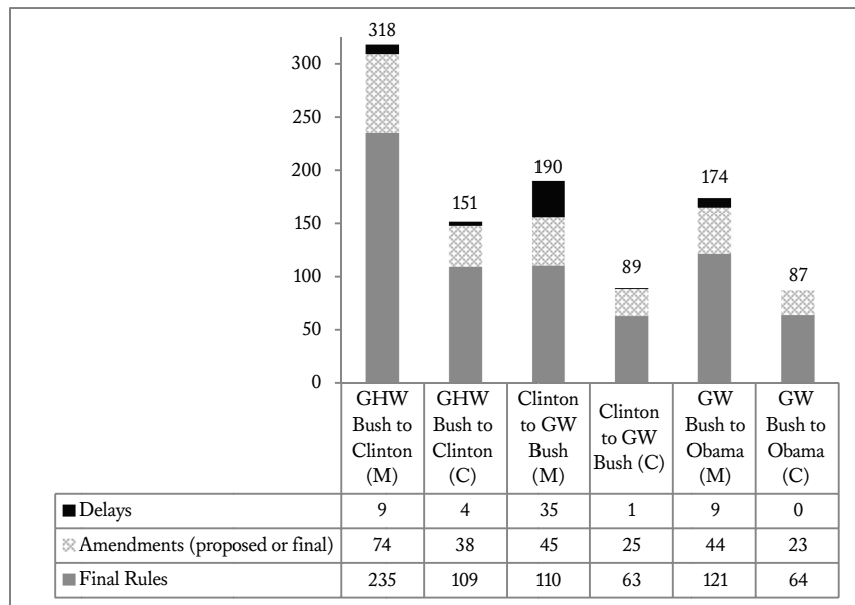
Date the rule became effective

Summary of the rule

Amendment's *Federal Register* citation, publication date, effective date, and summary

The study results appear in the table below:

TABLE 3: OIRA-REVIEWED MIDNIGHT REGULATIONS, 1992–2009



As illustrated by Table 3, there were 235 OIRA-reviewed final rules issued during the GHW Bush to Clinton Midnight Period, of which 74 were amended or had amendments proposed, as compared with 109 during the control period, of which 38 were amended or had amendments proposed.<sup>157</sup> During the Clinton to GW Bush Midnight Period, there were 110 OIRA-reviewed final rules issued, of which 45 were amended or had amendments proposed, as compared to 63 rules during the control period, of which 25 were either amended or had amendments proposed. During the GW Bush to Obama Midnight Period there were 121 OIRA-reviewed final rules issued, of which 44 were either amended or had amendments proposed, as compared to 64 OIRA reviewed final rules issued during the control period of which 23 were amended or had amendments proposed.

The data reveal a very small difference between the rate at which amendments were either finalized or proposed with regard to midnight

157. The absolute numbers of OIRA reviewed rules during the GHW Bush administration are higher than in other periods because after President Clinton issued Executive Order 12,866, 3 C.F.R. 638 (1994), the number of rules subject to OIRA review declined significantly. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 12 (2004) (describing significant drop in volume of rules reviewed by OIRA after the issuance of Exec. Order No. 12,866, 3 C.F.R. 117 (1982)).

rules as compared with the relevant control periods. In the GHW Bush to Clinton transition, surprisingly, non-midnight rules provoked amendments more often than midnight rules: 31.4% of midnight rules were either amended or had amendments proposed, as compared to 34.9% in the control period. In the Clinton to GW Bush transition, 40.1% of midnight rules were either amended or had amendments proposed, as compared to 39.7% of rules issued during the control period. In the GW Bush to Obama transition, midnight and control period rules had amendments adopted or proposed in almost identical proportions: 36.3% of the midnight rules and 35.9% of the non-midnight rules. This study reveals virtually no difference with regard to the durability of midnight rules, except perhaps in the GHW Bush to Clinton transition, when midnight rules were slightly less durable than non-midnight rules. This confirms the sense among most of the interviewees that there are not significant qualitative differences between midnight rules and non-midnight rules.

### *C. Interviews on the Quality of Midnight Rules*

As part of the preparation of the Report upon which this Article is based, interviews<sup>158</sup> were conducted with experts on midnight rulemaking, including several people with experience concerning midnight rulemaking as officials in outgoing administrations, incoming administrations, or both. The interviewees with experience inside government expressed similar views regarding midnight rules. As a matter of principle, they generally considered midnight rulemaking as a legitimate exercise of government power, since the outgoing administration retains full power to act until the moment of transition. Principled objections to midnight rulemaking were also expressed, however, by some. Those involved in reviewing midnight rules at the outset of administrations found that most rules did not suffer from any quality problems and that most were routine actions generated by career staff. Many, including officials involved in reviewing rules at the outset of the new administration, also expressed the view that incoming administrations have adequate tools to deal with any problematic midnight rules. Interviewees reacted skeptically to the suggestion that midnight rules were timed to overload or embarrass the incoming administration. One pointed out that rulemaking is very expensive and takes a great deal of time and effort and thus is unlikely to be used to cause difficulty for the incoming administration. However, at least one interviewee expressed the view that outgoing administrations sometimes defer decisions in order to push off an important decision onto the next administration. Further, an inter-

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158. See *supra* note \* for a list of the interviewees with information on their experience and affiliations. Notes on the interviews are on file with author, and interviewees have not been directly quoted in this Article.

viewee with lengthy government experience expressed the view that rule-making slows down during the election campaign to minimize controversy until after the election.

In addition to the principled view that there is something wrong with increased rulemaking during the midnight period, there were some other concerns expressed that were mainly on two fronts: rushed rules and diminished public participation. One interviewee thought that at least one outgoing administration rushed through important ill-considered rules with inadequate time for review and for genuine public input. There was one example cited of a rule that was approved by OIRA in one day. Interviewees also claimed that public participation was reduced because comment periods were short and agencies did not have sufficient time to digest the comments received. One case was cited in which the agency had to review 300,000 comments in one week to issue the rule on time. Despite these concerns, however, most interviewees concluded that the negative appearance of midnight rulemaking was much worse than the reality.

#### IV. REACTIONS OF INCOMING ADMINISTRATIONS TO MIDNIGHT RULEMAKING

As midnight rulemaking has become a common feature of presidential transitions, it has produced legal and political consequences. This Part of the Article details three aspects of these consequences. The first portion of this Part analyzes the strategies that incoming administrations have developed to deal with the high volume of late-term rules they confront upon taking office. The second portion of this Part discusses the sparse case law on the legality of the strategies employed by incoming administrations to deal with midnight rulemaking. The third Section of this Part explores the GW Bush administration's effort to avoid producing midnight rules by finishing its regulatory work earlier than previous administrations.

##### *A. Reactions of Incoming Administrations to Midnight Rules*

On January 29, 1981, on his tenth day in office, President Ronald Reagan issued a memorandum to twelve department heads and the Administrator of the EPA, directing them to delay the effective dates of recently published regulations for sixty days and not to promulgate any new regulations during the sixty days following the date of the memorandum.<sup>159</sup> The

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159. Memorandum from Ronald Reagan, Pres. of the U.S., to the Sec'y of the Treasury, the Attorney Gen., the Sec'y of the Interior, the Sec'y of Agric., the Sec'y of Commerce, the Sec'y of Labor, the Sec'y of Health and Human Services, the Sec'y of Housing and Urban Dev., the Sec'y of Transp., the Sec'y of Energy and the Sec'y of Educ., and the Adm'r of the Env'tl. Prot. Agency (Jan. 29, 1981), *available at* <http://www.presidency.ucsb.edu/>

memorandum was a precursor to Reagan's creation of the centralized review process established by Executive Order No. 12,291.<sup>160</sup> The memorandum's timing was prompted, in part, by the midnight regulatory activity of the Carter administration. The memorandum stated that the freeze was necessary "to subject to full and appropriate review many of the prior Administration's last-minute decisions that would increase rather than relieve the current burden of restrictive regulation." The sixty-day period was apparently designed to allow Reagan's appointees to gain control of the agencies involved and for him to establish the centralized review process adverted to in the memorandum.<sup>161</sup>

Reagan's memorandum served as a model for the actions of subsequent administrations dealing with midnight rules and gaining control of administrative agencies.<sup>162</sup> On January 25, 1993, Leon Panetta, the incoming Clinton administration's Director of OMB, issued a memorandum instructing agencies not to send any regulations to the *Federal Register* for publication until they had been reviewed by a Clinton-appointed agency head and requesting agencies to withdraw any regulations that had been submitted to the Federal Register but not yet published.<sup>163</sup> On January 20, 2001, President Bush's Chief of Staff, Andrew Card, issued a memorandum (the "Card Memorandum") to the "Heads and Acting Heads of Executive Departments and Agencies" directing them not to send any proposed or

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ws/index.php?pid=44134]#axzz1b4iGvpBn. President Reagan's Memorandum is reproduced in the Appendix to this Article, available at <http://www.mjealonline.org/documents>. The memorandum contained several exceptions including "regulations that respond to emergency situations or for which a postponement pursuant to this memorandum would conflict with a statutory or judicial deadline," and regulations "issued in accordance with the formal rule-making provisions of the Administrative Procedure Act . . . ; regulations issued with respect to a military or foreign affairs function of the United States; . . . regulations related to Federal government procurement; . . . matters related to agency organization, management, or personnel; [and] . . . regulations issued by the Internal Revenue Service." *Id.*

160. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2006).

161. Executive Order 12,291, which established centralized review of agency regulations by the Office of Management and Budget, was issued on February 17, 1981. *Id.* The Reagan administration issued a comprehensive fact sheet detailing its regulatory program on February 18, 1981, which included, inter alia, discussion of the regulatory freeze, its examination of Carter administration midnight rules and the establishment of regulatory review under Executive Order 12,291. Office of the Press Secretary of the White House, *Fact Sheet: President Reagan's Initiatives to Reduce Regulatory Burdens* (Feb. 18, 1981), available at [http://www.thecre.com/pdf/Reagan\\_RegainInitiatives.PDF](http://www.thecre.com/pdf/Reagan_RegainInitiatives.PDF). It was released in conjunction with an address by President Reagan before a Joint Session of Congress on his Program for Economic Recovery. See Ronald Reagan, Pres. of the U.S., *Address Before a Joint Session of the Congress on the Program for Economic Recovery* (Feb. 18, 1981), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=43425#ixzz1iLPpYk97>.

162. Anne Joseph O'Connell endorses these strategies. See O'Connell, *supra* note 16, at 529-30.

163. See Regulatory Review Notice, 58 Fed. Reg. 6074 (Jan. 25, 1993).

final regulation to the *Federal Register* unless it had been reviewed by an agency head appointed by Bush, to withdraw any regulations that had been submitted to the *Federal Register*, but not yet published, so that they could be reviewed, and to postpone the effective date of published, but not yet effective, regulations for sixty days.<sup>164</sup>

On January 20, 2009, President Obama's Chief of Staff, Rahm Emanuel, issued a memorandum instructing executive departments and agencies not to issue new rules until they had been reviewed and approved by an appointee of Obama, to withdraw any rules from the *Federal Register* that had not yet been published, and to "[c]onsider extending for 60 days the effective date of regulations that have been published in the *Federal Register* but not yet taken effect . . . for the purpose of reviewing questions of law and policy raised by those regulations."<sup>165</sup>

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164. Memorandum from Andrew H. Card, Jr., Assistant to the Pres. and Chief of Staff, to the Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=79291>. On January 26, 2009, President GW Bush's OMB Director Mitch Daniels issued a follow-up memorandum, instructing agencies to withdraw pending rules from OIRA and not to submit new rules or re-submit withdrawn rules until they have been reviewed by an appointee of the new administration. Memorandum from Mitchell E. Daniels, Jr., OMB Director, to the Heads and Acting Heads of Executive Departments and Agencies (Jan. 26, 2001) (reproduced in the Appendix to this Article, available at <http://www.mjealonline.org/documents>). This Memorandum also instructed agencies to inform OMB before publishing any rules not subject to OIRA reviews. *Id.*

165. Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, The White House, for the Heads of Executive Departments and Agencies (Jan. 20, 2009), *in* 74 Fed. Reg. 4435, 4435–36 (Jan. 26, 2009). The Emanuel Memorandum was followed the next day by a memorandum issued by Peter R. Orszag, Director of OMB, directed to heads and acting heads of executive departments and agencies, with further instructions on the implementation of the Emanuel Memorandum. The Orszag Memorandum was apparently not published in the Federal Register, but is available online and is reproduced in the Appendix to this Article, available at <http://www.mjealonline.org/documents>. Memorandum from Peter R. Orszag, Director of OMB, to the Heads and Acting Heads of Executive Departments and Agencies (Jan. 21, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation\\_memoranda\\_2009\\_pdf/m09-08.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation_memoranda_2009_pdf/m09-08.pdf). The memorandum instructs agency heads to be selective concerning the postponement of effective dates of regulations, not to postpone effective dates indefinitely, and to seek comments on postponements when possible and on the substantive issues raised by any rules postponed. It instructed agencies to use their judgment on whether to postpone the effective date of rules and reopen comment periods based on the following considerations:

- (1) whether the rulemaking process was procedurally adequate;
- (2) whether the rule reflected proper consideration of all relevant facts;
- (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations;
- (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations;
- (5) whether the rulemaking process was open and transparent;
- (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments;
- (7) whether interested parties had the benefit of access to the facts, data, or other

The Clinton, Bush, and Obama memoranda contained exceptions for rules governed by statutory or judicial deadlines. The Bush and Obama memoranda contained a further exception for specified urgent or emergency situations, while the Clinton memorandum simply provided for the possibility of additional exceptions to be requested from the Director of OMB. Obama's memorandum contained one new feature—it instructed agencies to reopen the comment period for delayed rules for thirty days, "to allow interested parties to provide comments about issues of law and policy raised by those rules."<sup>166</sup>

The provisions of these memoranda requiring that no new rules be published until they have been reviewed by an appointee of the new administration in effect impose a moratorium on new regulations for a short period after the transition. These were part of efforts by each administration to gain control over the agencies going forward, regardless of any midnight rules that may have been promulgated before the transition. In the case of Reagan, this also involved allowing time for his administration to establish the new centralized review procedure that was being planned.

It appears that incoming administrations have been successful in executing the instructions in these memoranda. For rules that were not yet published, rule withdrawals have not been reported, except in one case, in which a rule was later withdrawn on the ground that it should not have been published because it was pending at the Office of the Federal Register (OFR) when the Card Memorandum was issued.<sup>167</sup> According to an OFR official interviewed for this Article, before a rule is filed for public inspection, the OFR keeps all activity regarding the rule confidential, including withdrawal before the rule is made public. It does appear, however, that agencies have succeeded in withdrawing unpublished rules from the *Federal Register*.<sup>168</sup>

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analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.

*Id.*

166. Emanuel Memorandum, *supra* note 165.

167. See Methodology for Coverage of Phase II and Phase III Clinical Trials Sponsored by the National Institutes of Health, 66 Fed. Reg. 9199 (Feb. 7, 2001) (to be codified at 32 C.F.R. pt. 1999), discussed in William M. Jack, Comment, Taking Care that Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions under the Bush Administration's Card Memorandum, 54 ADMIN. L. REV. 1479, 1485 n.24 (2002). Jack recommends that information on rule withdrawals be made publicly available.

