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# Midnight Rulemaking and Congress

*Nina Mendelson*

## I. Introduction

The 2008 presidential transition was accompanied by a familiar pattern of midnight rulemaking. Shortly before leaving office, executive branch agencies in the administration of President George W. Bush issued a host of final rules, many on controversial subjects. In late November and December 2008 alone, the following rules, among others, were issued: The Transportation Department, over criticism from safety advocates, lengthened the number of hours long-haul truck drivers could drive daily.<sup>1</sup> The Department of Health and Human Services issued its “conscience rule” in late December, stating that a condition of federal funding for governments, hospitals, and other entities would be that those organizations accommodate an individual employee who refuses to participate in a health service program or research activity contrary to his religious beliefs or moral convictions.<sup>2</sup> The rule was controversial not only because it could limit access to abortion, but also to birth control and infertility treatment, particularly in rural areas with few medical facilities. And the Interior Department issued two Endangered Species Act (ESA) rules: one limiting an agency’s obligation to consult with the Interior Department prior to taking an action that could affect an endangered species or its habitat and the other limiting the protections available for the polar bear, despite the department’s earlier declaration of the polar bear’s status as a “threatened” species under the act.

This issuance by administrative agencies of significant, controversial rules<sup>3</sup> late in a presidential administration has become utterly typical of presidential transitions. Such rules were issued by the outgoing Carter,

Reagan, George H. W. Bush, and Clinton administrations.<sup>4</sup> Owing to broad delegations of authority from Congress, the administrative state is now a primary—perhaps *the* primary—engine of federal policy making, and it operates under the significant influence and even the direction of the president.<sup>5</sup> In the transition from one presidential administration to another, an outgoing president can use the administrative state to entrench his preferred policy positions through actions that I have collectively termed “agency burrowing.”<sup>6</sup> Administrative agencies might act in a way that is relatively cumbersome for a new administration to reverse. The highest-impact, most-difficult-to-reverse actions are probably notice-and-comment rules, which are typically broad, prospective, and have the force of law. Once issued, these notice-and-comment rules may be revised or repealed only if the new administration conducts a new time- and resource-consuming notice-and-comment proceeding and explains its reasons for selecting a new position.<sup>7</sup> Agencies also might hire or promote individuals who are likely to share the president’s policy positions.<sup>8</sup> Finally, these sorts of actions may be undertaken despite—or perhaps *because*—the incoming president would choose a different path. On occasion, an outgoing president’s actions have resulted in an incoming president bearing significant political costs. For example, for his proposal to reverse the Clinton administration rule setting standards for arsenic in drinking water, President George W. Bush was tarred in his first year as an “antienvironmentalist” president.<sup>9</sup>

In a striking acknowledgment of the commonplace nature of this practice, the George W. Bush administration Office of Management and Budget director Joshua Bolten wrote agencies in May 2008, stating that “regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.”<sup>10</sup> That memorandum could be understood either as an attempt to reduce late-term, lame-duck rulemaking or, more cynically, especially in view of the president’s poor poll numbers at the time,<sup>11</sup> as a message to agencies to get their controversial decisions finalized early.

Actions such as these have been widely criticized as an outgoing president’s last-chance grasp at power.<sup>12</sup> The electorate has selected someone new—very often of a different political party—to run the country. The new president can appoint new members of the cabinet and new top agency officials. The prospect of those changes has been associated with significant midnight rulemaking by the outgoing president’s administration. Indeed, one commentator has reported that the higher the level of turnover

among top executive branch officials, the more “midnight regulations” are likely to be issued.<sup>13</sup>

No one would, of course, want the government to effectively shut down after the election. The sitting president continues to have the obligation to execute the laws until the term ends on January 20. Nonetheless, an outgoing president’s use of the mechanisms of the administrative state to entrench particular policies or viewpoints that diverge from those preferred by the newly elected president seems problematic at best. At worst, it could be seen as a distasteful and antidemocratic power grab—an attempt to distribute rents, for example, or to set rights and obligations in the face of a rare and important concerted expression of will from the electorate.

The point of this chapter, however, is to discuss the extent to which these sorts of actions represent not just a potential cost to democracy, but also an opportunity, in some cases, for our system of representative democracy to function better. In previous work, I have discussed the extent to which midnight rulemaking can prompt greater attention to particular presidential activities by the public. Greater public engagement, if it happens, can in turn prompt a decision by the new president that is better informed and more responsive to public preferences.

This chapter focuses on Congress, our most democratic federal institution. Congress is generally responsible for defining the authorities possessed by the administrative state, and congressional oversight is key to holding agencies accountable for their actions. Midnight rulemaking also has the potential to increase congressional engagement. Two commentators have recently argued that relative inattention from Congress can facilitate midnight rulemaking, because Congress may meet less frequently during the lame duck period and there is no “repeat player” relationship between the outgoing president and the Congress.<sup>14</sup> To the contrary, however, Congress retains considerable formal power to respond to and override presidential decisions, whether during the transition period or later on.<sup>15</sup> To the extent there is a problem with congressional control over the administrative state, it is a more general one—whether Congress is sufficiently engaged to react to agency actions that veer too far from public concerns or preferences.

I want to suggest that midnight rulemaking can present a special opportunity to create an interbranch dialogue about the appropriate direction of the administrative state. Midnight rulemaking actions have been relatively high profile and controversial. As a consequence, they have prompted heightened public discussion. This in turn can generate greater attention in Con-

gress and an interbranch dialogue regarding agency actions. In short, midnight rulemaking may on occasion ironically prompt a more deliberative, and ultimately a more democratic, decision-making process.

## II. The Administrative State, the President, and Congress

In the setting of federal statutes ranging from environmental and banking regulation to housing subsidies, the administrative state possesses substantial power to make binding standards, resolve disputes, and implement programs. In so doing, agencies decide important questions of policy. Those policy questions can implicate technical issues: how much wearing a seat-belt would reduce risk to an automobile or airplane passenger, for example. But agencies also may resolve critical value questions: for example, how much government should protect people from their own bad decisions; how much risk society should tolerate; or which risks government should first seek to address. That agencies must often resolve these issues raises a question: how can we best assure that agencies are properly accountable and that their decisions appropriately respond to public views?

It is no longer plausible—if it ever was—to say that agencies are merely the “transmission belt” for critical policy decisions made, in statutes, by Congress.<sup>16</sup> A bureaucracy that implements a fairly vague statutory delegation may well take an action different from that envisioned by the legislative coalition enacting the statute.<sup>17</sup> This sort of “bureaucratic drift” alone may not be entirely problematic. One might interpret broad statutory language as incorporating an *expectation* by the enacting coalition that administrative implementers will flexibly apply the statute to meet the country’s changing needs. Indeed, one of the claimed benefits of the administrative state over Congress is that the administrative state is more flexible and able to adapt to changing circumstances. For example, Congress’s 1938 delegation to the Food and Drug Administration (FDA), in the Federal Food, Drug, and Cosmetic Act, to regulate substances qualifying as “drugs,” together with a long list of medications Congress itself identified at the time, reflects Congress’s recognition of ongoing active scientific research into new medications and its wish that the FDA be able to flexibly respond to regulate new substances that Congress was unaware of in 1938.<sup>18</sup> Similarly, Congress’s direction to the Environmental Protection Agency (EPA) to regulate polluting discharges to the water by reference to the “best available technology” is meant to allow the agency to continue to increase the stringency of effluent limits as technology improves.<sup>19</sup>

As agencies address less technical and more value-laden concerns, how-

ever, “bureaucratic drift” may become more problematic. If the EPA is supposed to regulate pollutants to “protect the environment,” just how much protection is appropriate? Do we protect the environment with no regard to cost or to other social priorities? Again, Congress may not resolve these questions in authorizing legislation and instead may leave the issues up to the agency. This presents a dilemma, since deciding how much risk or benefit is appropriate implicates not only available technology and scientific understanding of risk, but also social notions of the role of government, the proper allocation of social resources, and our collective tolerance of certain sorts of risks.

