

**Testimony of Jeffrey R. Holmstead
Before the
House Select Committee on Energy Independence and Global Warming
December 11, 2008**

Mr. Chairman, my name is Jeff Holmstead. I appreciate the opportunity to appear before the Committee. I am a partner in the law firm of Bracewell & Giuliani and the head of the firm's Environmental Strategies Group. This morning, however, I am not appearing on behalf of my law firm or any of my firm's clients. I am here solely in my personal capacity as a former EPA and White House official who has spent almost 20 years working on regulatory issues.

I understand this committee's interest in so-called "midnight" regulations, but the notion of an outgoing Administration working to finalize regulations before leaving office should not be surprising to anybody who is familiar with the process by which regulations are developed. The Administrative Procedure Act (generally known as the APA) governs the regulatory process, and it requires federal agencies to go through a series of time-consuming steps before issuing a regulation. For any significant regulation, this process takes at least 18 months and normally takes several years. Officials in the Bush Administration, like officials in prior Administrations, have been working on a wide range of regulatory issues and, like officials in prior Administrations, they want to get them finished before they leave office. History has shown that there is a natural tendency at the end of any Administration to try to finish up the things that political officials have been working on for years. The Bush Administration is no different than other modern presidencies in this respect. I also think it would be irresponsible for a President to cease all regulatory work months before his term in office is over. We elect our Presidents for a specific term and we expect them to carry out their work during that entire term, and regulatory policymaking is a crucial part of these duties.

Since President Carter left office in 1980, interest groups have used the term "midnight regulations" to draw attention to regulatory changes that they oppose and to call into doubt their legitimacy. Under President Carter, executive branch agencies completed more than 24,000 pages of new regulations during the last three months of his administration and, more recently, President Clinton published more 26,000 pages of new

regulations in the Federal Register during the midnight period of his administration. While the notion of secretive and rushed regulations may appeal to the cynicism that underscores much of the public's thinking about Washington, DC, it simply does not square with the facts – or with my first-hand experience.

At the beginning of this Administration, President Bush appointed me to serve as the head of the Air Office at EPA, and one of first tasks of the new political appointees was to review the regulations issued during the last weeks of the Clinton Administration. When I reviewed the Clinton regulations I found that these regulations – although unpopular with some stakeholders – were the product of years of work and deliberation. While they may not have been finalized until the last few months or weeks of the Administration, they were – with only one exception – no less legitimate or thorough than regulations finalized at any other time during the Clinton administration. My experience is consistent with the conclusions of scholars who have analyzed claims that midnight regulations are inherently deficient. For example, an empirical study of midnight regulations published in the *Wake Forest Law Review* noted that:

The inherent problem with these arguments [against midnight regulations] is that they assume that regulations promulgated in the midnight period are rushed through the system during the interim period. Significant regulations, however, cannot be proposed and completed in the period between election day and inauguration day, as it can take years for a significant regulation [to go through the rulemaking process].¹

Regulatory agencies are bound by the terms that Congress has dictated by statute. Any regulatory action must be consistent with the underlying statute that authorizes that particular action. Substantial transparency and due process protections ensure that all regulations, even so-called "midnight regulations" are based on a public rulemaking record. With very few exceptions, important regulatory actions are subject to the notice-and-comment requirements of the Administrative Procedure Act, which mandates that all interested parties have an opportunity to review and comment on proposed rules. None of these procedural protections are jeopardized by the midnight regulation process. Any

¹ Jason M. Loring and Liam R. Roth, *Empirical Study: After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 *Wake Forest L. Rev.* 1441, 1448 (2005).

regulatory action that has not gone through the proper administrative process, or that is inconsistent with the underlying statute, is likely to be overturned in court.

I know that the other witnesses here today have strong views about certain regulatory actions taken by the Bush Administration – and about other regulatory actions that were proposed some time ago and may be finalized during the next few weeks. I believe that they have all taken advantage of the opportunity to submit comments on those regulatory actions. These comments are part of the public record. I assume, because of their presence here today, that they have also made their views known to members of Congress.

I am familiar with some of the proposed regulations that they oppose, and would be happy to discuss the merits of those regulations. But this sort of debate should occur on the merits of each specific rule and not be cast as a general criticism of midnight regulations. It is more productive to focus on the content of regulations, rather than the date they were finalized. The Bush administration disagreed with a variety of Clinton Administration rules and my fellow witnesses have disagreed with a variety of Bush Administration rulemakings----but none of these disagreements would have been avoided by releasing rulemakings at an earlier date.

Mr. Chairman, I am happy to discuss past and predicted rulemakings that I may have expertise on, and I encourage all interested parties to participate vigorously in this debate. However, my hope is that all parties can avoid the hyperbole and innuendo associated with casting all "midnight" regulations as rushed, secretive, or somehow inherently illegitimate because they were completed in the final months of an administration. Such rhetoric does not further policy discussions and contributes to a widespread cynicism that undermines the public's faith in all institutions of government.