168. See Jack, *supra* note 167, at 1485–86 ("According to an 'informal' poll performed by the Office of Information and Regulatory Affairs (OIRA), agencies promptly responded to the directives of the Card Memorandum and withdrew a total of 124 regulations, forty of them final rules, from the OFR's 'publication queue' between January 21, 2001 and early February 2001.") (citing OFFICE OF INFO. & REGULATORY AFFAIRS, MAKING SENSE OF

To understand the power of incoming administrations to withdraw documents from the *Federal Register* after they have been submitted but before they have been published, it is important to understand exactly how the process works at the OFR. Documents submitted to the OFR go through three stages. The first stage is submission, which is simply the act of the agency delivering the document to the OFR for publication in the Federal Register.<sup>169</sup> The second stage is known as “filing for public inspection,” which happens on the second working day after the document is submitted to the OFR for documents received before 2:00 PM and happens on the third working day for documents received after 2:00 PM.<sup>170</sup> This schedule gives the OFR time to review the document before it is filed for public inspection and prepared for publication. Documents are available for public inspection at the OFR immediately upon filing, and filing is considered legally sufficient notice for the rule to take effect.<sup>171</sup> The third stage is actual publication in the *Federal Register*, which happens on the working day after filing.<sup>172</sup> There are also provisions for faster filing and publication in emergencies.<sup>173</sup>

OFR regulations allow for withdrawal of documents from the *Federal Register* by the submitting agency only. OFR regulations do not mention withdrawal before filing, so presumably this can be freely done. Because the OFR maintains confidentiality concerning documents until they are filed for public inspection, there would not necessarily be any public record of a withdrawal before filing. With regard to documents that have been filed for public inspection, the relevant regulation<sup>174</sup> states such documents “may” be withdrawn or corrected. Whether an agency can actually withdraw a document depends on how far along production of the printed Federal Register

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REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 34–35 (2001), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/costbenefitreport.pdf>).

169. In addition to the statutes and regulations cited in this Part, information on the workings of the Federal Register was gathered in correspondence with Jim Wickliffe, former OFR Scheduling Supervisor and Amy P. Bunk, Director of Legal Affairs and Policy, Office of the Federal Register.

170. 1 C.F.R. § 17.2 (2012).

171. 44 U.S.C. § 1507 (“[F]iling of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it.”). This section is the provision of the Federal Register Act requiring the publication of Proclamations, Executive Orders, documents having general applicability and legal effect, and documents required by Congress to be published.

172. The Federal Register Filing and Publication schedule is contained in the Code of Federal Regulations. 1 C.F.R. § 17.2 (2012).

173. 1 C.F.R. §§ 17.3–.6 (2012).

174. 1 C.F.R. § 18.13 (2012).



is and, in some circumstances, whether the OFR is convinced that there are adequate reasons for withdrawal.<sup>175</sup> When an agency requests withdrawal of a document that has already been filed for public inspection, the OFR insists on a legal justification such as a legal mistake in the drafting of the document. If the OFR is not convinced that there is an adequate reason for withdrawal, it may, in conjunction with the agency, consult the OMB or the Office of Legal Counsel (OLC) in the Department of Justice for guidance. Because filing occurs on the opening of the OFR each day at 8:45 AM, withdrawal is simplest before the day of filing.

Agencies, however, have successfully delayed the effective dates of published midnight rules that have not yet gone into effect.<sup>176</sup> For example, on February 4, 1981, the Reagan Administration's Secretary of Transportation issued a blanket notice postponing the effective dates of all Department rules covered by the memorandum.<sup>177</sup> Sometimes changes were made to the delayed rules, but in many instances, after review, the regulations promulgated by the previous administration were allowed to go into effect as originally promulgated. Whether incoming administrations were happy about this, or whether they decided that it was not worth the time or attention to change the prior administration's rules rather than focus on moving forward with the new agenda is uncertain.<sup>178</sup> Not surprisingly, in some instances, a new administration's efforts to change or rescind the prior administration's midnight rules were met with resistance by those who favored the midnight rules.<sup>179</sup>

The APA's notice and comment procedures have not prevented incoming administrations from acting quickly to prevent midnight rules from taking effect before they can be reviewed by the incoming administration. Agencies in the Reagan administration set a precedent of suspending the effective dates of midnight rules without notice and comment.<sup>180</sup> In the notices announcing suspensions, agencies in the Reagan administration

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175. Any document withdrawn after filing remains available for public inspection at the OFR even if it is not published in the Federal Register. *Id.*

176. For example, a comment in the Administrative Law Review reported that during the period between January 21, 2001 and early February 2001, President GW Bush's administration withdrew 40 final rules and delayed the effective dates of 90 more. See Jack, *supra* note 167, at 1485–86.

177. Notice of Postponement of Pending Regulations, 46 Fed. Reg. 10,706 (Feb. 4, 1981).

178. Senior EPA officials during the early days of President GW Bush's presidency reported that the EPA reexamined many Clinton administration midnight rules and found no problems with the vast majority of them.

179. See Howell & Mayer, *supra* note 30, at 544 (discussing how interest groups fight to retain what they gained at the end of the prior administration).

180. APA sections 553(b)(A) and (B) contain several exceptions to the notice and comment requirement. Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A)–(B) (2012).

relied on APA section 553(b)'s provision that allows an agency to promulgate a rule without notice and comment when the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>181</sup> The Reagan administration also found "good cause" for delaying the effective dates immediately, i.e., without waiting thirty days as specified in APA section 553(d).<sup>182</sup> For example, the Department of Transportation's (DOT) notice suspending the effective dates of numerous midnight rules found in the nation's "economic condition" good cause for dispensing with notice and comment and for the need for time to review regulations with imminent effective dates.<sup>183</sup>

In some instances, agencies satisfied the APA by finding that notice and comment would be "impracticable, unnecessary and contrary to the public interest" because there was insufficient time before the rules' effective dates to conduct the review ordered by the President and a notice and comment period, and because the review was necessary for the health of the economy.<sup>184</sup> In at least one instance, a notice of postponement of an effective date by the National Park Service was justified merely by the existence of Reagan's directive, with no finding of good cause for delay and no specification that the usual thirty day delay of rules' effectiveness was waived.<sup>185</sup> During the Reagan administration, when rules were postponed again beyond the initial sixty days required by the President's directive, notice and comment was not employed on the question of whether the rule should be postponed again. For example, the effective date of a rule issued by the Materials Transportation Board within DOT concerning the addition of water to pipelines transporting anhydrous ammonia was postponed for a second time without notice and comment based on a finding that "no

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181. *Id.* at § 553(b)(3)(B).

182. *Id.* at § 553(d).

183. Postponement of Pending Regulations, 46 Fed. Reg. 10,706 (Feb. 4, 1981). Similar language was used in support of delay without notice and comment in several additional Department of Transportation notices. *See, e.g.*, Amendments of Effective Date of Part 125 and Amendments Adopted in Relation to Part 125, 46 Fed. Reg. 10,705 (Feb. 4, 1981); Postponement of Pending Regulations, 46 Fed. Reg. 10,906 (Feb. 5, 1981).

184. Standards of Fill for Wine; Deferral of Effective Date, 46 Fed. Reg. 12,493, 12,493 (Feb. 17, 1981) (to be codified at 27 C.F.R. pt.4). The Department of the Treasury used very similar language in Napa Valley Viticultural Area; Deferral of Effective Date, 46 Fed. Reg. 12,493, 12,494 (Feb. 17, 1981) (to be codified at 27 C.F.R. pt.9) and Completely Denatured Alcohol Formula No. 20; Deferral of Effective Date, 46 FR 12,494 (Feb. 17, 1981) (to be codified at 27 C.F.R. pts. 211, 212).

185. This notice was issued after the effective date of the original rule, and characterizes President Reagan's directive itself as "postponing the effective date of all final regulations for 60-days." Special Regulations, Areas of the National Park System; Glacier Bay National Monument, 46 Fed. Reg. 12,496, 12,496 (Feb. 17, 1981) (to be codified at 36 C.F.R. pt.7).

further information would be provided beyond that already in the record of this rulemaking.”<sup>186</sup> The need for time to perform a review of the benefits of the rule was cited as the reason for the further delay.<sup>187</sup> The finding that notice and comment is not necessary because “no further information would be provided beyond that already in the record of this rulemaking” is equivalent to a finding under APA section 553(b) that notice and comment is “impracticable, unnecessary, or contrary to the public interest.”

During the early days of the Reagan administration, there were further postponements of the effective dates of rules to comply with Executive Order No. 12,291. Section 7 of that Order required agencies to “suspend or postpone the effective dates of all major rules” to the extent allowed by law except in case of emergency.<sup>188</sup> Further suspensions of the effective dates of rules to allow for review under Executive Order No. 12,291 were ordered, apparently without notice and comment.<sup>189</sup>

I was able to find in the *Federal Register* only one Clinton administration notice delaying the effective date of a GHW Bush administration midnight rule. This involved a rule issued on January 19, 1993, by the Health Care Financing Authority within the Department of Health and Human Services. In this instance, the agency did not employ notice and comment procedures and did not give any reason for not employing notice and comment. It stated as the reason for the delay that “the new administration wants to fully review the policies in these regulations.”<sup>190</sup> The notice did not refer to the Panetta Memorandum delaying rules at the outset of the administration.<sup>191</sup>

In a famous non-midnight example, the Clinton administration, in its first month in office, suspended without notice and comment the effective-

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186. Transportation of Liquids by Pipeline; Addition of Water to Pipelines Transporting Anhydrous Ammonia, 46 Fed. Reg. 20,556, 20,556 (Apr. 6, 1981) (to be codified at 49 C.F.R. pt. 195).

187. *Id.*

188. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2006).

189. Extension of Effective Dates for Final Rules; Request for Comments, 46 Fed. Reg. 19,233 (Mar. 30, 1981). Comments were requested on whether the rules were “major rules” under Executive Order 12,291.

190. Medicaid Program; Eligibility and Coverage Requirements, 58 Fed. Reg. 9120 (Feb. 19, 1993) (to be codified at 42 C.F.R. pts. 435, 436, 440)

191. *Id.* (“This notice delays by 6 months the effective dates and compliance dates of the final rule with comment period on Medicaid Eligibility and Coverage Requirements published January 19, 1993 in the Federal Register (58 Fed. Reg. 4908)”). There is an example of a delayed effective date of a rule in the early Clinton administration not related to the midnight rules issue, and in this case, the agency issued the delay as “Interim Final Rules” without notice and comment, indicating an administration view that notice and comment is not necessary to delay the effective date of a final rule. Delay in Application Date for Small Vehicles, 58 Fed. Reg. 10,989 (Feb. 23, 1993) (to be codified at 49 C.F.R. pt. 665).

ness of the Reagan administration's abortion "gag rule," which regulated communications between health care providers and patients about abortion in federally funded family planning clinics. It did not promulgate a substitute for more than seven years.<sup>192</sup> In this instance, the agency found "good cause" for dispensing with notice and comment before suspending the rule, mainly based on substantive reasons relating to the administration's view of the wisdom of the rule.<sup>193</sup>

Pursuant to the Card Memorandum, the incoming GW Bush administration delayed the effective dates of numerous midnight rules promulgated by the outgoing Clinton administration. Initial delays were done by publishing a notice in the *Federal Register* without notice and comment.<sup>194</sup> The GW Bush administration introduced a new reason for dispensing with notice and comment for the postponement of the effective dates of midnight rules. In addition to the familiar "good cause" claim, agencies asserted that actions suspending the effective dates of rules are exempt from notice and comment as procedural rules.<sup>195</sup>

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192. Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 (July 3, 2000) (to be codified at 42 C.F.R. pt. 59).

193. Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (Feb. 5, 1993) (to be codified at 42 C.F.R. pt. 59). This Rule had been issued by the Reagan administration and then reinterpreted during the administration of GHW Bush. See *Nat'l Family Planning and Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

194. U.S. GEN. ACCOUNTING OFFICE, GAO-02-370R, REGULATORY REVIEW: DELAY OF EFFECTIVE DATES OF FINAL RULES SUBJECT TO THE ADMINISTRATION'S JANUARY 20, 2001, MEMORANDUM 6 (Feb. 15, 2002).

195. Each suspension by the GW Bush administration was published in the Federal Register using language similar to the following example to justify the lack of notice and comment on the delay:

To the extent that 5 U.S.C. section 553 applies to this action, the action is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Department's implementation of this action without opportunity for public comment, effective immediately upon publication today in the Federal Register, is based on the good cause exceptions in 5 U.S.C. 553(b)(3)(B) and 553(d)(3), in that seeking public comment is impractical, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well [sic] as contrary to the public interest in the orderly promulgation and implementation of regulations.

Areas of the National Park System: Delay of Effective Date, 66 Fed. Reg. 8,366, 8,367 (Jan. 31, 2001) (to be codified at 36 C.F.R. pt. 7). A Westlaw search revealed 64 uses of this language in 2001 in notices delaying effective dates, four of which were for second delays and one of which was for a third delay. See, e.g., Partial Stay, Amendments, and Correction, 66 Fed. Reg. 12,848, 12,848 (Mar. 1, 2001) (to be codified at 21 C.F.R. pts. 10, 14, 16) (initial

In some cases, if the regulation was still under review when the sixty-day delay expired, this same language was used to justify further delays without notice and comment.<sup>196</sup> In one case, when comments were taken on whether to retain the rule, the GW Bush administration ordered a further delay in the effective date without notice and comment using the same language with an additional justification that time was needed to review comments received.<sup>197</sup>

A report prepared by the Government Accountability Office (GAO) provides details on the number and nature of rules postponed by the GW Bush administration pursuant to the Card Memorandum.<sup>198</sup> The GAO summarized the effects of the Card Memorandum as follows:

Our review . . . indicated that federal agencies delayed the effective dates for 90 of the 371 final rules that were subject to the Card memorandum. The effective dates for the remaining 281 rules were either not delayed or we could find no indication in the *Federal Register* of a delay. The Departments of Health and Human Services (HHS), Transportation (DOT), and Agriculture (USDA), and the Environmental Protection Agency (EPA) delayed more than half of the 90 rules. The agencies considered 65 of the 90 delayed rules to be substantive in nature, and considered 12 to be “major” rules (e.g., rules with at least a \$100 million impact on the economy).

As of the 1-year anniversary of the Card memorandum, 67 of the 90 delayed rules were postponed for one 60-day period and then appeared to have taken effect. Eight other rules were delayed for more than 60 days but appeared to have taken effect. The 15 remaining delayed rules had not taken effect by January 20, 2002.