Nonetheless, built into statutory delegations to agencies is often the power—even the responsibility—to resolve these sorts of questions. How can the extensive power to decide questions of value that is exercised by the (unelected) administrative state be justified as legitimate governmental authority?

A central part of the legitimacy assessment depends on the extent to which an agency decision—a decision rendered by unelected officials—can be characterized not only as compliant with the law and nonarbitrary, but as democratically responsive. It is worth a moment to more clearly specify the term “democratic.” Under a pluralist notion of democracy, government decisions may be considered democratic to the extent they aggregate and reflect preferences held by the public at large. Assuming that the public possesses coherent, formed preferences, the critical question for evaluating the “democratic” quality of an institution is the effectiveness of the means for communicating public preferences and the institution’s incentives to pay heed to those preferences. In the case of Congress and the presidency, the elections and related processes (such as polling) might serve both functions. In the setting of agency decision making, agencies, as institutions accountable to the president and to Congress, also have an incentive to learn and to respond appropriately to public preferences. Beyond this, agencies may be able to collect information on public preferences directly, through the notice-and-comment process for rulemaking. Political supervision of the agencies, as well as judicial review, may provide agencies with an incentive to respond appropriately to those preferences.

Alternatively, we might adopt a deliberative notion of democracy, where a democratic dialogue helps establish the proper direction for society. A particular institution’s decision might be viewed as democratic to the extent the institution facilitates deliberation and reasoned, public justifications are offered for its proposed decisions. Not only can the process of

deliberation offer an opportunity for people to change one another's preferences and reach a socially regarding outcome through reasoning, but it can also develop civic virtue in the participants.<sup>20</sup> Effective representation of an appropriate array of viewpoints is key to such a dialogue.<sup>21</sup> A national electoral process might be conceived of as deliberative, for example. With respect to agencies, again, they might be deemed democratic under a deliberative view because they are accountable to and responsive to democratically deliberative institutions. Even without these mechanisms, agencies engaging in rulemaking may qualify as democratically deliberative because they are required to collect public comment and give reasons (subject to judicial review) for rejecting significant comments.<sup>22</sup>

Currently, in view of the relatively unconstrained statutory delegations to agencies, administrative law scholarship places a great deal of emphasis on presidential control as a source of democratic legitimacy for the actions of the administrative state.<sup>23</sup> The president can convey the electorate's views on such matters as the role of government and the most significant health and safety concerns. He or she possesses the power to appoint and remove the heads of executive agencies at will, and it is generally accepted that statutes delegating authority to agencies contemplate at least some presidential supervision.<sup>24</sup> Since the Reagan administration, executive branch agencies have been required by executive order to submit significant draft proposed and final rules to the White House Office of Management and Budget for prepublication approval. The president thus is in a position to oversee the activities of the entire executive branch and to coordinate agency actions.

Jerry Mashaw has argued that presidential control over an executive branch agency may better assure democratic responsiveness than the agency's close accountability to Congress. Beyond the coordination function, the claim is that the president may be a better conduit for public preferences than Congress because he or she is chosen through a national election. This will prompt that president to take a more national viewpoint; he or she will not be in thrall to either narrowly regional interests or the demands of small constituent groups.<sup>25</sup> Members of Congress focused on reelection, by comparison, may concentrate too heavily on distributing pork to narrow interest groups or home state or home community constituents.<sup>26</sup>

As recent scholarship has explored, however, this is an unduly rosy picture of the president's electoral incentives. For a number of reasons, the presidential election may not effectively communicate voter preferences. Voters pay little attention to electoral issues. Voter turnout in presiden-

tial elections, though far higher than other elections, is low. It has not exceeded 60 percent of registered voters since the 1960s. Even if voters pay attention to electoral issues and participate in the presidential election, they have highly limited choices by the time of the general election. A voter generally must choose between two candidates, each of whom represents a package of policy views that probably does not correspond very well to the voter's own preferences. Further, as Cynthia Farina has argued, a voter may often cast a vote incorrectly in the sense of misunderstanding, in a basic way, the chosen candidate's stance on an issue important to the voter.<sup>27</sup> Meanwhile, although the president must win reelection in a national election, the structure of the electoral college results in presidential priorities being focused particularly on swing states and even on particular communities in swing states.<sup>28</sup> Finally, voter preferences are very often not well formed. On a wide array of issues, voter views may be inchoate at the time of an election, leaving the president with no possibility of a mandate or even a clear sense of national preferences on a given issue.<sup>29</sup> In short, the presidential election may only imperfectly transmit the views of the national electorate, and the president may have strong incentives to respond to small subgroups within that electorate. That will in turn impair the president's ability to transmit public preferences to the administrative state. Accordingly, as Anne O'Connell has suggested, "administrative law needs to attend more to Congress."<sup>30</sup>

Congress can, of course, define or redefine the terms of an agency's delegation by modifying an agency's authorizing statute by new legislation. Further, Congress has other well-established means of influencing the administrative state short of passing or modifying authorizing legislation. Congress can define the size of an agency's budget or pass specific legislation, such as through appropriations riders, that directs the agency to take (or not take) particular actions. With respect to agency decisions in particular, Congress has created the special tool of the Congressional Review Act, a tool for expedited passage of legislation that overrides particular agency actions. Admittedly, the potential of that act has not been fully realized, as it has been used only once and its use seriously threatened only one other time.<sup>31</sup> Less formally, Congress can conduct oversight, seeking an agency official's explanation of reasons for a particular decision,<sup>32</sup> or send less formal messages to an agency, such as through discussion at a confirmation hearing, in language contained in a committee report or conference committee report, or through floor statements.

Through these activities, Congress can communicate policy preferences

to the agencies, and Congress may be able to transmit and engage a wider and more representative set of public views than the president. First, Congress is, of course, a regional institution, the members of which are elected by state or by district. By dint of the electoral process, five hundred thirty-five members of Congress are more likely than the president to represent a wide range of public views and to capture regionally distinctive views.<sup>33</sup> While Mashaw may be correct to accept the assumption that the ability to “bring home the bacon” to local constituents plays more of a role in congressional elections than it does in presidential elections, so that “the congressperson’s position on various issues of national interest is of modest” importance,<sup>34</sup> a growing number of legislators have been elected from “ideologically homogenous constituencies,” leaving them more “discretion to pursue their own preferred policy goals,” rather than bacon-bringing.<sup>35</sup> Variation in local interests and values is less likely to be overlooked in congressional elections than in the presidential election. And the presidential election is not free from the pressures to deliver special benefits either—it is just that the pressures primarily relate to areas in which the vote may swing.<sup>36</sup> In sum, views held by a significant portion of the population are likely to receive at least *some* active representation through the congressional election process, and possibly greater representation than through the presidential election process.

As with the presidential election process, there are limits here, too. Because many members of Congress are elected from so-called safe districts, a change in voter views or values may not always correspond to a change in the identity of any particular representative or senator. Even in a district that is not a “safe” one, a voter’s choice among congressional candidates, as with presidential candidates, represents a choice among two bundles of preferences, neither of which is likely to perfectly correspond to the voter’s preferences. Nonetheless, the congressional election process seems likely to result in a range of views, particularly district and state views, being expressed among the collection of individuals that compose the House and Senate.