Although most of the delayed rules had not been changed by the 1-year anniversary of the Card memorandum, one had been withdrawn, three had been withdrawn and replaced by new rules, and nine others had been altered in some way (e.g., changing the implementation date or modifying a reporting requirement). The agencies indicated that other rules might be changed in the future,

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delay); Medicaid Managed Care: Further Delay of Effective Date, 66 Fed. Reg. 32,776, 32,777 (June 18, 2001) (to be codified at 42 C.F.R. pts. 400, 430, 431, 434, 435, 438, 440, 447) (second delay); Oil and Gas Leasing: Onshore Oil and Gas Operations, 66 Fed. Reg. 41,149, 41,149 (Aug. 7, 2001) (to be codified at 43 C.F.R. pt. 3160) (third delay).

196. Medicaid Managed Care: Further Delay of Effective Date, 66 Fed. Reg. at 32,777.

197. Oil and Gas Leasing: Onshore Oil and Gas Operations, 66 Fed. Reg. at 41,149 (Aug. 7, 2001).

198. U.S. GEN. ACCOUNTING OFFICE, *supra* note 194.

and OIRA has placed five of the delayed rules on a list for “high priority” review. The agencies generally did not provide the public with a prior opportunity to comment on the delays in effective dates or rule changes, frequently indicating that notice and comment procedures were either not applicable, impracticable, or were contrary to the public interest.<sup>199</sup>

This GAO report explains why only 90 of the 371 rules covered by the Card Memorandum were actually affected. First, the 371 total includes rules by independent agencies that were asked, but not required, to follow the Card Memorandum. According to the report, none of the 30 rules issued by independent agencies that would have been covered by the Card Memorandum were delayed.<sup>200</sup> Second, agencies did not postpone the effective dates of rules when there was sufficient time before that date to review the rules.<sup>201</sup> Third, the GAO reported that shortly after the Card Memorandum was issued, it was determined that “certain types of numerous and noncontroversial rules (e.g., air worthiness directives issued by the Federal Aviation Administration and bridge opening schedules published by the Coast Guard) should be allowed to take effect as scheduled.”<sup>202</sup> The GAO report states that these rules, and others not delayed pursuant to the Card Memorandum, were allowed to take effect as scheduled with no further notice in the *Federal Register* indicating why they were not delayed pursuant to the Card Memorandum.<sup>203</sup> The GAO report also states that within a year of President GW Bush’s inauguration, 75 of the 90 delayed rules had gone into effect, most (67) after a single 60-day or shorter delay.<sup>204</sup>

The GW Bush administration’s review of the previous administration’s rulemaking activities extended beyond rules that had actually been finalized in the midnight period. O’Connell reports that “[b]y the end of the first year of the Administration, hundreds of regulations started but not yet completed before Bush took office were formally withdrawn.”<sup>205</sup> According to O’Connell, proposed rules that span a presidential transition are 14 percent more likely to be withdrawn than other rulemaking proposals.

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199. *Id.* at 2–3.

200. *See id.* at 4, Table 1.

201. *See id.* at 4–5.

202. *Id.* at 5.

203. *Id.*

204. *Id.* at 7. In most cases, the rules went into effect without further notice in the *Federal Register*.

205. O’Connell, *supra* note 16 at 473; *see also id.* at 508 fig.10, 509 (detailing the number of withdrawn rules in President Clinton’s third year (383) and President GW Bush’s second year (433)).

When time allowed, the Obama administration sought comment on whether the effective dates of rules should be postponed.<sup>206</sup> Like prior administrations, when time did not allow, the Obama administration did not seek comment on whether effective dates should be postponed; however, this was clearly a disfavored strategy. In one instance, comments were sought for a remarkably short three days on whether to delay the effective date of the rule even though the effective date was only seven days after the opening of the comment period.<sup>207</sup> When comments were not sought, there was less consistency in terms of justifying the lack of notice and comment before imposing delays than during some other administrations. Interestingly, the language used in some of the notices postponing rules' effective dates without notice and comment asserted that normally notice and comment would be required to take such action, but that there was good cause for dispensing with it in the particular cases. Further, standard practice during the Obama administration was for agencies to reopen the comment period for at least thirty days on virtually all rules postponed, as instructed by the Emanuel Memorandum. Comments were sought on whether the rules should be retained or altered in any way.

The primary justifications given by agencies in the Obama administration for delay without notice and comment (and for immediate delay without observing the APA's minimum thirty-day waiting period for putting new rules into effect) were to allow the public to comment on the rules and to allow the agency time to consider any new comments received.<sup>208</sup> For

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206. See, e.g., Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 6,007 (Feb. 4, 2009) (seeking comment on proposal postponing, for 60 days, the effective date of a rule scheduled to take effect on March 23, 2009) (to be codified at 29 C.F.R. pt. 2550). Two more final rules were subsequently issued staying the effective date of the rule in question twice. Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 11,847 (Mar. 20, 2009) (to be codified at 29 C.F.R. pt. 2550); Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 23,951 (May 22, 2009) (to be codified at 29 C.F.R. pt. 2550). This example is discussed in Curtis Copeland's CRS report, *supra* note 22, at 8 nn. 41–43. Subsequent to the publication of Copeland's report, this rule was withdrawn and a new rule was promulgated in its place. See Investment Advice-Participants and Beneficiaries, 74 Fed. Reg. 60,156 (Nov. 20, 2009) (to be codified at 29 C.F.R. pt. 2550) (withdrawal of GW Bush administration rule); Investment Advice—Participants and Beneficiaries, 76 Fed. Reg. 66,136-01 (Oct. 25, 2011) (to be codified at 29 C.F.R. pt. 2550) (promulgation, after notice and comment, of substitute final rule). This final rule became effective on December 27, 2011, 21 months after the GW Bush administration's midnight rule would have taken effect.

207. See Medicare Program; Changes to the Competitive Acquisition of Certain Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) by Certain Provisions of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), 74 Fed. Reg. 6557 (Feb. 10, 2009) (to be codified at 42 C.F.R. pt.414).

208. These reasons for delay and re-opening the comment period seem to be founded on a distrust of midnight rules, since presumably the public already had an opportunity to comment on the rules before they were adopted and the agency already considered those comments.

example, in a notice delaying the effective dates of midnight rules concerning Medicaid premiums, the Centers for Medicare and Medicaid Services within the Department of Health and Human Services stated: “The 60-day delay in the effective date is necessary to give the public the opportunity to submit additional comments on the policies set forth in the November 25, 2008 final rule, and to provide an opportunity for CMS to consider all additional public comments.”<sup>209</sup> In language that was used in several other notices, the agency explained its decision not to seek comment on the delay as follows:

A delay in effective date and reopening of the comment period is necessary to ensure that we have the opportunity to receive additional public comments to fully inform our decisions before the policies contained in the final rule become effective. Moreover, we believe it would be contrary to the public interest for the November 25, 2008 final rule to become effective until we are certain that all public comments, including any additional comments that are submitted in the reopened comment period, are considered. To do otherwise could potentially result in uncertainty and confusion as to the finality of the final rule. For the reasons stated above, we find that both notice and comment and the 30-day delay in effective date for this action are unnecessary. Therefore, we find there is good cause to waive notice and comment procedures and the 30-day delay in effective date for this action.<sup>210</sup>

In some instances, agencies at the outset of the Obama administration did not find it necessary to justify the lack of notice and comment on actions delaying the effective dates of final midnight rules. Rather, sometimes agencies simply declared that the rules’ effective dates were delayed in order to comply with the Emanuel Memorandum, and reopened them for further notice and comment on issues and concerns about the rule.<sup>211</sup>

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209. Medicaid Program; Premiums and Cost Sharing, 74 Fed. Reg. 4888 (Jan. 27, 2009) (to be codified at 42 C.F.R. pts. 447, 457).

210. *Id.* at 4888–89. An example using similar language is Medicare Program; Changes to the Competitive Acquisition of Certain Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) by Certain Provisions of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), 74 Fed. Reg. 7653, 7654 (Feb. 19, 2009) (to be codified at 42 C.F.R. pt. 414).

211. Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, 74 Fed. Reg. 5107 (Jan. 29, 2009) (to be codified at 36 C.F.R. pts. 223, 261). The EPA at the outset of the Obama administration also delayed the effective date of midnight rules without citing reasons or making findings in support of the delay. *See, e.g.*, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation, 74 Fed. Reg. 7284 (Feb. 13, 2009) (to be codified at 40 C.F.R. pts. 51, 52).



In some cases, agencies gave reasons for delay without advertent to APA section 553 or any requirement that good cause exist for either the delay itself or the immediate effectiveness of the delay. For example, the Department of Defense delayed the implementation of a new hospital payment system with a notice, which cited both the Emanuel Memorandum and the need for more time for implementation as reasons for delay. After advertent to these two factors, the agency concluded:

In view of both of these developments, the Department is delaying the effective date of TRICARE's OPSS until May 1, 2009, and is inviting additional public comment on the final rule. Any timely public comments received will be considered and any changes to the final rule will be published in the Federal Register.<sup>212</sup>

When agencies at the outset of the Obama administration sought comments on proposals to delay the effective dates of rules, the language announcing the proposal for the delay in effective date often advertent to the Emanuel Memorandum and the Orszag Memorandum implementing it. For example, on February 3, 2009, the Employment Standards Administration within the Department of Labor published a notice requesting comment on whether the February 20, 2009, effective date of a rule published on January 21, 2009, should be extended for sixty days.<sup>213</sup> The agency gave as the reason for proposing delay: "to provide an opportunity for further review and consideration of the questions of law and policy raised by it."<sup>214</sup> The agency thus sought comments not only on the question of delay but also "comments generally on the rule, including comments on the merits of rescinding or retaining the rule."<sup>215</sup> The notice specified two different comment periods: a ten-day comment period on whether to implement the delay (because otherwise the rule would have gone into effect before the delay could be implemented) and a thirty-day comment period on the substantive merits of the rule. Because the agency undertook notice and comment, there was no need for a finding of cause to proceed without those procedures. However, there was no discussion of why it was appropriate to revisit a rule that had just been published.

In a curious case on February 11, 2009, the Department of Housing and Urban Development published a notice seeking comment on whether the

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212. Hospital Outpatient Prospective Payment System (OPSS): Delay of Effective Date and Additional Opportunity for Public Comment, 74 Fed. Reg. 6228, 6228 (Feb. 6, 2009) (to be codified at 32 C.F.R. pt. 199).

213. Labor Organization Annual Financial Reports, 74 Fed. Reg. 5899, 5899 (Feb. 3, 2009) (to be codified 29 C.F.R. pts. 403, 408).

214. *Id.*

215. *Id.*

March 30, 2009, effective date of a rule published on January 27, 2009, should be extended for sixty days “[i]n accordance with the memorandum of January 20, 2009, from the assistant to the President and Chief of Staff, entitled ‘Regulatory Review.’”<sup>216</sup> The comment period was thirty days, which allowed the agency time to decide on postponement before the rule went into effect. This example is curious because the rule was originally published on January 27, 2009, one week after Obama became President. It is not clear how, in light of the Emanuel Memorandum, this rule was published. Perhaps it was issued in violation of the instruction not to issue any new rules without the approval of an appointee of the new administration.

In some situations, agencies may be legally authorized or even required to reconsider rules shortly after their issuance, including midnight rules. The APA grants all interested persons the right to petition for the “issuance, amendment, or repeal of a rule.”<sup>217</sup> As Copeland reports, the implementation of some rules has been delayed while the agency acts on petitions for reconsideration. The Clean Air Act explicitly grants the EPA the discretion to stay the effectiveness of a rule under reconsideration for up to three months.<sup>218</sup> Copeland reports that in 2009, the EPA granted reconsideration of three midnight rules and stayed the effective date of at least one of them.<sup>219</sup>

Other tools that incoming administrations can use to mute the consequences of midnight rules involve administrative control over rule enforcement and the settlement of litigation directed at midnight rules. Many rules depend on agency enforcement, and the actual substantive effects of rules can vary widely depending on how they are enforced. In some situations, the implementation of a final rule depends on further steps taken by the agency, and if the agency does not act, implementation may be delayed or even stymied. For example, Copeland reports on two instances in which a final midnight rule was not enforced by the Obama administration.<sup>220</sup> The first involves a Department of Health and Human Services (HHS) midnight rule that was issued on December 19, 2008, with an effective date of January 20, 2009.<sup>221</sup> This rule required HHS to collect information, which may not be done by a federal agency without OMB

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216. Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Proposed Delay of Effective Date, 74 Fed. Reg. 6839, 6839–40 (proposed Feb. 11, 2009) (to be codified at 24 C.F.R. pts. 5, 92, 908).

217. Administrative Procedure Act, 5 U.S.C. § 553(e) (2006).

218. *Air Pollution Control Act*, 42 U.S.C. § 7607(d)(7)(B) (2006).

219. See COPELAND, *supra* note 22, at 26 tbl.1.

220. See COPELAND, *supra* note 22, at 30–31.

221. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

approval under the Paperwork Reduction Act. Copeland reports that as of the date of his report, HHS had not requested OMB approval, which means the rule had no effect.<sup>222</sup> Subsequent to the publication of Copeland's report, HHS proposed and adopted a final rule rescinding in part and revising the December 2008 rule.<sup>223</sup> The other example involves a Department of the Interior midnight rule on shale oil deposits on federal land.<sup>224</sup> The outgoing Bush administration had begun to implement the rule in January 2009 by issuing a solicitation for bids on a demonstration project under the rule.<sup>225</sup> In February 2009, the Obama administration withdrew the solicitation and opened the matter for comments on the terms and conditions of leases under the program.<sup>226</sup> A new solicitation, with revised terms, was issued on November 3, 2009.<sup>227</sup>

Judicial review also presents incoming administrations with the opportunity to affect the substance of midnight rules by using the discretion agencies have over litigation strategy and settlement agreements. As Rossi has pointed out, if rules are challenged, an incoming administration might settle litigation with an agreement to enforce the rules in a manner more in line with its policy views than with those of the prior administration that issued the midnight rule being challenged.<sup>228</sup>

The incoming administration also has enforcement discretion and may shape the enforcement of a midnight rule to conform to its policy views. This discretion is not unlimited. In one case, a federal court issued an injunction requiring implementation of a midnight rule issued by the Department of Labor on December 18, 2008, that had been challenged on judicial review by labor interests and suspended by the Department of Labor after President Obama took office.<sup>229</sup> Business interests joined the

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222. COPELAND, *supra* note 22, at 30.

223. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88), *discussed in* COPELAND, *supra* note 22, at 30.

224. Oil Shale Management—General, 73 Fed. Reg. 69,414 (Nov. 18, 2008) (to be codified at 3 C.F.R. pts. 3900, 3910, 3920, 3930), *discussed in* COPELAND, *supra* note 22, at 30–31.

225. COPELAND, *supra* note 22, at 31.

226. See Withdrawal of the Call for Nominations—Oil Shale Research, Development, and Demonstration (R, D, and D) Program and Request for Public Comment, 74 Fed. Reg. 8983 (Feb. 27, 2009), *discussed in* COPELAND, *supra* note 22, at 31.

227. Call for Nominations—Oil Shale Research Development and Demonstration Program, 74 Fed. Reg. 56,867 (Nov. 3, 2009).

228. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1039–40 (2001).