Consider, in addition, that voter views on particular topics may be ill-formed at the time of an election. Assuming this is the case, looking simply at electoral incentives to detect and transmit public views seems an unsatisfactory way to assess an institution’s democratic responsiveness or to assess whether an institution has a “sense of the popular will” More critically, we should consider the institution’s ability to conduct meaningful deliberation and to engage a wide range of views. On this deliberative view of

democracy, an institution has a claim to democratic legitimacy when its process is participatory and deliberative, and proposed decisions are justified with publicly articulated reasons.<sup>37</sup>

Here, Congressional deliberation may have the advantage over presidential deliberation because it is likely to engage a wider range of views and preferences. The president may well deliberate with his or her staff and with groups with whom he or she meets—and members of Congress can do this too—but the president, not the voters, selects the administration's cabinet and staff members. The president can choose whether to attempt to make those individuals representative of a wide range of public views or whether to have advisors whose views, for the most part, mirror his or her own. Moreover, the president can decide whether to make that debate public. For the most part, internal White House debates on regulatory policy have remained opaque to the public eye.<sup>38</sup> By contrast, congressional deliberation often takes place through public statements, as members of Congress articulate the reasons for their positions.<sup>39</sup>

Finally, compared with an agency, congressional deliberation also is likely to be more “democratic” because the discussants are more representative. Even though agencies must respond to significant comments they receive in rulemaking, it is unclear that groups participating in a rulemaking process are likely to be any more representative than those transmitting information to Congress or to the president. Second, agencies may be biased toward well-organized and more narrowly focused interest groups, particularly those groups representing regulated entities.<sup>40</sup> Such groups are likely to more effectively transmit their views in the rulemaking process. Wholly apart from the question of whether agencies might be captured by those they regulate, they are acquainted with those groups, have a long-term incentive to understand the information transmitted by regulated entities, and seek to obtain their compliance. All this can prompt agencies to pay particular attention to the views of regulated entities.<sup>41</sup> Third, comments submitted may well focus more on technical questions than on value-laden questions. Finally, even if values-focused comments are submitted, the incentives for the agency decision maker to decide value-laden questions in a democratically responsive way are limited.<sup>42</sup> Presidential supervision may prompt an agency official to choose a policy that is responsive to the president's views—and if the president is electorally responsive, ultimately to public views. Congressional supervision, if it is present, may create similar incentives. Otherwise, if the agency official is a well-intentioned, public-interested official,<sup>43</sup> the president may inde-

pendently seek to implement a policy that is democratically responsive, in the sense of responding thoughtfully and fairly to value-laden views expressed in the administrative process. In short, though, the incentives for an agency decision to be “democratic” in nature largely collapse down to those faced by the president and Congress, except that the agency may have a more formalized means for collecting information from the public at large. Apart from supervision by the president or Congress or a sense of personal obligation, there is no particular *direct* incentive for the agency official to be democratically responsive.<sup>44</sup>

Moreover, compared with agency deliberation, a congressional debate potentially can be more visible and more transparent. Even certain submajority debates within Congress, such as the committee hearing and the floor debate in one house, may still amount to a more public deliberative discussion than that available within the executive branch. While some deliberative discussion likely does take place within the executive branch, its benefits are undermined by a general lack of transparency.<sup>45</sup> Citizens hearing reports of a congressional debate on a topic of interest are more likely to perceive that their viewpoints are receiving actual representation and view the outcome as more legitimate.<sup>46</sup>

Needless to say, congressional deliberation may not always be public or necessarily superior to presidential deliberation or agency deliberation. Nor, if only one “best” institution could be selected to oversee agency decision, is it a foregone conclusion that Congress would be the institution. And at the time of this writing, the level of public confidence in Congress—as with the government at large—was at a quarter-century low.<sup>47</sup> Nonetheless, because Congress is a valuable forum for the airing of public views, congressional debate, even by a submajority, clearly is—and ought to be—an important source of information and guidance for agencies as they implement their statutes.

These arguments are, of course, strongest when the entire Congress is involved—or has the opportunity to be involved—in the passage of legislation. Constitutional bicameralism and presentment requirements and Senate and House rules make it likely that legislation, a concerted expression of congressional will, will be passed only after significant deliberation or opportunity for deliberation. Beyond this, however, even some views articulated by a *submajority* of Congress—and not even in the process of enacting legislation—can be valuable for agencies. While deliberation by a submajority is inferior to deliberation by the entire Congress, such statements could contribute importantly to an agency decision-making process on public preferences or policy matters. Again, I mean to focus upon the

less formal discussions and articulations of views within Congress, whether or not legislation results. For example, House or Senate committee members may discuss an agency action with a cabinet official at an oversight hearing, or individual members of Congress may make floor statements.

Information transmitted by even a few members of Congress can be highly valuable to a decision-making agency. As elected officials, members of Congress do have an incentive to understand and engage public views, and they generally are likely to engage a wider range of policy issues than agency officials. For a very basic example, the vast majority of congressional committees have jurisdiction over more than one federal agency. Committee service alone, then, can provide a member of Congress with a comparatively broad perspective.

Concern might be expressed that congressional statements, particularly informal ones, might be unreliable. Gersen and Posner have suggested, for example, that informal statements—anything less than a one-house or concurrent resolution—may not fairly indicate a member of Congress's preferences for legislation.<sup>48</sup> Member statements of use to agencies, however, include those that convey information regarding the workability or consequences of a particular regulatory approach or on public preferences with respect to a particular topic.<sup>49</sup> Despite Gersen and Posner's arguments that speeches are "cheap talk" consuming few resources,<sup>50</sup> these congressional statements are likely to be reliable. First, an elected official typically has a substantial investment in his or her reputation. For example, a reputation for fairness and commitment to a policy stance can be connected not only to electoral success, but to a legislator's success in advancing socially desirable policies.<sup>51</sup> Similarly, a reputation for reliability and consistency generally will enhance a legislator's ability to obtain campaign contributions.<sup>52</sup> The value of a reputation for reliable statements obviously increases with the chances of "repeat play." Legislators will have repeat play with other legislators with whom they wish to collaborate or whose support they wish to obtain for legislative measures, with voters in their district or state, with agencies, and with interest groups who are deciding whether to make campaign contributions. Not only do legislators already function in institutions with substantial repeat play opportunities, recent political science scholarship suggests that the committee system may in part be explained by the fact that it keeps the opportunities for repeated play high, so that an individual legislator can obtain confirmation of a reputation for reliability and "collect" on the benefits of that reliability.<sup>53</sup> Finally, a congressional statement that is public, particularly one made in

an active debate, will be more costly if unreliable because the statement can be more easily monitored by interest groups, voters, and colleagues.

Congress cannot, of course, encourage agencies to violate existing law, both because agencies are bound by the law and because Congress is constrained to follow only constitutionally prescribed means of enacting legislation.<sup>54</sup> And any formal action vetoing an agency's decision or limiting its options must, of course, be done through the constitutionally prescribed mechanisms.<sup>55</sup> Further, Congress and its members are barred from executing the laws.<sup>56</sup> But these statements are made in the context of broad and constitutional delegations of administrative authority.<sup>57</sup> Broad statutes are widely perceived to evince an expectation on the part of the enacting Congress that the agency's application of particular laws will evolve with time. Application may evolve to take account of changed scientific circumstances, but also changed social circumstances, including views of the role of government. If an agency's application of a statute is to evolve in accordance with changed social circumstances, then information from congressional discussion must—along with information gathered from the public and from executive officials—be seen as a useful source to an agency seeking to detect those changed social circumstances.

The biggest difficulty with Congress supplying public values information to the agencies is simply that Congress is insufficiently engaged. As is widely recognized, its attention to the work of agencies is at best sporadic.<sup>58</sup> As Matt McCubbins and Thomas Schwartz have famously observed with respect to oversight of the administrative state, Congress may function less like a police patrol and more like a fire department triggered by an individual or interest group's pulling of an alarm.<sup>59</sup> One implication is that Congress will try to redirect an administrative agency heading down the wrong path only if (presumably well-organized) individuals and interest groups ask it to do so.<sup>60</sup> Congress may thus inadequately police an agency when the agency misapprehends democratic values that are held more widely and more diffusely.