229. The rule at issue concerned visas for temporary agricultural workers. Temporary Agricultural Employment of H-2A Aliens in the United States, 73 Fed. Reg. 77,110 (Dec. 18, 2008) (to be codified at 229 C.F.R. pts. 501, 780, 788). This example is discussed at various places in Copeland's CRS report. See Copeland, *supra* note 22 at 22, 32.

litigation in support of the 2008 rule. When the agency suspended the new rule, it put back in place the prior rule that had been issued in 1987. This was problematic because although the agency sought comments on the suspension, which it stated was necessary because it did not have the time or resources to implement the new rule, it explicitly excluded comments on the merits of the 2008 rule or its 1987 predecessor.<sup>230</sup> The court enjoined the suspension on the ground that the agency violated APA section 553 by not considering comments on the merits of the action it took, which was to reinstate, even if temporarily, the 1987 rule.<sup>231</sup>

A final strategy that incoming administrations might use against midnight rulemaking is to support rejection under the Congressional Review Act (CRA)<sup>232</sup> or other negative action in Congress. The CRA provides an expedited procedure for Congress to consider whether to legislatively reject an agency rule. This procedure has been used only once, to reject OSHA's ergonomics rule, which was promulgated in the final year of the Clinton administration. The CRA was the subject of a separate ACUS study<sup>233</sup> and thus was not considered in any depth in the Report upon which this Article is based. The important point for purposes of this Article is that CRA rejection is more likely to be effective with regard to midnight rules, since the President would be less likely to veto Congress's resolution rejecting a rule promulgated by a former administration than by the President's own.<sup>234</sup>

Even if Congress does not take action under the CRA, it can legislatively rescind, amend, or delay regulations, as it has done on more than one occasion with regard to midnight rules. For example, in the economic stimulus bill enacted by Congress in February 2009, Congress legislatively precluded the implementation of an HHS midnight rule issued on Novem-

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230. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 11,408 (proposed March 17, 2009) (to be codified at 20 C.F.R. pt. 655, 29 C.F.R. pts. 501, 780, 788) ("Please provide written comments only on whether the Department should suspend the December 18, 2008 final rule for further review and consideration of the issues that have arisen since the final rule's publication. Comments concerning the substance or merits of the December 18, 2008 final rule or the prior rule will not be considered.")

231. North Carolina Growers' Ass'n, Inc. v. Solis, 644 F. Supp. 2d 664 (M.D.N.C. 2009) (grant of preliminary injunction), *aff'd*, North Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012).

232. Congressional Review Act, 5 U.S.C. §§ 801–08 (2006).

233. Although ACUS studied the CRA, the committee overseeing the study ultimately decided not to go forward with any recommendations based on it. See *Congressional Review Act*, ADMIN. CONF. OF THE U.S., <http://www.acus.gov/research/the-conference-current-projects/congressional-review-act/> (last visited Oct. 25, 2012).

234. Presentment to the President is required under *INS v. Chadha*, 462 U.S. 919 (1983).

ber 7, 2008, for a period of six and one-half months.<sup>235</sup> During that period, the agency proposed and adopted a final rule rescinding the rule in question.<sup>236</sup> This episode shows how, under some circumstances, support from the incoming administration for congressional action directed at midnight rules might advance the incoming administration's efforts to alter or revoke such rules.

Incoming administrations have tools to deal with some, but not all, of the other actions that have been taken by administrations just before they have left office. Executive orders are freely revocable and subject to alteration by the new President, and there are many instances in which incoming Presidents have revoked executive orders (sometimes quite recent ones) issued by their predecessor.<sup>237</sup> For example, on January 30, 2009, Obama revoked two of GW Bush's executive orders concerning regulatory planning and review, one issued in 2002 and the other issued in 2007.<sup>238</sup> Interpretative rules, policy statements, guidance documents, and other regulatory documents issued without notice and comment are also easily revocable by an incoming administration. There may, however, be political constraints to revoking some of these, especially those that must be published in the Federal Register. It also takes time and effort to make sure that revocation is done properly and that regulatory systems function properly after revocation. Pardons and clemencies issued by an outgoing President are immune from revocation or alteration by an incoming administration, except perhaps in the rare circumstance in which they have not been delivered before revocation is ordered.<sup>239</sup>

Incoming administrations thus have powerful tools to deal with the previous administration's midnight rules, but these tools might not be adequate to deal with the entire problem. One issue is the timing of midnight rules. Although the midnight period that causes the most concern is the period between the election and the inauguration of the new President, the volume of regulatory activity appears to increase throughout the entire final year of two-term presidencies.<sup>240</sup> As discussed below, if an outgoing admin-

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235. Copeland, *supra* note 22, at 20 (discussing implementation of Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition, 73 Fed. Reg. 66,187 (Nov. 7, 2008)).

236. *Id.* at 20, 20 n.117-118 (citing Medicaid Program: Rescission of School-Based Administration/Transportation Final Rule, Outpatient Hospital Services Final Rule, and Partial Rescission of Case Management Interim Final Rule, 74 Fed. Reg. 31,183 (June 30, 2009) (to be codified at 42 C.F.R. pts. 431, 440, 441)).

237. See HALCHIN *supra* note 30, at 11 n.38.

238. Exec. Order No 13,497, 3 C.F.R. 218 (2010) (revoking Exec. Order No. 13,258, 3 C.F.R. 204 (2003) and Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (concerning regulatory planning and review), *amending* Exec. Order No. 12,866, 3 C.F.R. 638 (1994)).

239. See *supra* note 34.

240. See generally O'Connell, *supra* note 17.

istration succeeds in finishing the bulk of its work more than sixty days before the end of the term, the incoming administration may not have the power to suspend the effective dates of rules, since significant rules can be made effective sixty days after promulgation. Even though such rules would not meet the technical definition of midnight rules, and there would be no political accountability concern, given that all rules were done well before the election, similar concerns of quality and projection of the agenda may arise if an administration engages in a high volume of regulatory activity earlier in its eighth year, especially if it appears that agencies rushed to meet an earlier deadline and increased the volume of activity substantially over prior years.

The incoming administrations' regulatory agenda may embody or affect the new administration's reactions to midnight rules and leftover rulemaking proposals.<sup>241</sup> When an administration takes office, it must decide how much time and energy to spend looking back and how much time and energy to devote to moving forward with the administration's own agenda. It may choose to allow midnight rules to take effect in order to free up resources to pursue the administration's own agenda. For rules not yet completed, the new administration may not be concerned with the effort that the prior administration put into formulating proposals, and may prefer to work from scratch on its own proposals instead of completing pending rules.

### *B. The Legality of Strategies for Dealing with Midnight Rules*

There have not been many cases raising procedural challenges to incoming administrations' reactions to midnight rules promulgated by the previous administration. This is likely due to a combination of factors. In the vast majority of cases, any challenge to a delay in the effective date of agency rules is likely to be moot before the challenge would get very far. Most of the time, after the sixty-day delay to allow the incoming administration to review the previous administration's midnight rules, the rules are allowed to go into effect. A case challenging the sixty-day delay is unlikely to be adjudicated before the sixty days has ended. Cases in which the incoming administration decides to rescind a midnight rule, or delay its effective date more than sixty days to allow for further review, are more likely to be adjudicated by the federal courts on judicial review, but this has not happened very often. One reason is that once the sixty-day period expires, the tendency has been to either allow the rule to go into effect, or, in some cases, to use notice and comment rulemaking to promulgate a further delay. This would ultimately meet any procedural objection to the

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241. See O'Connell, *supra* note 16, at 532.

further delay, except in those cases in which additional delays have been ordered without notice and comment.

### 1. Legal Views in the Executive Branch and Commentary

The OLC provided an opinion to the Reagan administration on the legality of Reagan's order to agency and department heads delaying the effective dates of rules for sixty days and ordering a freeze until the centralized review process could be put into place.<sup>242</sup> The OLC concluded that Reagan's order was lawful. As to rules that had not yet been finalized and published, the OLC concluded that the delays were lawful because the APA does not impose any procedural requirements on such an action.<sup>243</sup> It further concluded that even if the delay were subject to substantive judicial review, "[t]he explanation here—that the new Administration needs time to review initiatives proposed by its predecessor—is, we believe, sufficient."<sup>244</sup>

The OLC opinion offered a different analysis of the President's power to delay the effective dates of rules that have been published but had not yet reached their effective dates. Here, the opinion first proposed that a sixty-day extension of a rule's effective date is within the agency's power because while the APA prescribes only a thirty-day minimum between promulgation and legal effect, it does not prohibit or even discourage agencies from providing more than thirty-days' notice of the effective dates of rules.<sup>245</sup> The opinion implies that if it would have been lawful to prescribe a longer period when the rule was first promulgated, the agency retains the power to lengthen the period even after the rule has been published.<sup>246</sup> The opinion further concludes that extending the effective date of a rule is not itself a rule and thus does not require advance notice and comment.<sup>247</sup> The opinion

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242. Presidential Memorandum Delaying Proposed and Pending Regulations, 5 Op. O.L.C. 55 (1981).

243. *Id.* at 56.

244. *Id.*

245. *Id.* at 56–57.

246. *Id.* at 57.

247. *Id.*:

[W]e conclude that a 60-day delay in the effective date should not be regarded as 'rule making' for the purposes of the APA. Although such a delay technically alters the date on which a rule has legal effect, nothing in the APA or in any judicial decision suggests that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b). This conclusion is supported by the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days. The purposes of the minimum 30-day requirement would plainly be furthered if an extension of the effective date were not considered 'rule making,' for such an extension would permit the new Administration to review the pertinent regulations and would free

does acknowledge that extensions of effective dates might be subject to judicial review under the APA, but concludes that although a statement of reasons for the delay might be required, “a reference to the President’s Memorandum should be sufficient in most cases.”<sup>248</sup>

The OLC opinion also concludes that even if a delay in a rule’s effective date is considered rulemaking, agencies have good cause for dispensing with notice and comment on the delay.

A new President assuming office during a time of economic distress must have some period in which to evaluate the nature and effect of regulations promulgated by a previous Administration . . . . If notice and comment procedures were required, the President would not be permitted to undertake such an evaluation until the regulations at issue had become effective. A notice and comment period, preventing the new Administration from reviewing pending regulations until they imposed possibly burdensome and disruptive costs of compliance on private parties, would for this reason be ‘impracticable, unnecessary, or contrary to the public interest.’ 5 U.S.C. § 553(b)(3)(B). This rationale furnishes good cause for dispensing with public procedures for a brief suspension of an effective date.<sup>249</sup>

Note that due to its reliance on the nation being in a period of “economic distress,” this reasoning may not justify dispensing with notice and comment in transitions that occur under different conditions.

One law review note<sup>250</sup> disagrees with the OLC opinion and has argued strongly that the delays imposed by incoming administrations are unlawful. The note argues that:

As a matter of administrative law doctrine, [the delays] were arbitrary and capricious because they did not provide adequate reasons for their promulgation and because they did not rely on factors that Congress contemplated when it delegated its legislative

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private parties from having to adjust their conduct to regulations that are simultaneously under review.

*Id.* (footnote omitted).

248. *Id.* The opinion notes that if the effective date of the original rule had been a “matter of controversy” during the original rulemaking, more specific reasons for delay would be required. *Id.* at 57–58.

249. *Id.* at 58.

250. B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782 (2003).



power. Therefore, a reviewing court should invalidate such delays if they ever are attempted again.<sup>251</sup>

The note sorts the documents agencies have employed to announce delays into two categories: those that rely simply on the President's order and those that justify the delay based on the policies underlying the President's order. The note finds both deficient for different reasons. "[T]hose that merely cite the President's authority should fail automatically because they do not offer any reason for the delays . . . . Although agencies need not give elaborate justifications for every brief delay, they must provide some explanation."<sup>252</sup> For those that rely on the reasons underlying the President's order to delay the effective dates of midnight rules, the note concludes that such reasons are inadequate because they are not based on any policy Congress enacted in the statute underlying the rules: "[T]he cited policies were the President's, not those that Congress expressed in the statute creating the agency's rulemaking authority. In fact, the President's policies may even have been hostile to the statute and constituted an attempt to effect its administrative repeal."<sup>253</sup> The note's argument rests on the principle that agencies may justify rulemaking based only on reasons embodied in the statute that form the basis for the rules.<sup>254</sup>

Another commentator has taken a more equivocal position on the legality of the actions of incoming administrations directed at midnight rules.<sup>255</sup> This commentator concludes that in most cases, a sixty-day delay in the effective date of a rule may be exempt from notice and comment as a procedural rule because "a temporary delay may not substantially affect a party's interest in a final rule . . . ."<sup>256</sup> However, the comment also concludes that in some cases, a sixty-day delay, and longer delays, may not be procedural:

If the delay had a substantive impact on a regulated entity or on the public, the agency should have considered those interests and determined if the delay could be characterized as procedural. Without considering these interests, agencies should not have

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251. *Id.* at 785 (footnote omitted).

252. *Id.* at 803.

253. *Id.* at 803.

254. *See* *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) ("To the extent that [the statute] constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.").

255. *See* Jack, *supra* note 167.

256. *Id.* at 1506.

relied on the blanket explanation that all of the delays were mere procedural rules.<sup>257</sup>

The comment assumes that delays in effective dates are rules presumptively subject to notice and comment, and is not persuaded by the repeated, apparently pro forma assertions by the GW Bush administration that notice and comment would be “impracticable or contrary to the public interest” and that “good cause” existed for dispensing with notice and comment. The bases for the comment’s negative view of these justifications for dispensing with notice and comment are: first, the brief notice and comment periods that were held in some cases illustrate that notice and comment was possible; and second, it does not appear that the agencies engaged in a serious weighing of the costs and benefits of notice and comment before asserting that it was contrary to the public interest or that good cause existed for not seeking advance comment.<sup>258</sup> The comment allows that notice and comment for a brief delay might be “unnecessary” and would thus survive scrutiny under APA section 553.<sup>259</sup> The argument is that in such cases the delay “will not substantially affect a party’s rights and interests because it will not ultimately restrict a party’s rights created by a duly promulgated rule or conclusively relieve a regulated entity of the requirements of a duly promulgated rule.”<sup>260</sup>

## 2. Case Law on Reactions to Midnight Regulation

### a. Withdrawal of Rules from the *Federal Register*

The case law suggests that incoming Presidents’ strategy of ordering agencies to withdraw regulations from the *Federal Register* before they are published is lawful and renders the withdrawn rule null and void.<sup>261</sup> In *Kennecott Utah Copper v. Department of Interior*, the Department of the Interior (DOI) promulgated a midnight rule concerning certain hazardous wastes and sent it to the OFR where it was received in the afternoon of January 19, 1993, the last full day of the GHW Bush administration.<sup>262</sup> On January 21, 1993, the second day of the Clinton administration, the DOI withdrew the rule before it was published.<sup>263</sup> After the DOI promulgated substitute regulations less favorable to industry, Kennecott Copper sought

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257. *Id.* at 1507–08 (footnote omitted).

258. *Id.* at 1509–10.

259. *Id.* at 1510–11.

260. *Id.* at 1511.

261. *See Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996); *Chen v. Immigration and Naturalization Service*, 95 F.3d 801 (9th Cir. 1996).

262. *Kennecott Copper*, 88 F.3d at 1200.

263. *Id.* at 1200–01.

judicial review on numerous grounds, including claims that withdrawing the regulation from the *Federal Register* before publication violated the APA and the Federal Register Act. The court of appeals rejected claims under the Federal Register Act, holding that the OFR's understanding and application of the Federal Register Act allowing withdrawal was reasonable and that it lacked jurisdiction over Kennecott's APA claim because the withdrawal of a rule before publication is not itself a rule subject to judicial review.<sup>264</sup> The court of appeals ignored the midnight rule context of the case, and instead upheld the OFR's interpretation allowing withdrawal of rules before publication as a reasonable way of allowing agencies to correct mistakes and avoid the "needless expense and effort of amending regulations through the public comment process" later.<sup>265</sup>

The court also rejected claims, brought by different petitioners, that the DOI could not withdraw the rule without first allowing notice and comment.<sup>266</sup> The DOI argued in response that any violation of the APA was cured by allowing notice and comment on the substitute regulations that were promulgated the following year.<sup>267</sup> Although the court rejected this argument on the ground that "the two sets of regulations . . . did not cover the same issues,"<sup>268</sup> it held that the challengers were not entitled to notice and comment on the withdrawal of the rule from the OFR for two different reasons. First, the court held that the withdrawn rule had never gone into effect as a binding rule.<sup>269</sup> Second, the act of withdrawal was not a rule within the APA's definition of that term mainly because the withdrawn rule had never gone into effect. Notice and comment, therefore, was not required before the agency withdrew the not-yet published document.<sup>270</sup> This reasoning basically approves of the common presidential strategy of ordering the withdrawal from the OFR of all rules that had been submitted but not yet published before the transition.

In *Chen v. Immigration and Naturalization Service*, an asylum applicant relied, in part, on a rule that had been sent to the OFR by the outgoing administration of GHW Bush but was withdrawn before publication by the incoming Clinton administration.<sup>271</sup> The Ninth Circuit held that the withdrawn rule had no legal effect: "In accordance with President Clinton's directive, this rule was withdrawn from publication. It was never subse-

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264. *Id.* at 1206–07.

265. *Id.* at 1206. *See supra* note 175 and accompanying text (explanation of OFR procedures and the withdrawal of unpublished rules).

266. *Kennecott Copper*, 88 F.3d at 1207.

267. *Id.* at 1208.

268. *Id.*

269. *Id.* at 1208.

270. *Id.* at 1208–09.

271. *Chen v. Immigration and Naturalization Service*, 95 F.3d 801, 804 (9th Cir. 1996).

quently published; therefore, it has no legal effect and is not binding on this court.”<sup>272</sup> Several additional decisions affirm or assume that the unpublished rule at issue in *Chen* has no legal effect because it was withdrawn before publication.<sup>273</sup>

One court has taken the contrary view. In *Xin-Chang v. Slattery*, the district court held that the withdrawn rule involved in *Chen* was effective even though it had not been published.<sup>274</sup> This court viewed publication as a formality unrelated to the legal effectiveness of the rule. The court considered the rule effective at some earlier (unspecified) stage of adoption, perhaps when the rule was signed by the agency head and sent to the OFR for publication. Publication, according to this court, is required only because, under the APA, an unpublished rule cannot be used against a member of the public.<sup>275</sup> The court concluded that “where a rule confers a substantive benefit to a person, an agency must comply with it, even if the rule is not published.”<sup>276</sup> The district court’s conclusion was rejected on appeal by the Second Circuit, which held that the unpublished rule never became effective.<sup>277</sup> The Second Circuit had a technical basis for its decision: the unpublished version of the rule had no effective date because the intent of the outgoing administration was for the OFR to insert the date of publication as the rule’s effective date. Since the rule was never published, it contained no effective date and thus could not have become effective without publication.<sup>278</sup>

An official at the OFR has confirmed that many rules arrive at the OFR with instructions to insert an effective date, often thirty or sixty days after publication. OFR regulations contain instructions for computing effective dates based on agency instructions.<sup>279</sup> The reasoning in *Zhang v.*

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272. *Id.* at 805.

273. *See* *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995); *Shan Ming Wang v. Slattery*, 877 F. Supp. 133, 140 (S.D.N.Y. 1995); *Si v. Slattery*, 864 F. Supp. 397, 403 (S.D.N.Y. 1994); *Chen v. Carroll*, 866 F. Supp. 283, 287 (E.D. Va. 1994); *Gao v. Waters*, 869 F. Supp. 1474, 1480 (N.D. Cal. 1994).

274. *Xin-Chang v. Slattery*, 859 F. Supp. 708, 712 (S.D.N.Y. 1994), *rev’d*, *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995).

275. *Id.* at 712. *See* Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(E) (West, current through P.L. 112–174); *Morton v. Ruiz*, 415 U.S. 199, 232–33 (1974).

276. *Xin-Chang*, 859 F. Supp. at 712.

277. *Zhang*, 55 F.3d at 749.

278. *Id.* at 749.

279. OFR regulations contemplate computation of effective dates when the submitted rule specifies an effective date measured as a number of days after publication. *See* 1 C.F.R. § 18.17 (2012). The possibility of OFR inserting the date of publication as the effective date of a rule that states it is effective immediately upon publication is not explicitly contemplated. However, it seems implicit that OFR would have power to insert the date of publication as the effective date, if the agency specified that the rule goes into at that time. According to the OFR official interviewed for this project, agencies tend to designate specific effective

*Slattery* raises the possibility that the court would not allow an incoming administration to withdraw a rule sent to the Federal Register with an effective date already designated, as is the case with a substantial number of rules. However, the court of appeals also appeared to endorse the notion that the incoming Clinton administration had the power to prevent an unpublished rule from becoming effective by withdrawing it from the OFR.<sup>280</sup>

There is at least one state supreme court decision that found against the authority of an incoming governor to order withdrawal of unpublished rules from the state equivalent of the Federal Register. In New Mexico, incoming governor Susana Martinez issued an executive order upon taking office, suspending “all proposed and pending rules and regulations under the Governor’s authority for a ninety-day review period.”<sup>281</sup> Claiming authority under the order, the Acting Secretary of the state Environment Department instructed the Director of the State Records Center not to publish environmental rules in the New Mexico Register that had been promulgated during the prior administration. On petitions for mandamus filed by proponents of the rules, the New Mexico Supreme Court ordered the Records Center to publish the rules, relying on two sets of reasons. First, the court held that the executive order, which specifically suspended rules under the Governor’s authority, did not apply to the rules at issue because the Records Center and the environmental agencies involved were statutorily removed from control by the Secretary and thus the Governor.<sup>282</sup> Further, the Records Center is itself an independent agency not subject to the governor’s control. Second, the Records Center’s own rules require publication of rules properly submitted unless the issuing authority requests withdrawal, and in this case the withdrawal request was invalid because it was made by the Acting Cabinet Secretary of the New Mexico Environment Department, rather than the chairs of the agencies that had promulgated the rules.<sup>283</sup> It does not appear that the New Mexico court’s reasoning would apply to the typical actions of incoming presidential administrations, mainly because incoming administrations have not applied their regulatory review procedures to independent agencies, and the federal rule withdrawals have apparently all been requested by the proper federal agencies.

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dates when there are statutory deadlines involved or when a rule must go into effect on a weekend, which normally would not be the effective date under OFR rules.

280. *Zhang*, 55 F.3d at 749 (“This failure to publish was a deliberate step by an incoming Administration to terminate all open initiatives of the outgoing administration. By its own terms, the Rule never became effective.”).

281. *New Energy Economy, Inc. v. Martinez*, 247 P.3d 286, 288 (N.M. 2011) (citing N.M. Exec. Order No. 2011-001 (Jan. 1, 2011)).

282. *See id.* at 293.

283. *See id.*

## b. Suspension of the Effective Dates of Published Rules

Suspension or postponement of the effective dates of published rules raises issues different from those raised by withdrawal of rules that have not yet made it into the Federal Register. It is generally understood that a rule is final upon publication in the Federal Register, even if it has an effective date after the date of publication.<sup>284</sup> The legal issues in such cases are: first, whether a postponement or suspension of the effective date of a rule is itself a rule under the APA; and second, if so, whether such a rule may be issued without notice and comment.<sup>285</sup>

In *Natural Resources Defense Council, Inc. v. EPA*, the Third Circuit invalidated the Reagan administration's suspension of a Carter administration midnight rule<sup>286</sup> on discharge of waste into public water treatment works.<sup>287</sup> The rule, which had been promulgated to comply with the government's obligations under a settlement agreement, was published on January 28, 1981, and carried an effective date of March 13, 1981. On February 12, 1981, however, pursuant to Reagan's instructions, the effective date of the rule was postponed until March 30, 1981.<sup>288</sup> Then, on March 27, 1981, the EPA administrator indefinitely postponed the effective date of the rule, relying solely on Executive Order No. 12,291 as authority for the postponement.<sup>289</sup> The indefinite postponement was challenged on the basis that it was a rule and thus was subject to the APA's notice and comment requirements.<sup>290</sup>

The court of appeals first concluded that the postponement was a rule under the APA's definition, presumptively subject to the APA's notice and comment requirements.<sup>291</sup> The court next determined that the postpone-

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284. See *Env'tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983).

285. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 119–122 (4th ed. 2006).

286. Technically, the rule was promulgated by the Reagan administration. However, it was clearly a project of the EPA under President Carter, coming out less than 10 days after President Reagan took office, and the rule was suspended to comply with President Reagan's instructions to suspend new rules to allow his administration to review the work of the Carter administration and put in place the new centralized review process that was in the works.

287. *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982).

288. *Id.* at 755.

289. *Id.* at 756; see Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2006).

290. *Natural Res. Def. Council*, 683 F.2d at 753.

291. *Id.* at 761–62 (“In general, an effective date is ‘part of an agency statement of general or particular applicability and of future effect.’ It is an essential part of any rule: without an effective date, the ‘agency statement’ could have no ‘future effect,’ and could not serve to ‘implement, interpret, or prescribe law or policy.’ In short, without an effective date a rule would be a nullity because it would never require adherence.”). The D.C. Circuit's decision in *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.3d 802, appears to agree with this conclusion.

ment was subject to the APA's notice and comment requirement because it had "a substantial impact upon the public and upon the regulated industry . . . ." <sup>292</sup> The EPA also argued that "good cause" excused its failure to employ notice and comment procedures because the effective date of the rule was imminent and it needed additional time to satisfy the Regulatory Impact Analysis (RIA) requirement of Executive Order No. 12,291. The court rejected this argument, concluding that nothing prevented the EPA from complying with the APA and the Executive Order by allowing the rule to go into effect, preparing an RIA after the fact, and conducting notice and comment rulemaking on whether to suspend the effectiveness of the rule based on its findings in the RIA or for other reasons. <sup>293</sup> The decision thus appears to reject the assertion that compliance with the President's regulatory review instructions and the imminent effective date constitute good cause to dispense with notice and comment. It is unclear what the court would hold if the Executive Order and the APA were in irreconcilable conflict, for example, if the President were to order agencies to suspend the effective dates of rules immediately, without notice and comment.

In *Council of Southern Mountains, Inc. v. Donovan*, the court of appeals approved a six-month "Midnight Suspension" of the effective date of a rule that the Mine Safety and Health Administration had promulgated two years earlier. <sup>294</sup> The regulation at issue, promulgated in 1978, required mines to equip their miners with certain safety equipment by December 21, 1980. <sup>295</sup> On December 5, 1980, without notice and comment, the Department of Labor extended the compliance date to June 21, 1981, by which time Reagan would have assumed the presidency, succeeding Carter. <sup>296</sup> The agency argued that there was good cause for dispensing with notice and comment because the deadline was imminent and there were serious questions about the safety and availability of the new equipment. <sup>297</sup> The court first strongly rejected the argument that the approach of a deadline alone can provide good cause for dispensing with notice and comment to extend the deadline, especially when the agency either knew the deadline all along or created the deadline itself. <sup>298</sup> The court then characterized the case as "close," but found the agency had good cause for acting without notice and

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292. *Natural Res. Def. Council*, 683 F.2d at 764.

293. *Id.* at 765-66. In fact, this is exactly what the EPA did while the litigation challenging the March 27 postponement was pending. *Id.* at 757 (citing General Pretreatment Regulations for Existing and New Sources, 46 Fed. Reg. 50,503 (Oct. 13, 1981) (to be codified at 40 C.F.R. pts. 125, 403)).

294. *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981).

295. *Id.* at 575.

296. *Id.*

297. *Id.* at 579.

298. *Id.* at 580-81.

comment, mainly because the unavailability of necessary equipment was beyond the agency's control and the agency was working diligently to implement the rule as soon as possible.<sup>299</sup>

At a minimum, these decisions indicate that courts will require good reasons for delaying the implementation of published rules without notice and comment beyond the mere desire of incoming administrations to reexamine midnight rules before they go into effect.

Another court of appeals decision that disallowed the suspension of a midnight rule is *Natural Resources Defense Council v. Abraham*, but it arose in a special situation in which the relevant statute prohibited the agency from "backsliding," and thus may not be generalizable.<sup>300</sup> The Department of Energy (DOE) published in the *Federal Register* midnight rules under the Energy Policy and Conservation Act (EPCA) regarding the energy efficiency of air conditioners with heat pumps on January 22, 2001,<sup>301</sup> two days after Bush became President. Due to the publication schedule, these rules apparently could not be withdrawn from the Federal Register before publication. The rule listed an effective date of February 21, 2001. On February 2, 2001, advertizing to the Card Memorandum, the DOE issued a final rule without notice and comment<sup>302</sup> delaying the effective date of the new efficiency standards until April 23, 2001, or approximately sixty days after the original effective date.<sup>303</sup> On July 25, 2001, the DOE published an NPRM proposing to withdraw the January 22 rule and substitute less stringent efficiency standards.<sup>304</sup> On May 23, 2002, the DOE adopted these proposed rules, as well as a related proposal to define terms contained in the EPCA's anti-backsliding provision.<sup>305</sup> The anti-backsliding provision, in substance, makes it unlawful for the DOE to relax any previously adopted efficiency

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299. *Id.* at 582. No further notices appear in the Federal Register, so presumably the rule was implemented as of that date. As further evidence that the rule was allowed to go into effect after the delay, the agency issued an emergency training requirement concerning use of the new equipment in 1987. See *Self-Contained Self-Rescue Devices; Emergency Temporary Standard*, 52 Fed. Reg. 24,374 (June 30, 1987) (to be codified at 30 C.F.R. pt. 75).

300. *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

301. *Central Air Conditioners and Heat Pumps Energy Conservation Standards*, 66 Fed. Reg. 7170 (Jan. 22, 2001) (to be codified at 10 C.F.R. pt. 430).

302. The rule delaying the standards' effective date found that notice and comment were not necessary because the delay was a procedural rule and that in any case notice and comment could be dispensed with for good cause and because it was impracticable, given the need to impose the delay quickly. *Central Air Conditioners and Heat Pumps Energy Conservation Standards*, 66 Fed. Reg. 8745 (Feb. 2, 2001) (to be codified at 10 C.F.R. 430).