Further, congressional deliberation, even at its most active, could also be criticized. For example, the committee structure, set up to develop expertise in a wide variety of specialized subjects,<sup>61</sup> may end up instead disproportionately rewarding well-organized interest groups.<sup>62</sup> Richard Lazarus has noted the extent to which changes in congressional structure have reduced effective deliberation on environmental issues.<sup>63</sup> The incentives created by the Budget Act to refocus congressional deliberations on appropriations, rather than authorizing legislation, have prompted a decline in

the specialized, knowledgeable authorizing committees and an increase in oversight being conducted by appropriations committees, often smaller, less well-staffed, less-specialized committees.<sup>64</sup> Even where authorizing committees exercise oversight, the committee may not be representative of Congress as a whole. Such oversight may represent another bite at the apple for interest groups who lost in the administrative process.<sup>65</sup>

In short, as it currently stands, congressional oversight of agencies can offer important information to agencies, but oversight is generally sporadic and when it does take place, it can be at the behest of well-organized interest groups.

### III. Midnight Rulemaking and Congress: Two Examples

So what about midnight rulemaking and democracy? Midnight rulemaking is primarily criticized as antidemocratic because it takes place post-election—and thus in the face of the electorate’s expressed preferences. As Jack Beermann and I have both discussed, midnight rulemaking may be motivated by the need to keep the government going, the desire to finish longtime projects before a deadline, and the goal of avoiding the delays that can come from bringing a new team up to speed. Less attractively, some midnight rules and other actions can be motivated by the desire to entrench policies that a new president would not otherwise select or even to impose political costs on a new president, should that new president wish to choose a different option.<sup>66</sup>

In some instances, however, midnight rulemaking may have the potential to enhance democratic processes by prompting greater congressional engagement. Take a pair of examples from the most recent presidential transition. In mid-December 2008, the Department of the Interior’s Fish and Wildlife Service finalized a new rule regarding the obligations of federal agencies to consult with the Service prior to taking an action that might affect endangered species.<sup>67</sup> Section 7 of the Endangered Species Act requires federal agencies considering permit or license applications or authorizing or funding some other sort of action to consult first with a so-called wildlife agency—the National Marine Fisheries Services (NMFS) or the Fish and Wildlife Service (FWS)—if the action could “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”<sup>68</sup> Under regulations in effect prior to December 2008, if the permitting agency determined that the proposed action is not likely to adversely affect a listed species or habitat and the NMFS or FWS concurred, the statutory obligation to protect the species would be met. The

new regulations exempted agencies from having to consult if the agency *itself* determined the action would not affect a listed species and the effects of the action would be manifested through “global processes” or would be difficult to measure.

The practical effect was that in many cases the permitting agency—often an agency with no particular expertise in endangered species or habitat—could unilaterally determine the appropriateness of its action under the Endangered Species Act. Most controversially, perhaps, was the exception for “global processes,” which was targeted at project-related climate change impacts and represented a judgment that the Endangered Species Act should not be a means of dealing with climate change. Again, for potential effects evinced through global processes, the permitting agency could be the final authority on whether its action was appropriate under the Endangered Species Act. The rule received significant public attention, and the agency received many comments; a high percentage of those comments consisted of form letters submitted by the public at large.<sup>69</sup>

At around the same time, the administration finalized a special rule addressing the polar bear’s status as a listed threatened species. The earlier listing of the polar bear as “threatened” triggered statutory requirements that agencies consult with the Interior Department regarding any federal action, including permitting or licensing, that could jeopardize the species or negatively affect its habitat. Typically, designation of a species as “threatened” would also be associated with a regulatory decision prohibiting at least some “takes” of the species, including indirect harm through habitat destruction.<sup>70</sup> The special rule, however, specified that any activity occurring outside of the current range of the species, even if it would have a significant effect on polar bears or bear habitat, such as through emission of greenhouse gases connected with the melting of arctic ice, would *not* be deemed a prohibited act under the Endangered Species Act.<sup>71</sup>

Prior to this time, neither of these issues had received sustained attention either in the media or in Congress. References in the popular media to the Endangered Species Act or to the issues raised by these rules in the year previous to the rules’ issuance were occasional at best, and mentions in Congress were almost nonexistent. Members of Congress did occasionally refer to the polar bear, but generally with respect to other issues, such as the status of the Arctic National Wildlife Refuge. Similarly, the relationship of endangered species protections to global climate change policy received no focused public attention during the 2008 presidential campaign.

Once the rules were issued, however, they attracted immediate con-

gressional attention. Shortly after they were issued, Congressman Markey mentioned both the consultation and polar bear rules at a hearing on “midnight” regulations.<sup>72</sup> When it was introduced in February 2009, the House Omnibus Appropriations Act of 2009 (with appropriations for the Interior Department, the EPA, and a large number of other agencies) contained a rider relating to these two rules. Section 429 of the introduced bill gave the Interior and Commerce Departments sixty days to summarily withdraw the two ESA rules and reinstate the rules previously in effect.

In the Senate, however, Senator Murkowski and three colleagues offered an amendment to delete the rider, so that any repeal of the ESA rules would be subject to the usual notice-and-comment rulemaking requirements. This prompted debate among several members of the Senate on the substantive merits of the rules. With respect to the polar bear rule, Murkowski and others argued in favor of maintaining administrative procedures for repeal of the rules, since without the special rule for the polar bear, there could be “lawsuits to stop any action that would increase carbon dioxide or any greenhouse gas emissions anywhere in the country . . . if the project had not first consulted with U.S. Fish and Wildlife on potential impacts.” Murkowski further suggested that using the endangered species listing as a way to “regulate greenhouse gas emissions” would be “overreaching,” potentially triggering “such a backlash that it harms support for the Endangered Species Act.”<sup>73</sup>

Senator Feinstein and others called the consultation rule “wrongheaded” because it would leave species-related decision making up to the acting agency “without any input from scientists or biologists.”<sup>74</sup> Senator Boxer noted that the rules were “midnight regulations” and “capricious.”<sup>75</sup> The Murkowski amendment failed and the rider remained in the bill.

After the presidential transition, eight senators, including Senators Durbin, Boxer, and Kerry, wrote Interior Secretary Salazar in April 2009 urging Salazar to use the authority granted in the appropriations bill to summarily reverse the polar bear and consultation rules so that the Interior Department would continue to retain the ability to “consider[] and address[] the very factors that are causing the ice to melt [and the decline of the polar bear], including climate change.”<sup>76</sup> Forty-four members of the House wrote a similar letter regarding the consultation rule, though not the polar bear rule.<sup>77</sup> The possibility of reversal of the midnight rules also energized twenty conservation and environmental groups, who wrote the Interior Department separately to encourage it to use its authority to reverse both ESA rules. (The Center for Biological Diversity sent a petition

with nearly 50,000 signatures as well.)<sup>78</sup> The transition period was marked by significant news coverage, both of the late-term Bush administration rules,<sup>79</sup> of congressional debate,<sup>80</sup> and of the Obama administration's reactions.