303. *Id.*

304. *Central Air Conditioners and Heat Pumps Energy Conservation Standards*, 66 Fed. Reg. 38,822 (July 25, 2001) (to be codified at 10 C.F.R. pt. 430).

305. *Central Air Conditioners and Heat Pumps Energy Conservation Standards*, 67 Fed. Reg. 36,368 (May 23, 2002).



standard, and the Bush administration's definitional provisions were designed to make clear that its actions with regard to these rules did not constitute backsliding. On judicial review, the Second Circuit held that the DOE's amendments violated the EPCA's anti-backsliding provision and thus were unlawful. The court rejected the DOE's interpretation of the statute, refusing to defer to it under *Chevron v. Natural Resources Defense Council*.<sup>306</sup>

For purposes of this Article, the most interesting aspect of *Abraham* was the court's rejection of the DOE's claim that it has inherent power to suspend the effective date of published rules before their effective dates.<sup>307</sup> In this particular case, the DOE may have been able to suspend and revise the rules based on some peculiarities of the statutory structure, if its February 1, 2001, suspension of the rule had been valid. However, the Second Circuit found that the February 1 suspension without notice and comment was not valid because it had the substantive effect of allowing the DOE to substitute less stringent standards.<sup>308</sup> This violated even the DOE's own interpretation of the anti-backsliding provision.<sup>309</sup>

The court also rejected the DOE's argument that good cause existed for dispensing with notice and comment for the delay in the rule's effective date. Here, the court rejected the implicit argument that the midnight nature of the rule contributed to good cause for suspending it without notice and comment. Basically, the court considered the DOE during the two administrations a single entity, and thus because the emergency (the imminent effectiveness of the new rules) that necessitated quick action was created by the DOE itself, there was no good reason for suspension without notice and comment.<sup>310</sup>

The court also rejected the argument that the notice and comment procedures the DOE conducted on the replacement standards cured any defect

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306. *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 198–200 (2d Cir. 2004) (referring to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

307. *Id.* at 202–04.

308. *Id.* at 204–05.

309. *Id.* at 205.

310. *Id.*:

We cannot agree . . . that an emergency of DOE's own making can constitute good cause. . . . Furthermore, we fail to see the emergency. The only thing that was imminent was the impending operation of a statute intended to limit the agency's discretion (under DOE's interpretation), which cannot constitute a threat to the *public* interest . . . . Therefore, because the February 2 delay was promulgated without complying with the APA's notice-and-comment requirements, and because the final rule failed to meet any of the exceptions to those requirements, it was an invalid rule.

*Id.*

in the process for suspending the rule.<sup>311</sup> The court provided two reasons for rejecting this argument: first, that the notice and comment procedure concerning the new rule did not address whether the original rule should have been suspended; and second, that if the suspension was not effective without notice and comment, the anti-backsliding provision rendered the replacement standards substantively invalid regardless of the process employed.<sup>312</sup>

*Abraham* apparently rejects one of the common justifications used by incoming administrations to act without notice and comment when they delay rules that have already been published—namely, that the incoming administration needs time to review rules with imminent effective dates. If the agencies are a single entity before and after the transition, then this argument is basically unintelligible—the agency has already fully considered the rule during the initial notice and comment process. Under *Abraham*, rather than simply announcing that the prior administration’s published midnight rule is suspended, the incoming administration may have to conduct notice and comment rulemaking to prevent the rule from taking effect.<sup>313</sup> This might be impossible in some situations when there is inadequate time for notice and comment before the midnight rule is scheduled to go into effect.

In another case, discussed above, the Court of Appeals for the Fourth Circuit found an agency’s suspension of a midnight rule<sup>314</sup> contrary to the APA, but not on grounds applicable to most midnight rule suspensions. In *North Carolina Growers’ Ass’n, Inc. v. United Farm Workers*,<sup>315</sup> the court affirmed the grant of a preliminary injunction against the suspension, with

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311. *Id.* at 206, n.14.

312. *Id.*

313. In most situations, an incoming administration would still be able to revise a midnight rule by conducting a new notice and comment process. If the incoming administration conducts a new notice and comment rulemaking, it doesn’t really matter whether the original rule had gone into effect—the second rule would replace the original rule through the normal process of rulemaking. In *Abraham*, however, because of the relevant statute’s anti-backsliding provision, the incoming administration might not have had the power to revise the standard at all, even via notice and comment rulemaking, at least if the revision would impose less stringent efficiency standards. With the anti-backsliding provision, even a new notice and comment process could not replace the old rule with a less-protective one.

314. See Temporary Agricultural Employment of H-2A Aliens in the United States, 73 Fed. Reg. 77,110 (Dec. 18, 2008) (to be codified at 29 C.F.R. pts. 501, 780, 788). This example is discussed at various places in Copeland’s CRS report. See Copeland, *supra* note 22, at 22, 32.

315. *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012), *aff’g* *N.C. Growers’ Ass’n, Inc. v. Solis*, 644 F. Supp. 2d 664 (M.D.N.C. 2009). The Court of Appeals also rejected a purported class action counterclaim brought by the United Farm Workers to collect additional wages that temporary agricultural workers would have received had the 2008 rule been validly suspended. See *id.*

notice and comment, of a midnight rule concerning visas for temporary agricultural workers. In the notice requesting comments on the possibility of suspension, the Department of Labor stated that the suspension was necessary because it did not have the time or resources to implement the new rule.<sup>316</sup> The court found that the Department of Labor had violated the APA by suspending the rule and putting back into place a prior rule on the subject after it explicitly stated that it would not consider comments on the merits of the 2008 rule or its 1987 predecessor.<sup>317</sup> Because most postponements or suspensions pursuant to notice and comment do not involve the refusal to consider comments on the merits of reinstating a prior rule, this application of APA section 553 does not necessarily affect most suspensions or postponements of midnight rules.<sup>318</sup>

There is a body of non-midnight case law that subjects rule suspensions to judicial review on substantive and procedural grounds.<sup>319</sup> In a non-midnight context, it has been held that agency action suspending a rule is subject to judicial review, and that the agency must have a sufficient policy justification for the suspension to meet the arbitrary or capricious standard of judicial review.<sup>320</sup>

The GW Bush administration relied on an additional justification for postponing effective dates without notice and comment—namely, that such actions are “rules of procedure” exempt from the notice and comment requirements of APA section 553. There is no case law on the specific question of whether this application of the procedural rule exception to notice and comment is correct. As discussed below, it appears, however, that the more general case law interpreting the exception supports the conclusion that a brief delay in the effective date of a rule is a rule of procedure exempt from section 553’s notice and comment requirements.

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316. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 11,408 (proposed Mar. 17, 2009) (to be codified at 20 C.F.R. pt. 655, 29 C.F.R. pts. 501, 780, 788). The proposed rule, basically restoring the substance of the pre-2008 rule, was adopted on February 12, 2010. See Temporary Agricultural Employment of H-2A Aliens, 75 Fed. Reg. 6884 (Feb. 12, 2010). Thus, the litigation concerned the 2009 growing season only.

317. *N.C. Growers’ Ass’n, Inc.*, 702 F.3d at 769–70.

318. In a concurring opinion, Judge Wilkinson recognized the midnight rulemaking context of the case. See *North Carolina Growers’ Ass’n v. United Farm Workers*, 702 F.3d 755, 771–72 (4th Cir. 2012) (Wilkinson, J., concurring). He noted that the changing rules were the result of a political “seesaw” between employers and agricultural workers and that the court’s decision was “not a matter of tying an agency’s hands in the face of a fresh electoral mandate” but rather an insistence on compliance with the APA. *Id.* at 772. In his view, “[t]o have approved the process at issue in this case . . . would have been to generate a blueprint for agency unaccountability, at odds with the very idea that government at all levels is subject to the written law.” *Id.*

319. See O’Connell, *supra* note 16, at 530 n.198.

320. See *Pub. Citizen v. Steed*, 733 F.2d 93, 105 (D.C. Cir. 1984) (voiding the suspension of tire treadwear grading requirements).

There is no authoritative understanding of the meaning of the procedural rule exception to the notice and comment requirement. In early cases, the courts appear to have focused on whether a rule had a substantial impact on the private party's substantive rights—the greater the impact, the more likely a rule would be found to be subject to section 553's notice and comment requirements.<sup>321</sup> In later cases, the courts recognized that many rules that are truly procedural can have substantial impacts on regulated parties and have moved away from an emphasis on impact toward a more direct inquiry into the nature of the rule claimed by the agency to be procedural. A leading case on the procedural rule exception is *American Hospital Ass'n v. Bowen*.<sup>322</sup> In that decision, the D.C. Circuit stated that in determining whether a rule is procedural, the D.C. Circuit “has gradually shifted focus from asking whether a given procedure has a ‘substantial impact’ on parties to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.”<sup>323</sup> A brief delay of a rule's effective date appears procedural under this standard—the freeze does not necessarily reflect approval or disapproval of the substance of the rule, it merely provides time for the agency to review the rule and perhaps take further substantive action.<sup>324</sup>

Another legal issue that incoming administrations may confront involves the standard of review that would be applied to rescissions of, or amendments to, midnight rules that have become final. In general, a rule is considered to be final upon publication in the *Federal Register*, and once that

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321. See, e.g., *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112–13 (D.C. Cir. 1974).

322. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

323. *Id.* at 1047 (citation omitted). At the Supreme Court, *Lincoln v. Vigil*, 508 U.S. 182 (1993), held that a decision closing a health clinic serving needy Indian children and reallocating the clinic's resources to a national program was a rule of agency organization or a general statement of policy and thus exempt from the APA's notice and comment requirement despite the fact that the decision had a substantial impact on those who had previously obtained services at the clinic.

324. Consistent with the move away from considering the impact of a rule when determining whether it is procedural under the APA, the D.C. Circuit has held that rules with great impact on private parties may nonetheless be procedural. See, e.g., *Bachow Commc'ns, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001). The rules held procedural in *Bachow* prohibited broadcast license applicants from amending their applications to cure substantive problems and shortened the period that the FCC would wait before processing applications (to make sure no mutually exclusive application precluded a license grant). *Id.* These cases, especially *Bachow*, lend support to the argument that a rule delaying the effective date of another rule is procedural. Although this conclusion means that agencies are legally free to impose these delays without notice and comment, ACUS has recommended in the past that agencies voluntarily use notice and comment when promulgating rules of procedure. ADMIN. CONF. OF THE U.S., RECOMMENDATION 92-1: THE PROCEDURAL AND PRACTICE RULE EXEMPTION FROM THE APA NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS (1992).

happens, a new rulemaking is necessary to amend or rescind the rule. Incoming administrations always have the option of rescinding or revising midnight rules by conducting a new notice and comment rulemaking. As a substantive matter, rules rescinding or amending other rules must meet the standard of review applicable to rules made under the particular statute involved.<sup>325</sup> In *State Farm*, the Supreme Court rejected the argument that rescissions should be reviewed on an extra-deferential standard (the argument being that because rescissions are deregulatory in operation, they should be treated like decisions not to regulate).<sup>326</sup> Rather, the Court held that rescissions should be reviewed under the arbitrary and capricious standard that applies to most rules issued after notice and comment.<sup>327</sup>

*State Farm* was originally understood to be a potentially serious impediment to rescission or revision of midnight rules. More than one scholar interpreted *State Farm* as placing serious restrictions on agencies' ability to rescind or amend their rules.<sup>328</sup> Under this understanding of *State Farm*, the existing rule constituted the regulatory baseline, and any change would need to be supported by reasons that made the new rule better than the old rule. Recently, the Supreme Court has clarified that this reading of *State Farm* was erroneous. In *FCC v. Fox Television Stations, Inc.*, the Court read the APA to more freely allow revision and rescission of rules than was previously thought.<sup>329</sup> Under *Fox*, although agencies must display awareness that they are making a change, the new rule is not judged as to whether it is a better

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325. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (stating that the procedural and judicial review provisions of the APA apply to orders establishing, amending, or revoking standards under the National Traffic and Motor Safety Act because the Act does not suggest a "difference in the scope of judicial review depending upon the nature of the agency's action.").

326. See *id.* at 40–44.

327. *Id.* at 42–43.

328. See Beermann, *supra* note 10, at 1010; Loring & Roth, *supra* note 11, at 1457.

329. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009). In *Fox Television*, the Court stated that the understanding that *State Farm* significantly restricted agencies' ability to amend rules was based on a misreading of a key passage in the *State Farm* opinion. That passage stated that rescission of a rule requires "a reasoned analysis for the change beyond that which may be required when an agency *does not act in the first instance.*" *Id.* at 514 (emphasis added) (quoting *State Farm*, 463 U.S. at 42). This, according to the Court in *Fox Television*, "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance." *Id.* In other words, the passage in *State Farm* was misread to imply that agency decisions to alter existing policy required greater justification than initial agency decisions to impose regulations. What the *State Farm* Court actually said was that agency decisions to alter existing policy needed greater justification than decisions not to act in the first instance. Decisions to not act in the first instance are normally reviewed under a highly deferential version of arbitrary, capricious review. See *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007). Decisions to impose new regulatory burdens or alter existing ones are normally reviewed under the standard version of the arbitrary, capricious standard.

rule than the prior rule, but rather, whether it is adequately supported by the rulemaking record.<sup>330</sup> After *Fox*, incoming administrations have more perceived freedom to rescind and revise midnight rules than was previously thought to exist under *State Farm*, although as noted, notice and comment is probably required to change or rescind any rule that has already been published in the *Federal Register* at the time of the transition.

### 3. The Florida Courts' Reactions to Midnight Rulemaking

Although it is not directly relevant to the legal issues surrounding midnight rulemaking in federal agencies, it is worth considering a recent controversy in the State of Florida that occurred when a new governor took steps similar to those taken by incoming presidents. Upon taking office in January 2011, Governor Rick Scott issued an executive order suspending all rulemaking in the state and establishing a centralized review mechanism similar to that employed at the federal level under Executive Order No. 12,866 and related orders, to be administered by the Office of Fiscal Accountability and Regulatory Reform (OFARR).<sup>331</sup> After the transition period was over, Scott replaced this order with an order omitting the suspension of rulemaking, but reiterating that all rules must be reviewed by the OFARR before issuance.<sup>332</sup> These orders were challenged in state court, and the Florida Supreme Court decided that the governor lacked the power to suspend rulemaking and require that rules be submitted to centralized review before promulgation.<sup>333</sup> In so holding, the Florida Supreme Court found that rulemaking is essentially a legislative function with which the governor could not constitutionally interfere:

[T]he Governor's executive orders at issue here, to the extent each suspends and terminates rulemaking by precluding notice publication and other compliance with Chapter 120 absent prior approval from OFARR—contrary to the Administrative Procedure Act—infringe upon the very process of rulemaking and encroach upon the Legislature's delegation of its rulemaking power as set forth in the Florida Statutes.<sup>334</sup>

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330. *Fox*, 556 U.S. at 515.

331. Fla. Exec. Order Nos. 2011-01 (Jan. 4, 2011), available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-01-rulemaking.pdf>.

332. Fla. Exec. Order Nos. 2011-72 (Apr. 8, 2011), available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-72-fiscal.pdf>.

333. See *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011).

334. *Id.* at 713.

The Florida court further explained:

Executive Orders 11–01 and 11–72 supplant legislative delegations by redefining the terms of those delegations through binding directives to state agencies, i.e., first by suspending and terminating rulemaking, second, by requiring agencies to submit to OFARR any amendments or new rules the agency would want to propose, and then by causing OFARR to interject itself as the decisive entity as to whether and what will be proposed.<sup>335</sup>

If federal courts followed this reasoning, presidential authority to act against midnight rules, and more generally to supervise the rulemaking process, would be in doubt. This seems extremely unlikely, because the principles of Florida law, upon which the Florida Supreme Court relies, do not appear to be consistent with the federal understanding of presidential power. Although the legality of centralized review was attacked in the aftermath of Reagan's issuance of Executive Order No. 12,291, such review is now an accepted element of the federal administrative process. Further, although early cases may have understood rulemaking as a quasi-legislative function, the current understanding seems to be that the President has a great deal of authority to supervise the execution of the law as delegated to agencies by legislation. In sum, federal law is not likely to follow Florida's precedent as exemplified by the acceptance of withdrawal of rules before publication pursuant to presidential directives.

#### 4. Summary and Conclusions Concerning the Legality of Reactions to Midnight Rulemaking

First, it is lawful for incoming administrations to withdraw rules that have been submitted to the *Federal Register* but not yet published and to order executive branch agencies not to submit any new rules to the *Federal Register* until an appointee or designee of the new administration has reviewed them. Both the OLC opinion and the weight of judicial decisions support the view that the APA does not prescribe any procedure for withdrawing a submitted rule before publication. The only uncertainty regarding the first half of this proposition is the view expressed by the district court in the *Xin-Chang*<sup>336</sup> decision, that publication is a formality and that a rule, at least one benefiting a member of the public, becomes effective when it is finalized at the agency; this view was not completely rejected by the Second Circuit. As to rules that had not been submitted to

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335. *Id.* at 715.

336. *Xin-Chang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994), *rev'd*, *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995).

the OFR for publication at the time of the transition in administrations, the power to delay agency action while the new administration puts its officials into place is inherent in the President's role as the superintendent of the executive branch. The only caveat here is that legislative and judicially-imposed deadlines should be observed. However, even when such deadlines exist, agencies are often able to delay the rulemaking process because courts do not tend to order immediate compliance with deadlines.<sup>337</sup>

Second, the power of agencies to delay the effective dates to simply allow the new administration to review rules that have been published but have not yet reached their effective dates without notice and comment is uncertain. The weight of the authority is mixed on whether notice and comment is required to delay the effective date of a published rule. The weight of the case law supports the view that a delay in the effective date of a published rule is itself a rule presumptively subject to the APA's notice and comment requirements.<sup>338</sup> There is also support for the contrary view that a delay in the effective date of a rule is not itself a rule subject to the APA's procedural requirements. Assuming that delays are rules, it is less clear whether rules delaying the effective dates of published rules are within any of the APA's exceptions to the notice and comment requirement. What little case law there is appears to reject the view that the desire of the new administration to review midnight rules before they go into effect provides good cause to proceed without notice and comment.<sup>339</sup> The GW Bush administration may, however, have been correct that a brief delay in the effective date of a rule can be considered a rule of agency procedure, unless the delay appears to embody value judgments about particular types of conduct.<sup>340</sup> However, a lengthy delay, or a second delay targeting a particular rule for revision, may not be viewed as procedural and may require notice and comment. Further, courts may require agencies to support delays with reasons consistent with the policies embodied in the substantive statutes involved.

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337. See, e.g., *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 159 (3d Cir. 2002) (establishing mediation process to determine schedule for promulgation of rule held to have been unreasonably delayed).

338. See *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761–62 (3d Cir. 1982); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (per curiam).

339. See *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004); *Natural Res. Def. Council*, 683 F.2d 752. *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981), approved a delay in the effective date of a rule without notice and comment, but only because there were serious questions about the availability of equipment necessary to comply with the rule, and the rule's effective date was imminent.

340. See *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).



*C. The Bush Administration's Effort to Curb  
Its Own Midnight Rulemaking*

On May 9, 2008, Bush Chief of Staff Josh Bolten issued a memorandum (the "Bolten Memo") directed to "Heads of Executive Departments and Agencies" under the subject heading "Issuance of Regulations at the End of the Administration," directing them to propose any remaining rules by June 1, 2008, and to finalize all rules by November 1, 2008.<sup>341</sup> The Bolten Memo clearly explained the reason for establishing this timetable: after reciting the Administration's approach to regulation, the memorandum stated, "[w]e need to continue this principled approach to regulation as we sprint to the finish, and *resist the historical tendency of administrations to increase regulatory activity in their final months.*"<sup>342</sup>

The June 1 deadline for proposing rules and the November 1 deadline for finalizing rules would mean that the GW Bush administration would issue virtually no midnight rules under the definition used in this Article. All proposals would be public and subject to comment well before the election, and all rules would be issued before the election, eliminating the possibility that rules were held back until after the election to avoid political consequences.

These deadlines might also, for several reasons, have the effect of increasing the durability of rules that might otherwise have been issued later. First, there would be no unpublished rules subject to simple withdrawal from the *Federal Register* by the succeeding administration, since the November 1 deadline would ensure that all finalized rules would be published in the *Federal Register*. Second, rules finished by November 1 could theoretically all be final and in effect before the transition. The APA requires at least thirty days between publication and effectiveness, and the CRA requires sixty days for rules to which it applies. Assuming no additional particular statutory constraints, any rule that is issued by November 1 could be fully effective by January 1.

It does not appear that the schedule anticipated by the Bolten Memo would prevent Congress from disapproving rules under the CRA. Due to the way that certain features of the CRA interact with congressional procedures, it is impossible to know in advance the exact cutoff date between rules that are subject to action by the new Congress under the CRA and rules that are not. A report prepared by the CRS concluded the following

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341. Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Exec. Dep'ts and Agencies (May 9, 2008), *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cos\\_memo\\_5\\_9\\_08.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cos_memo_5_9_08.pdf). This Memorandum is reproduced in the Appendix to this Article, *available at* <http://www.mjealonline.org/documents>.

342. *Id.* (emphasis added).

concerning the effect of the Bolten Memo's deadlines on Congress's power under the CRA:

If Congress follows [its] general pattern in the second session of the 110<sup>th</sup> Congress, the data suggest that any final rule submitted to Congress after June 2008 may be carried over to the first session of the 111<sup>th</sup> Congress, and may be subject to a resolution of disapproval during that session. However, the starting point for the carryover period could slip to late September or early October if an unprecedented level of congressional activity occurs late in the session.<sup>343</sup>

The Bolten Memo did not succeed in eliminating midnight rulemaking in the GW Bush administration, but it reduced it at least somewhat. According to Susan Dudley, OIRA Administrator at the end of the GW Bush administration, the number of post-election rules issued in 2008–09 was 100, compared to 143 in 2000–01.<sup>344</sup> The number of post-election economically significant rules was much closer: 27 in 2008–09, compared to 31 in 2000–01.<sup>345</sup> The final three weeks of the GW Bush administration were much less busy than the same period during the Clinton administration, with 20 final rules issued in 2008–09, compared to 72 final rules in the final 3 weeks of the Clinton administration.<sup>346</sup>

Dudley also reports that the deadlines in the Bolten Memo were received with displeasure, both by political appointees and by career officials, who, as she reports, “had worked hard on many of the regulations nearing the finish line, and were disappointed when they did not make it across before January 20.”<sup>347</sup> There was great pressure to waive the deadlines, which the Bolten Memo had promised would occur only in “extraordinary circumstances.”<sup>348</sup> Dudley reports that Bolten decided to allow waivers in four circumstances. First, in what appears to be the largest category of waivers, the deadline was waived for “draft final regulations submitted to OIRA for interagency review before mid-October (two weeks before the deadline to issue a final rule), [and] OIRA and the agencies worked expeditiously to conclude review.”<sup>349</sup> Second, an exemption was provided for “[f]inal regulations that an agency identified as a high priority *and* had provided adequate public notice and opportunity for comment (generally

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343. HALCHIN, *supra* note 30, at 7.

344. See Susan E. Dudley, *Regulatory Activity in the Bush Administration at the Stroke of Midnight*, THE FEDERALIST SOC'Y, 28 (July, 2009), [http://www.fed-soc.org/doclib/20090720\\_Engage102.pdf](http://www.fed-soc.org/doclib/20090720_Engage102.pdf).

345. *Id.*

346. *Id.* at 29.

347. *Id.* at 27.

348. Bolten, *supra* note 126.

349. Dudley, *supra* note 344, at 28.

defined as having met the June 1 deadline for publication of the proposed rule) . . . .”<sup>350</sup> Third, “[r]egulations that faced statutory or judicial deadlines were also granted exceptions, even if they did not meet the first two criteria . . . .” Fourth, “regulations that were considered presidential priorities” were also exempted.<sup>351</sup> Dudley summarizes the effects of the memo as follows:

[M]idnight regulations are inevitable. But the Bolten memorandum, which supported OIRA’s efforts to impose some restraint on last minute regulatory activity, had a positive effect. If nothing else, the early efforts to counteract the midnight regulation tendency spread out the completion of regulations over a longer period, providing more time for constructive interagency review. For the most part, the criteria for receiving an extraordinary circumstance exemption also ensured an opportunity for public comment.<sup>352</sup>

Dudley recommends that future administrations issue similar memoranda, perhaps earlier in their administrations, to reduce midnight rulemaking as much as possible.<sup>353</sup>

The Bolten Memo was viewed by some as concerned less with eliminating midnight rulemaking than immunizing rules from easy alteration or rescission by the next administration.<sup>354</sup> This would be the case if there were a rush to issue a higher than normal number of rules just before the earlier deadline established by the memo. In 2008, the final full year of the GW Bush administration, O’Connell found 649 final actions by cabinet agencies and 118 actions by executive branch agencies, for a total of 767 total final actions.<sup>355</sup> For comparison purposes, in 2000, the final full year of the Clinton administration, cabinet agencies completed 694 actions and executive branch agencies completed approximately 159 final actions, for a total of 853

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350. *Id.*

351. *Id.*

352. Susan Dudley, *Observations on OIRA’s Thirtieth Anniversary*, 63 ADMIN. L. REV. 113, 124–25 (2011).

353. *See id.* at 125; Telephone Interview with Susan Dudley, former OIRA Adm’r (Nov. 15, 2011).

354. *See* Christopher Carlberg, Essay, *Early to Bed for Federal Regulations: A New Attempt to Avoid “Midnight Regulations” and Its Effect on Political Accountability*, 77 GEO. WASH. L. REV. 992, 997–98 (2009); O’Connell, *supra* note 16, at 504 (characterizing Bolten Memo as one of GW Bush’s “unprecedented steps to make the rules issued in his final year harder to overturn”). Carlberg does recognize that “placing a moratorium on federal regulations during the [M]idnight [P]eriod increases political accountability . . . by prohibiting regulation promulgation during the period the outgoing President is least politically accountable.” Carlberg, *supra* at 1001.

355. These figures are drawn from the text of O’Connell’s article, *supra* note 16, at 503, and from supporting data supplied by O’Connell and on file with the author of this Article.

actions.<sup>356</sup> The difference in the number of final actions between the two administrations (86) is substantial, but not overwhelmingly large. The total difference in late actions by the two administrations is greater because of the higher number of rules issued during January by the outgoing Clinton administration than by the GW Bush administration during its final three weeks in office.<sup>357</sup>

The overall picture of late-term rulemaking in the GW Bush administration shows a clear increase in action near the end of the term, even in the final quarter when, had it been enforced, the Bolten Memo would have sharply limited rulemaking. The GW Bush administration actually promulgated more economically significant rules in its final quarter than the record-setting Clinton administration had eight years earlier:

In terms of presidential transitions, cabinet departments finished more important actions in the last quarter of President Clinton's Administration (83 actions) than in any other quarter in the data for that presidency (the next highest was the second quarter of 1996 with 55 actions). Similarly, cabinet departments and executive agencies promulgated more final actions (95 and 22 actions, respectively) in the final quarter of President George W. Bush's Administration than in any other quarter of his presidency (the next highest were 72 and 20 actions in the third quarter of the final year for cabinet departments and executive agencies, respectively).<sup>358</sup>

Thus, because many waivers were granted, the effect of the Bolten Memo appears to be a modest shift of rulemaking to earlier in the GW Bush administration's final year. If that is an accurate depiction, then the Bolten Memo would have addressed only one set of concerns related to midnight rulemaking, that of delaying the issuance of rules until after the election to avoid accountability. It would not have addressed the other set of concerns related to the quality of midnight rules. To the extent that agencies increased the volume of rulemaking and rushed to complete rules before a slightly earlier deadline, the concerns over the quality of the rules would be exactly the same if the deadline had been Inauguration Day, as in prior administrations.

It remains to be seen whether the Bolten Memo will set a precedent for future administrations. The Obama administration did not issue a similar directive in 2012 while President Obama was standing for re-election. Now

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356. E-mail from Anne Joseph O'Connell, *supra* note 107

357. See *supra* Section III.B.

358. O'Connell, *supra* note 16, at 504.

that President Obama has been reelected, the opportunity for a directive like the Bolten Memo will arise in 2016.

## V. RECOMMENDATIONS

The Administrative Conference has adopted a set of recommendations to Congress and agencies relating to the problem of midnight rules. In this Part, I analyze the strengths and weaknesses of reforms others have proposed. In the next Part, I provide the Administrative Conference's recommendations.

### *A. Prior Reform Proposals*

There have been many proposals for reform of midnight rulemaking, some directed at limiting the ability of outgoing administrations to engage in midnight rulemaking and others at enhancing the ability of incoming administrations to revise or rescind midnight rules.

The simplest proposal that has been floated is for Congress to simply prohibit midnight rulemaking. Congress could statutorily prohibit rulemaking during the period between Presidential Election Day and Inauguration Day. This was suggested by Federal Circuit Judge Jay Plager in a debate reported in the spring 2001 issue of *Administrative Law & Regulatory News*.<sup>359</sup> Judge Plager suggested:

[One possible] measure would be to have Congress pass a law prohibiting submission of final regulations during the interregnum. Or Congress might permit publication of regulations during this period but subject them to special rules, such as automatically extending them, making them subject to extension without notice and comment, attaching a presumption of irregularity to them, or denying them *Chevron* deference.<sup>360</sup>

Prohibiting all final rules during the midnight period is unrealistic. Most midnight rules are routine and are required to implement statutes. Prohibiting all rulemaking for more than two months would create a backlog that the incoming administration would have to deal with just when it wants most to get started on its own program. Thus, although it may be desirable to defer significant and especially controversial rulemakings until after the transition, shutting the rulemaking process down would not be a desirable reform.