The Obama administration reversed the consultation rule shortly after the passage of the appropriations legislation. Rather than simply reinstating the status quo ante, however, the agency said this: "We believe that it is appropriate to withdraw the new regulations and return to the *status quo ante* pending a comprehensive review of the ESA section 7 consultation regulations. Recognizing the widespread public concern about the process in the promulgation of the new regulations, the Departments agree that a thoughtful, in-depth, and measured review would be beneficial before a determination is made regarding potential changes to the section 7 consultation regulations. The section 7 consultation process is important for the conservation of species and critical habitat and involves complex and highly technical issues; the input from career conservation biologists who have experience with the section 7 consultations and who can provide scientific and technical expertise should, of course, be a key part of the process. In addition, any rulemaking process should be accorded a sufficient period of time to provide for careful, meaningful involvement of the affected public and to ensure consistency with the purposes of the ESA. This thorough review will allow the Departments to identify a range of options and implement improvements, if appropriate."<sup>81</sup> The formal statement from the agencies—their publication in the *Federal Register* of the decision to revoke the rule—is opaque regarding potential political influences on the decision. Indeed, the agencies describe the decision as solely their own, although evidence elsewhere suggests that the White House Office of Management and Budget obtained some changes in the rule before its final publication.<sup>82</sup>

The polar bear rule ended up on a different track, however. Initial indications were that the Obama administration sought an easy reversal of this rule as well. Federal law requires the president to submit a comprehensive federal budget on or before the first Monday in February, and that submission typically begins the congressional budget process.<sup>83</sup> It accordingly could have been the Obama administration that suggested the rider in the first place. Moreover, the same interest groups hopeful of reinstating the earlier version of the consultation rule also lobbied heavily on the polar bear rule.<sup>84</sup>

Despite its likely initial position, however, the Obama administration

ultimately decided to retain the polar bear rule. The Interior Department published no statement in the *Federal Register*, as it was leaving the Bush administration rule in place. However, Secretary Salazar did make a statement that the rule would be retained. Salazar acknowledged that greenhouse gases threaten the polar bear, but stated that “the global risk from greenhouse gases . . . requires comprehensive policies, not a patchwork of agency actions carried out for particular species. ‘It would be very difficult for our scientists to be doing evaluations of a cement plant in Georgia or Florida and the impact it’s going to have on the polar bear habitat.’”<sup>85</sup>

Based solely on the written record, it is very difficult to know conclusively which influences led the Interior and Commerce Departments to take different paths on the consultation and polar bear rules. Nonetheless, the change in approach to the polar bear rule, together with the fact that the agencies took nearly all the time Congress allotted them to act, is very suggestive that the agencies were reconsidering their original positions in light of the public and congressional views expressed on the issue in early 2009.

In particular, the agency decisions appeared to be consistent with some of the reasons offered in the congressional debate. With respect to the consultation rule, senators participating in the debate on the Murkowski amendment appeared neither to raise any specific objection to abandoning the consultation rule nor to dispute Senator Feinstein’s point that consideration of the status of threatened or endangered species ought to be done by trained scientists residing in the Interior and Commerce Departments.

By contrast, Murkowski and her colleagues supporting the amendment to strike the rider nearly all focused on the virtues of the Bush administration’s polar bear rule and the difficulties of abandoning it. Namely, it would be challenging to make an individual regulatory decision based on the small incremental effect a project would have on greenhouse gases, arctic ice, and in turn the polar bear. Meanwhile, Endangered Species Act litigation could become a significant forum in which climate change policy would be developed. This is not a scientific argument about whether greenhouse gases affect the polar bears. Instead, it is an argument about the best way to make policy decisions. Even though reducing greenhouse gases and addressing climate change are clearly important goals, creating a veto on nationwide greenhouse-gas creating projects—or subjecting them to an Endangered Species Act permit to be issued by the Interior Department—would not only be impracticable but would not be an appropriate means to develop global warming policy. Instead, as Secre-

tary Salazar stated, a more comprehensive approach would be preferable to a simple focus on a small project's effect on polar bear habitat. Salazar's statement ended up picking up some of the most thoroughly argued points in the congressional debate. While it is unclear exactly how many senators supported one view or another on the polar bear rule, the agency decision should be seen as more democratically responsive to the extent it was informed by the well-developed views expressed in the Senate and the open debate on the question.<sup>86</sup>

Ultimately, the polar bear decision was met with approval from mainstream newspapers as well. For example, the *Washington Post* praised the decision: "Interior Secretary Ken Salazar ruffled more than a few feathers this month when he let stand a Bush administration decision to prohibit the use of the Endangered Species Act to regulate greenhouse gas emissions. It was the right call when it was made in 2008, and it is the right call now."<sup>87</sup> Despite declining to require any agency activity that might increase greenhouse gases to obtain a "take permit" prior to proceeding, the Obama administration instead has increased the size of the polar bear's critical habitat.<sup>88</sup> Agency activities within that habitat will remain subject to consultation with the wildlife agencies.

In short, the Endangered Species Act example suggests an administration decision that changed over time, in light of public and congressional engagement. The Obama administration decisions on both the consultation and the polar bear rule were likely better informed and more democratically deliberative than either the Bush administration's rules of December 2008, or the position, implicit in the adopted appropriations rider, that the two rules should be reconsidered with an option for summary reversal.

The Bush administration "midnight rules" on endangered species and the Obama administration's desire to reverse them ultimately had the effect of engaging Congress and heightening public interest in the issues. As I have written elsewhere, the identity of the president and his or her agency heads, together with the content of a "midnight rule," can not only generate public interest in the rule, but also can supply important information about the range of regulatory options. For example, in its outgoing months, the Clinton administration issued a rule known as the "roadless rule," restricting road building in national forests. The Clinton rule provided the public with a benchmark with which to evaluate other regulatory options, such as those proposed by the George W. Bush administration.

Here, the endangered species rulemakings of the Bush administration

similarly provided the public and Congress with an additional benchmark against which to evaluate a range of policy options. The midnight rules represented the outgoing administration's analysis and preferred policy regarding how to administer the Endangered Species Act and what protections to afford the threatened polar bear. The timing of the rule prompted debate in Congress, but it also provided a concrete proposal which members of Congress could react to and discuss. That process of congressional debate prompted better informed and more democratically deliberative final decisions than if the Bush administration had done nothing on these issues and left it all up to the Obama administration.

Not only might the midnight rulemaking have had benefits for the ultimate agency decision, but we might also see it as encouraging better congressional functioning. As McCubbins and Schwartz have suggested, Congress usually acts in a "fire-alarm" mode. The primary criticism of fire-alarm functioning is that the congressional agenda is limited and that fire alarms are pulled by organized interest groups.<sup>89</sup> By contrast, in the midnight rulemaking setting, members of Congress may already be attuned to the activities of the outgoing president, and the fire alarm is effectively pulled by the fact that the outgoing president has placed the issue on the agenda.

Again, consider the endangered species rules. These issues did not receive significant congressional attention during the year prior to the issuance of the rules, apart from scattered statements in the *Congressional Record* on other issues.<sup>90</sup> The *Congressional Record* contains no discussion of any sort regarding whether acting agencies should be required to consult with the Interior and Commerce Departments prior to taking action that could negatively impact endangered species. The issuance of the rules, however, caused a number of senators to join issue and debate the relevant policy questions.

This is an improvement to the usual fire alarm pulling. The rule has been placed on the agenda by an outgoing president rather than, say, an organized interest group. A midnight rule can highlight the space between the outgoing and incoming president's views. That space, once identified by the outgoing president's concrete action, provides an opportunity for constructive engagement. Especially because issue may not have been joined during the presidential election, these sorts of issues can be particularly valuable ones for congressional debate.

A significant concern might be that it is a lame-duck president who is selecting these topics to engage the attention of the public and of Con-

gress, arguably displacing the new president's political agenda and sometimes yielding to a temptation to distribute rents as well as to make policy serving the outgoing president's view of the public interest.<sup>91</sup> Further, a deluge of midnight regulations could overwhelm both Congress and the incoming president, and many such rules might stay in place simply because too many resources, both fiscal and political, would be required to revise or repeal them. But rules that make good policy in the eye of the departing president may prompt genuine political discussion, because they also likely possess support from a significant portion of the political community. In the setting of the Endangered Species Act midnight rules, the result was a debate that otherwise would not have taken place. Even if it might be characterized as an outgoing president's late-term power grab, then, teeing up an issue for public debate through a midnight rule may ultimately be more democracy enhancing than no action at all.

#### IV. Conclusion

None of this is to say that midnight rulemaking is always a good thing—or even that it is, overall, the best way to prompt congressional debate or renewed congressional attention to the actions of the administrative state. Nonetheless, we can learn something from the productive and valuable debate midnight rules sometimes engender. Public views on particular issues may not be fully crystallized at the time an incoming president is elected. Congress may not have focused—or have been made to focus—upon particular policy issues. A silver lining of the midnight rule may be that it prompts more direct and concentrated congressional engagement on particular policy issues. That has the potential to improve both the agency decision ultimately made by the new president and congressional deliberation itself. A critical lesson we should take away is the value of congressional discussion for agency action and the need for innovative ways to better engage Congress in difficult, value-laden issues handled by the administrative state. It revised the rule at the end of 2011.

#### Notes

1. See Federal Motor Carrier Safety Administration, Department of Transportation, Hours of Service of Drivers, 73 *Federal Register* 69,567 (November 19, 2008). The Obama administration agreed to reconsider the rule. See Federal Motor Carrier Safety Administration, Motor Carrier Safety Advisory Committee Public Meeting, 74 *Federal Register* 62,882 (December 1, 2009).

2. Department of Health and Human Services, Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 *Federal Register* 78,072 (December 19, 2008). Under the Obama administration, the agency issued a proposed rule to rescind that regulation in March 2009. See Department of Health and Human Services, Proposed Rules: Rescission of the Regulation Entitled “Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 *Federal Register* 10,207 (March 10, 2009). As of December 2011, no final rule had been issued.

3. This chapter focuses only on so-called notice-and-comment rulemaking conducted by agencies. Other actions, such as adjudication, funding of grants, and other such decisions, are beyond the scope of this chapter.

4. Although the activities themselves have characterized presidential transitions for decades, so-called midnight rulemaking and other entrenchment activities within the administrative state just before the arrival of a new president first received significant analysis in the legal literature around the time of the Clinton/Bush transition. See, e.g., Jack M. Beermann, “Presidential Power in Transitions,” *Boston University Law Review* 83 (December 2003): 947; Jay Cochran, “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters” (unpublished, March 8, 2001); Nina Mendelson, “Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives,” *New York University Law Review* 78 (May 2003): 557.

5. E.g., Peter Strauss, “Foreword: Overseer, or ‘The Decider’? The President in Administrative Law,” *George Washington Law Review* 75 (June 2007): 696.

6. Nina Mendelson, “Agency Burrowing,” 557.

7. *Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–1811 (2009).

8. David Barron, “From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization,” *George Washington Law Review* 76 (2008): 1095, 1097 (noting “politicization of the national bureaucracy itself”).

9. Nina Mendelson, “Agency Burrowing,” 557, 602.

10. Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments & Agencies (May 9, 2008), available at <http://www.ombwatch.org/files/regs/PDFs/BoltenMemo050908.pdf> (last accessed July 8, 2011).

11. See Fox News/Opinion Dynamics poll data regarding favorability rating of George W. Bush (showing 2007 and 2008 favorability ratings con-

sistently at or below 40 percent), available at <http://www.pollingreport.com/BushFav.htm> (accessed December 7, 2009).

12. See generally Beermann, "Presidential Power in Transitions," 947; Jerry Brito and Veronique de Rugy, "Midnight Regulations and Regulatory Review," *Administrative Law Review* 61 (2009): 163; Cochran, "The Cinderella Constraint"; Susan E. Dudley, "Reversing Midnight Regulations," *Cato Review of Business & Government* 24 (2001): 9; Nina Mendelson, "Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives," 557.

13. See Antony Davies and Veronique de Rugy, "Midnight Regulations: An Update 4" (Mercatus Center, George Mason University, 2008), available at [www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806\\_RSP\\_Midnight%20Regulations.pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf) (Last accessed July 8, 2011).

14. Brito and de Rugy, "Midnight Regulations and Regulatory Review," 163, 174 ("If there are no such future interactions [with Congress and the electorate], an administration will be more likely to 'defect' and pursue a regulatory course that might have otherwise invited retaliation."); *ibid.* at 174–175 ("The accountability provided by the threat of congressional retaliation is also weakened once a president knows that there is no 'next period' in which he will need Congress's cooperation on legislative, budgetary, and other matters").

15. Beermann, "Presidential Power in Transitions," 947.

16. Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1667, 1675–1676; Jerry L. Mashaw, "Should Administrators Make Political Decisions," in *Greed, Chaos, and Governance* (New Haven, CT: Yale University Press 1997).

17. But see, e.g., Kenneth A. Shepsle, "Congress is a 'They,' not an 'It': Legislative Intent as Oxymoron," *International Review of Law and Economics* 12 (1992): 239.

18. See, e.g., *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 164 (2000) (discussing the view that the federal Food Drug and Cosmetic Act was a purposely broad delegation of discretionary powers to the FDA) (Breyer, J., dissenting).

19. Clean Water Act sec. 301(b)(2)(A), codified at 33 U.S.C. 1311(b)(2)(A).

20. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996).

21. *Ibid.*

22. Mark A. Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," *Harvard Law Review* 105 (1992): 1511, 1515 (describing rulemak-

ing as “best hope of implementing civic republicanism’s call for deliberative decisionmaking informed by the values of the entire polity”); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (overturning agency rule for failure to “discuss [or] answer[]” relevant comment).

23. A prominent example is found in Jerry L. Mashaw, “Should Administrators Make Political Decisions?” in *Greed, Chaos, and Governance* (New Haven, CT: Yale University Press 1997).

24. See Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245; Kevin Stack, *Columbia Law Review* 100 (2006): 263; Nina Mendelson, “Another Word on the President’s Statutory Authority Over Agency Action,” *Fordham Law Review* 79 (2011): 2455.

25. See Mashaw, “Should Administrators Make Political Decisions?”; Steve Calabresi, “Some Normative Arguments for the Unitary Executive,” *Arkansas Law Review* 48 (1995): 23; Nina Mendelson, “Agency Burrowing,” 557, 583 (“[S]he will be better able to counteract narrowly regional interests and the demands of small groups of constituents.”).

26. See Calabresi, “Some Normative Arguments for the Unitary Executive,” 23.

27. Cynthia Farina, “False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive,” *University of Pennsylvania Journal of Constitutional Law* 12 (February 2010): 357.

28. See Jide Nzelibe, “The Fable of the Nationalist President and the Parochial Congress,” *University of California at Los Angeles Law Review* 53 (2006): 1231–1246. See also Wallace Mendelson, “Separation, Politics, and Judicial Activism,” *Indiana Law Review* 52 (1977): 313, 316 (“a presidential candidate who has substantial support in some fifteen or twenty major metropolitan areas is virtually assured of victory”); Nelson Polsby, *Congress and the Presidency* (Englewood Cliffs, NJ: Prentice-Hall, 1986 (presidential candidates tend both to be chosen from populous states with large electoral college impact and to have made alliances with urban interest groups).

29. See Evan Criddle, “Fiduciary Administration,” *Texas Law Review* 88 (2010): 441; Farina, “False Comfort and Impossible Promises,” 357.

30. See Anne O’Connell, “Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State,” *Virginia Law Review* 94 (2007): 889, 969.

31. The Congressional Review Act was used to override the Clinton “ergonomics” rule, and its use was threatened seriously on only one other occasion.