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359. See William S. Morrow, Jr., *Midnight Regulations: Natural Order or Disorderly Governance*, ADMIN. & REG. L. NEWS, Spring 2001, at 3, 18.

360. *Id.*

One legislative proposal was directed at both the power of outgoing administrations to issue midnight rules and the power of incoming administrations to rescind them. In January 2009, Representative Jerrold Nadler introduced a bill entitled the “Midnight Rule Act” with the stated purpose to “delay the implementation of agency rules adopted within the final 90 days of the final term a President serves.”<sup>361</sup> The operative provisions of this proposal simply provided that “a midnight rule shall not take effect until 90 days after the agency head is appointed by the new President” and that “[t]he agency head appointed by the new President may disapprove of a midnight rule no later than 90 days after being appointed.”<sup>362</sup> “Midnight rule” was defined as “a rule adopted by an agency within the final 90 days a President serves in office.”<sup>363</sup> The bill allowed the outgoing President to avoid the ninety-day delay by making a determination, in an executive order, that the rule is necessary due to an imminent threat to health or safety or other emergency, necessary to enforce criminal law, necessary for national security, or issued pursuant to a statute implementing an international trade agreement.

This proposal would provide the incoming administration with a powerful tool to deal with midnight rules, but although it might provide the basis for reform, it suffers from some weaknesses that should give pause.<sup>364</sup> For one, the bill’s language does not provide exceptions for instances in which the incoming administration would rather have the midnight rules go into effect immediately, for example, if the incoming administration is of the same party, likes the rules, or if midnight rules were the product of cooperation between the incoming and outgoing administrations. At a minimum, any reform along the lines of this proposal should allow the incoming administration the option of putting midnight rules into effect immediately. Another problem is that the proposal fails to account for rules for which a delay may be legally questionable or unnecessary. There is, for example, no indication that rules required by statutory deadlines or court orders are exempt. The most significant problem with the proposal is that the incoming administration’s only option is to disapprove the midnight rule or allow it to go into effect as written. There is no option to revise a midnight rule. This means that if the new agency head concludes that a rule is necessary, even one that is very close to the one promulgated by the prior administration, the agency must either accept the imperfect rule or engage in a new rulemaking proceedings to promulgate what might be an only

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361. Midnight Rule Act, H.R. 34, 111th Cong. (2009).

362. *Id.*

363. *Id.*

364. For a more complete analysis of Representative Nadler’s proposal, see Beermann, *supra* note 143.

slightly different rule. It would be preferable if the incoming administration could issue a new rule based on the original rulemaking record,<sup>365</sup> supplemented by comments solicited by the incoming administration.

Another proposal aimed at the power of outgoing administrations was made by Brito and de Ruyg. Their proposal grows out of their concern that during midnight periods, institutional review mechanisms are overwhelmed by the high volume of rules. They are most concerned with review of significant rules by OIRA under Executive Order No. 12,866.<sup>366</sup> Their proposal is to “cap the number of significant regulations an agency is allowed to submit to OIRA during a given period.”<sup>367</sup> They assert that this reform could be accomplished either by executive order or by a statute, although given that they recommend a flexible cap based on resources available to OIRA, it seems more realistic that the cap would be imposed and administered by the executive branch.<sup>368</sup>

Assuming that the volume of rules during the midnight period is a serious problem, Brito and de Ruyg’s proposal to cap the number of significant rules each agency is allowed to submit to OIRA does not seem like an effective reform. To allow for the usual increase in regulatory activity as the deadline approaches, the authors suggest that the “number should be well above the ‘normal’ levels of regulatory activity we see during non-midnight periods . . . .”<sup>369</sup> If each agency is allowed to submit rules to OIRA “well” in excess of the norm during non-midnight periods, this proposal would apparently allow for a great deal of midnight rulemaking, perhaps dampening but not resolving the problem. Further, it is unclear exactly how much dampening would occur if rulemaking “well above the normal levels” would still be allowed.

On another level, the focus on OIRA review seems misplaced. OIRA review is not a legislatively mandated element of the rulemaking process. Given that OIRA review was created by an Executive Order, each President has the unilateral power to abolish it with the stroke of a pen. Rather, it is part of each President’s internal management of the regulatory system. Congress has enacted many procedural and substantive requirements for rulemaking, but it has not required that all regulations or even all significant regulations go through a review process like OIRA review. The party of interest in OIRA review is the President, and it is up to the President to

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365. See Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757, 765 (1999) (arguing that agencies may reconsider recently promulgated rules without notice and comment).

366. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 745 (2006) and 5 U.S.C. § 601 app. at 108 (Supp. IV 2010).

367. BRITO & DE RUYG, *supra* note 50, at 18 (emphasis omitted).

368. *Id.* at 19.

369. *Id.* at 18.

determine whether the somewhat more rapid review during the midnight period is adequate. Perhaps a revised Bolten Memorandum could incorporate this suggestion, but it seems to be an unlikely subject of legislation, given that Congress has not mandated OIRA review under any circumstances.

A less drastic and more complex suggestion made by Andrew Morriss and his co-authors is to place regulators on a “budget” and limit their regulatory activity during the midnight period to that allowed by the budget.<sup>370</sup> This proposal is consistent with the desire to reduce the amount of midnight rulemaking that is shared by many. The main concern with this proposal is whether it is necessary given the routine nature of much rulemaking even during the midnight period and whether it would be effective at curbing the midnight rules that critics believe ought to be curbed, since agencies could spend their budgets on the most controversial midnight rules and leave the routine rules to the incoming administration.

Additional proposals have been aimed at enhancing the power of incoming administrations to deal with the midnight rules left behind. As discussed above, the legality of the common strategies administrations have employed to deal with midnight rules is subject to some doubt, especially the practice of postponing the effective dates of published rules without notice and comment. In this regard, Judge Plager suggests either automatically suspending midnight rules or making them subject to suspension without notice and comment.<sup>371</sup> As discussed above, the last several incoming administrations have taken this step, and its legality has not been definitively established, one way or the other. This modest reform would allow the incoming administration the power and time to reexamine midnight rules to ensure that they are consistent with the administration’s policy and not the product of a rushed regulatory process.

Andrew Morriss and his co-authors suggest a related but more substantial reform. Their suggestion is “[m]aking regulations issued ‘at midnight’ (after the election, for example) able to be repealed without a new rulemaking process but simply by issuing a notice in the *Federal Register* . . . .”<sup>372</sup> This is similar to Representative Nadler’s legislative proposal, and it suffers from the same defect, that it does not appear to allow the incoming administration to take the less drastic step of amending midnight rules and then allowing them to go into effect as amended. Perhaps the authors would view this as a friendly amendment to their suggestion, since it is designed, as is their proposal, to enhance the power of incoming administrations to deal with midnight rules. The authors make an alternative, related suggestion,

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370. Morriss et al., *supra* note 70, at 597.

371. Morrow, *supra* note 359.

372. *Id.*



that “[r]ules might also be prohibited from going into effect for a period after the new administration was inaugurated, allowing withdrawal of proposed final rules without new rulemaking.”<sup>373</sup> This proposal is based on the assumption that the incoming administration has the power to withdraw any published midnight rule before its effective date. That assumption is doubtful and thus if enacted, the reform should include both the extension of the effective date of all rules issued during the midnight period and an explicit grant of power to the new administration to withdraw any rules before their effective dates.

It has also been suggested that incoming administrations might encourage Congress to use the CRA to override midnight rules.<sup>374</sup> As discussed above, the CRA has been used only once, to void Clinton’s ergonomics rule. While this may support the notion that the CRA is more likely to be successfully used when a new President has taken office and is willing to sign the resolution of disapproval, the CRA has not proven to be a useful tool to combat midnight rulemaking. It has been suggested that a new President could, independent of the CRA, submit a bill to Congress containing a package of midnight rules that the incoming administrations recommends Congress legislatively reject.<sup>375</sup> This seems even less likely to succeed in Congress than CRA rejection, since there is likely to be a group in Congress that supports at least one of the rules in the package and has sufficient strength to prevent passage of the bill. Legislative disapproval thus does not seem to be a likely avenue for combating midnight rulemaking.

Another question related to possible reforms is whether the Bolten Memo was desirable and, if so, whether it should be adopted as a model for future transitions. The Bolten Memo was viewed by some as an effort to shield the GW Bush administration’s midnight rules from reversal by the Obama administration and as ineffective since it merely moved midnight up to “11 PM.” To those concerned with rushed rulemaking processes, an earlier deadline poses the exact same problem as the end of the term—agencies might rush rules through the process to beat the new “11 PM” deadline. To critics who view midnight rules as illegitimate attempts to extend the outgoing administration’s agenda into the future, the fact that the GW Bush administration issued fewer true midnight rules may not be sufficient, given the high volume of rules (and proposed rules) prior to the Bolten memo’s deadlines.

To those opposed to midnight rulemaking on principle and those concerned with the incoming administration’s need to review midnight rules, the Bolten Memo has its virtues. GW Bush administration OIRA Adminis-

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373. *Id.*

374. *See* Brito & de Rugy, *supra* note 15, at 189–90.

375. *Id.* at 190.

trator Dudley viewed the Bolten Memo as consistent with her principled stand against midnight rulemaking.<sup>376</sup> To those who share her view, the specter of dozens or even hundreds of midnight rules is ugly and undermines the perceived legitimacy of the administrative state. Fewer post-election rules means less avoidance of political accountability. Additionally, the incoming administration benefits when the outgoing administration issues fewer rules with effective dates after the transition because it will not need to devote resources to reviewing as many rules that have not gone into effect as of Inauguration Day. It is likely to seem less urgent for the new administration to review rules that have been final and in effect for several months than to review those rules that have not gone into effect when the administration took office.

O'Connell has discussed variants of many of the proposed reforms to both midnight rulemaking and the responses of incoming administrations, including making rulemaking more difficult during the midnight period; subjecting midnight rules to less deferential judicial review; and either explicitly requiring notice and comment before incoming Presidents suspend the effective dates of midnight rules, or explicitly exempting such actions from notice and comment.<sup>377</sup> She is skeptical of the utility of any of the many reforms that have been proposed and predicts that agencies and other political actors will react strategically to any changes:

For instance, agencies might try to evade these restrictions by promulgating policies through informal adjudications, guidance, or policy statements. If rescission of finalized regulations were made more procedurally difficult, agencies might forego trying to change the regulations and instead just refuse to enforce them. In addition, what counts as "midnight" might be pushed back to right before an election, creating the same problems as before. And if the reforms were to apply to congressional as well as presidential transitions, agencies would have little time to act without these additional restraints.

Finally, even assuming that these proposals would be beneficial and effective, they may not be politically feasible to implement.<sup>378</sup>

In sum, while some of the proposed reforms relating to midnight rulemaking have merit, no proposal offered to date provides an appropriate measured response to the realities of the midnight rulemaking phenomenon.

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376. Interview with Susan Dudley, *supra* note 353.

377. *Supra* note 16, at 972–73.

378. *Id.* at 974.

VI. ACUS RECOMMENDATIONS<sup>379</sup>*A. Recommendations to Incumbent Presidential Administrations*

1. Incumbent administrations should manage each step of the rulemaking process throughout their terms in a way that avoids an actual or perceived rush of the final stages of the process.
2. Incumbent administrations should encourage agencies to put significant rulemaking proposals out for public comment well before the date of the upcoming presidential election and to complete rulemakings before the election whenever possible.
3. When incumbent administrations issue a significant “midnight” rule—meaning one issued by an outgoing administration after the presidential election—they should explain the timing of the rule in the preamble of the final rule (and, if feasible, in the preamble of the proposed rule). The outgoing administration should also consider selecting an effective date that falls ninety days or more into the new administration so as to ensure that the new administration has an opportunity to review the final action and, if desired, withdraw it after notice and comment, before the effective date.
4. Incumbent administrations should refrain from issuing midnight rules that address internal government operations, such as consultation requirements and funding restrictions, unless there is a pressing need to act before the transition. While incumbent administrations can suggest such changes to the incoming administration, it is more appropriate to leave the final decision to those who would operate under the new requirements or restrictions.
5. Incumbent administrations should continue the practice of sharing appropriate information about pending rulemaking actions and new regulatory initiatives with incoming administrations.

*B. Recommendations to Incoming Presidential Administrations*

6. Where an incoming administration undertakes to review a midnight rule that has already been published, and the effective date

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379. These recommendations were adopted by the Administrative Conference on June 14, 2012. The recommendations are reproduced here verbatim, without the preamble. ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012-2: MIDNIGHT RULES (2012), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf>.

of the rule is not imminent, the administration should, before taking any action to alter the rule or its effective date, allow a notice-and-comment period of at least thirty days. The comment period should invite the public to express views on the legal and policy issues raised by the rule as well as whether the rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect. The administration should then take account of the public comments in determining whether to amend, rescind, delay the rule, or allow the rule to go into effect. If possible, the administration should initiate, if not complete, any such process prior to the effective date of the rule.

7. When the imminence of the effective date of a midnight rule precludes full adherence to the process described in paragraph six, the incoming administration should consider delaying the effective date of the rule, for up to sixty days to facilitate its review, if such an action is permitted by law. Before deciding whether to delay the effective date, however, the administration should, where feasible, allow at least a short comment period regarding the desirability of delaying the effective date. If the administration cannot provide a comment period before delaying the effective date of the rule, it should instead offer the public a subsequent opportunity to comment on when, if ever, the rule should take effect and whether the rule itself should be amended or rescinded.

#### *C. Recommendation to Congress*

8. In order to facilitate incoming administrations' review of midnight rules that would not otherwise qualify for one of the APA exceptions to notice and comment, Congress should consider expressly authorizing agencies to delay for up to sixty days, without notice and comment, the effective dates of such rules that have not yet gone into effect but would take effect within the first sixty days of a new administration.

#### *D. Recommendation to the Office of the Federal Register*

9. The Office of the Federal Register should maintain its current practice (whether during the midnight period or not) of allowing withdrawal of rules before filing for public inspection and not allowing rules to be withdrawn once they have been filed for public inspection or published, absent exceptional circumstances.

## CONCLUSION

The midnight rulemaking phenomenon has become a familiar element of presidential transitions. Whenever an outgoing President is replaced by a President of a different political party, there is a noticeable increase in regulatory activity at the end of the incumbent's term, followed by a freeze on new rulemaking and a review of the midnight rules promulgated by the incoming administration. Midnight rulemaking has been condemned by commentators and media observers from across the political spectrum, although it is not clear exactly what is wrong with the practice. There are no strong indications that midnight rules are of lower quality than rules promulgated in non-midnight periods, and it appears that incoming administrations have tools that are adequate to deal with those few rules that are problematic. Clearly, however, midnight rulemaking breeds cynicism and distrust of government, and it has negative effects on the transition of administrations. Because most rulemaking is routine and necessary to keep the government operating, shutting down all rulemaking activity once a new President is elected may be a cure that is worse than the disease. Any reforms directed at midnight rulemaking should take account of these considerations. Outgoing administrations should aim to complete their rulemaking activities as early in the final year as possible, should explain the timing of midnight rules, should minimize the promulgation of controversial rules during the midnight period, and should smooth the transition to the new administration as much as possible.