32. Mark Seidenfeld, “The Psychology of Accountability and Political Review of Agency Rules,” *Duke Law Journal* 51 (2001): 1059.

33. George A. Bermann, "Regulatory Federalism: European Union and the United States," *Recueil des Cours* 263 (1997): 48, 53; Herbert Wechsler, "The Political Safeguards of Federalism," *Columbia Law Review* 54 (1954): 543; Ernest Young, "Two Cheers for Process Federalism," *Villanova Law Review* 46 (2001): 1349.

34. Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (New Haven: Yale University Press, 1999), 152.

35. See Lawrence R. Jacobs and Robert Y. Shapiro, *Politicians Don't Pander* (Chicago: University of Chicago Press, 2000), 33, 36–37.

36. Farina, "False Comfort and Impossible Promises," 291–292 ("what cannot be disputed is [the electoral college's] success in focusing the attention of would-be Presidents on geography").

37. See Gutmann and Thompson, *Democracy and Disagreement*, 12, 16, 40–41.

38. See Nina Mendelson, "Disclosing 'Political' Oversight of Agency Decision Making," 108 *Michigan Law Review* (2010), 1127.

39. Of course, whether accompanied by published reasoned debate or not, legislation has its own legitimacy because it is the product of a constitutionally prescribed process, and it may have a particularly strong claim if it is indeed the product of reasoned debate.

40. See generally Jason Webb Yackee and Susan Webb Yackee, "A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy," *Journal of Politics* 68 (2006): 128, 133; Wendy Wagner, "Administrative Law, Filter Failure, and Information Capture," *Duke Law Journal* 59 (2010): 1324, 1367; Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* (Washington, D.C.: CQ Press, 2003), 182–183.

41. Nina Mendelson, "Regulatory Beneficiaries and Informal Agency Policy-making," *Cornell Law Review* 92 (2007): 397, 428–430.

42. See Mariano Florentino-Cuellar, "Rethinking Regulatory Democracy," *Administrative Law Review* 57 (2005): 411, 414; see also Nina Mendelson, "Foreword: Rulemaking, Democracy, and Torrents of E-Mail," *George Washington Law Review* 79 (2011).

43. This is Seidenfeld's assumption. See Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," 1511, 1555 ("Staff bureaucrats focus on what they believe the public interest is and whether the suggested policy furthers it.").

44. Judicial review requiring that an agency answer significant comments is no guarantee of democratic responsiveness, though it may help assure rationality.

45. Nina Mendelson, "Disclosing 'Political' Oversight of Agency Decision Making."

46. Private efforts by members of Congress to pressure agencies accordingly would not have this same benefit to citizens.

47. See Pew Research Center for the People and the Press, “Distrust, Discontent, Anger and Partisan Rancor,” available at <http://people-press.org/report/606/trust-in-government> (accessed April 28, 2010) (noting that discontent with Congress and elected officials is “epic” and that favorable opinions of Congress have declined from 50 percent of those polled in 2009 to 25 percent in 2010).

48. See Jacob Gersen and Eric Posner, “Soft Law: Lessons from Congressional Practice,” *Stanford Law Review* 61 (2008): 573; see also Guy Hafteck, “Legislative Threats,” *Stanford Law Review* 61 (2008): 629. With respect to the intent of an individual member of Congress or of some sort of collective intent, statements may be subject to some of the same criticisms as those leveled against legislative history. For example, statements can be strategic, may not be representative, and so forth. Compare Antonin Scalia, “Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997) with Stephen Breyer, “On the Uses of Legislative History in Interpreting Statutes,” *Southern California Law Review* 65 (1992): 845. This is particularly an issue for statements from congressional committees. While the idealistic notion of committees is a smaller body representative of the whole that has an opportunity to develop expertise, committees have been criticized as composed of “preference outliers,” who seek committee membership in order to distribute benefits to their constituents or to well-organized interest groups. Keith Krehbiel has compiled statistical evidence tending to suggest that committees are not, in fact, composed of preference outliers. Keith Krehbiel, “Are Congressional Committees Composed of Preference Outliers,” *American Political Science Review* 84 (1990): 149. My suggestion, however, is not that congressional statements should be used to rewrite a statute *de facto*, or as a form of soft law, but instead as valuable information—particularly on broader questions of policy or value—to an agency implementing a broad statutory delegation.

49. The “intention”/“technical” dichotomy comes from the work of David Austen-Smith. David Austen-Smith, “Strategic Models of Talk in Political Decision Making,” *International Political Science Review* 13 (1992): 45–58.

50. Gersen and Posner, “Soft Law: Lessons from Congressional Practice,” 573, 589.

51. Hafteck, “Legislative Threats,” 629, 668.

52. See Randall Kroszner and Thomas Stratmann, "Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation," *Journal of Law and Economics* 48 (2005): 41, discussed in Hafteck, "Legislative Threats."

53. Randall Kroszner and Thomas Stratmann, "Congressional Committees as Reputation-building Mechanisms," *Business and Politics* 2:1 (2000): 35–52.

54. Cf. Scalia, *A Matter of Interpretation*, (critiquing reliance on legislative history as de facto revision of legislation without following constitutional procedures).

55. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

56. E.g., *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991).

57. See *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001) (describing current nondelegation standards).

58. E.g., Thomas McGarity, "Some Thoughts on 'Deossifying' the Rule-making Process," *Duke Law Journal* 41 (1992): 1385, 1450 (noting the sporadic nature of congressional review of agency rules); Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," 1511, 1551 (noting high transactions costs of congressional overrides); Jerry L. Mashaw, "Prodelegation: Why Administrators Should Make Political Decisions," *Journal of Law, Economics and Organization* 1 (1985): 81, 85 (same).

59. See Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28 (1984): 165.

60. *Ibid.* at 172 ("To be sure, fire-alarm oversight tends to be *particularistic* . . . *emphasiz[ing]* the interests of individuals and interest groups more than those of the public at large. . . . [W]hether [the lack of emphasis on some public interest concerns] is a shortcoming of fire-alarm oversight depends on one's ideological point of view.")

61. Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor: Michigan Studies in Political Analysis, 1991), 105 (Committees "as agents of their parent chambers, exist to investigate, deliberate, apply specialized knowledge, and recommend action.").

62. E.g., William Eskridge, "Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation," *Virginia Law Review* 74 (1988): 275.

63. Richard Lazarus, "Congressional Descent: The Demise of Deliberative Democracy in Environmental Law," *Georgetown Law Journal* 94 (2005–2006): 619.

64. One result may be less far-seeing environmental legislation. *Ibid.*

65. J. R. DeShazo and Jody Freeman, "The Congressional Competition to Control Delegated Power," *Texas Law Review* 81 (2009): 1443.

66. See page 55, this volume (discussing political costs suffered by President George W. Bush from attempting to reopen EPA drinking water arsenic rule). More recently, the Obama HHS's announcement that it would revisit the Bush administration's "conscience rule" was described as "trigger[ing] an immediate political firestorm" by the *Washington Post*. See Rob Stein, "Health Workers' 'Conscience' Rule Set to Be Voided," *Washington Post*, February 28, 2009.

67. Department of the Interior Fish & Wildlife Service, Interagency Cooperation under the Endangered Species Act, 73 *Federal Register* 76,272 (December 16, 2008).

68. See 16 U.S.C. sec. 1536.

69. See Department of the Interior Fish & Wildlife Service, Interagency Cooperation under the Endangered Species Act, 73 *Federal Register* 76,272 (December 16, 2008) ("Approximately 235,000 comments were received; of these, approximately 215,000 were largely similar 'form' letters.").

70. See Endangered Species Act, sec. 4(d); e.g., NOAA's National Marine Fisheries Service, Northwestern Regional Office, ESA 4(d) Rules (Protective Regulations), available at <http://www.nwr.noaa.gov/ESA-Salmon-Regulations-Permits/4d-Rules/> (accessed December 18, 2009) ("The ESA prohibits ANY take of species listed as endangered, but some take of threatened species that does not interfere with salmon survival and recovery can be allowed. Before 2000, NOAA Fisheries Service had simply adopted 4(d) rules that prohibited take of threatened species").

71. See Department of the Interior, Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 *Federal Register* 76,249 (December 16, 2008) ("In addition, this special rule provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA.>").

72. See Allison Winter, "Interior cleared to finalize controversial rule revisions," *Land Letter*, December 11, 2008, available at <http://www.eenews.net/Landletter/2008/12/11/archive/2?terms=polar+bear>. The December 11, 2008, hearing of the House Select Committee on Energy Independence and Global Warming was entitled, "Approaching Midnight: Oversight of the Bush Administration's Last-Minute Rulemakings." For Congressman Markey's opening statement, see <http://www.globalwarming.house.gov/tools/3qo8materials/files/0076.pdf> ("Meanwhile, the Department of the Interior is seeking to gut the Endangered Species Act by removing scientific input, weakening protec-

tions for iconic species like the polar bear and preventing consideration of the impacts of global warming.”).

73. See 155 *Congressional Record* S 2677-78, daily ed. March 5, 2009 (statement of Senator Murkowski); 155 *Congressional Record* S 2679, daily ed. March 5, 2009 (statement of Senator Inhofe) (“Any permit for a powerplant, refinery, or road project that increases the volume of traffic anywhere in the United States could be subject to litigation, if it contributes to local carbon emissions”); 155 *Congressional Record* S2598, daily ed. March 2, 2009 (statement of Senator Kyl) (“The practical effect of this rule withdrawal is that any acts that increase carbon dioxide or greenhouse gas emissions, which means almost anything we do, since, of course, we breathe carbon dioxide, would be subject to a lawsuit if it did not first consult the U.S. Fish and Wildlife Service on mitigation against potential impacts of climate change and harm to polar bears.”).

74. See *Congressional Record* daily ed. March 5, 2009, at S 2800 (statement of Senator Feinstein); see also 155 *Congressional Record* S2782, daily ed. March 5, 2009 (statement of Senator Cardin) (“Professional scientific organizations argued, came out and said, quite frankly, this is unacceptable.”)

75. See *Congressional Record* daily ed. March 5, 2009, at S 2810 (statement of Senator Boxer). She also inserted several news articles and editorials into the Record.

76. See Patrick Reis, “Senators Urge Reversal of Bush-era ESA regs,” *E&E News PM*, April 23, 2009, available at <http://www.eenews.net/eenewspm/2009/04/23/archive/12?terms=polar+bear> (last visited December 18, 2009); letter available at [http://www.biologicaldiversity.org/campaigns/save\\_the\\_act\\_save\\_species\\_from\\_the\\_climate\\_crisis/pdfs/DF-to-Salazar-ESA-Approps-Authority-04-23-2009.pdf](http://www.biologicaldiversity.org/campaigns/save_the_act_save_species_from_the_climate_crisis/pdfs/DF-to-Salazar-ESA-Approps-Authority-04-23-2009.pdf) (last visited December 18, 2009).

77. The letter is available at [http://www.biologicaldiversity.org/campaigns/save\\_the\\_act\\_save\\_species\\_from\\_the\\_climate\\_crisis/pdfs/040309\\_ESA\\_Letter\\_to\\_Salazar\\_Locke.pdf](http://www.biologicaldiversity.org/campaigns/save_the_act_save_species_from_the_climate_crisis/pdfs/040309_ESA_Letter_to_Salazar_Locke.pdf) (last visited December 18, 2009).

78. See Allison Winter, “Groups press Obama to quickly toss Bush’s ESA rules,” *E&E News PM*, April 9, 2009, available at <http://www.eenews.net/eenewspm/2009/04/09/archive/4?terms=polar+bear> (last visited December 18, 2009).

79. E.g., Juliet Eilperin, “New Rule Would Discount Warming as Risk Factor for Species,” *Washington Post*, November 21, 2008, at A3; Editorial, “Protections in Peril,” *Washington Post*, December 27, 2008, at A14.

80. Cornelia Dean, “Bid to Undo Bush Memo on Threats to Species,” *New York Times*, March 4, 2009, at A14 (“A rider undoing the Bush change has been attached to the budget bill, and if it passes, the change would be undone.”).

81. See Departments of the Interior and Commerce, Interagency Cooperation Under the Endangered Species Act, 74 *Federal Register* 20,421 (May 4, 2009).

82. [www.reginfo.gov](http://www.reginfo.gov), which reports data on White House review of rules, shows that the rule was published “consistent with change,” referring to a change made during the regulatory review process. The Web site does not indicate the content of the change or whether it was made at the behest of the White House or on the agencies’ own initiative. See [www.reginfo.gov](http://www.reginfo.gov) (archival search for RIN 1018-AW73 performed December 21, 2009).

83. See 31 U.S.C. 1105(a); Bill Heniff Jr., “The Congressional Budget Process Timetable” 2, Congressional Research Service Order Code 98-472 GOV, March 20, 2008, available at <http://budget.house.gov/crs-reports/98-472.pdf>.

84. E.g., Allison Winter, “As deadline looms, Interior mulls Bush’s polar bear rule,” *New York Times* online, May 4, 2009 (quoting Bill Snape of Center for Biological Diversity: “The [consultation rule] repeal was a huge victory in favor of sound science and common sense, but it’s only half the pie . . . we need to get rid of that bad Bush rule on polar bears and global warming”).

85. Andrew Revkin, “U.S. Curbs Use of Species Act in Protecting Polar Bear,” *New York Times*, May 9, 2009, at A13.

86. As noted, several senators had written the agency supporting reversal of the polar bear as well as the consultation rule. See Patrick Reis, “Senators Urge Reversal of Bush-era ESA regs,” *E&E News P.M.*, April 23, 2009, available at <http://www.eenews.net/eenewspm/2009/04/23/archive/12?terms=polar+bear> (last visited December 18, 2009).

87. Editorial, “Cold Reality: Addressing climate change is a job for Congress, not the Endangered Species Act,” *Washington Post*, May 18, 2009, at A18. William N. Andreen’s excellent comment points out that a number of these views were also enunciated by senior Bush administration officials, so they were not new to the agencies. Even if, as Andreen suggests, congressional debate might not have helped an agency learn the potential policy implications, it might have helped the agency weigh them.

88. Fish and Wildlife Service, Department of the Interior, Proposed Rule: Designation of Critical Habitat for the Polar Bear in the United States, 74 *Federal Register* 56,058 (October 29, 2009); Fish and Wildlife Service, Department of the Interior, Rules and Regulations: Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 *Federal Register* 76,086 (December 7, 2010).

89. See McCubbins and Schwartz, “Congressional Oversight Overlooked,”

165; Jacob Gersen and Anne Joseph O'Connell, "Hiding in Plain Sight? Timing and Transparency in the Administrative State," *University of Chicago Law Review* 76 (2009): 1157.

90. E.g.: 154 *Congressional Record* S6886-01 (July 17, 2008) (Senator Stevens) (with respect to ANWR); 154 *Congressional Record* 6554-01 (July 10, 2008) (Senator Crapo) (related to energy prices).

91. In "Agency Burrowing," I wrote that an outgoing president had a defensible claim to put an issue on the nation's policy agenda. See Nina Mendelson, "Agency Burrowing," 557, 640-641 (arguing that the outgoing president possesses expertise and resources to identify issues of concern to substantial minority of public and that agenda contributions should be seen as legitimate if public support for them is substantial).