

# **Midnight Rules: A Reform Agenda**

**DRAFT REPORT**

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This draft report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.

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- I. Introduction., p. 3
- II. Evidence that the Problem Exists., p. 7
- III. Normative Issues Surrounding Midnight Rulemaking, p. 19
  - A. Political Background of Midnight Rules., p., 19
  - B. Normative Views of Midnight Rulemaking, p. 34
  - C. Summary, p. 39
- IV. Evaluating Midnight Rules, p. 40
  - A. Measuring the Quality of Midnight Rules., p. 41
  - B. The Volume and Durability of Midnight Rules., p. 46
  - C. Interviews on the Quality of Midnight Rules., p. 61
- V. Reactions of Incoming Administrations to Midnight Rulemaking, p. 62
  - A. Reactions of Incoming Administration to Midnight Rules, p. 63
  - B. The Legality of Strategies for Dealing with Midnight Rules, 85
    - 1. Legal Views in the Executive Branch and Commentary, p. 86
    - 2. Case Law on Reactions to Midnight Regulation, p. 90
      - a. Withdrawal of Rules from the Federal Register, p. 90
      - b. Suspension of the Effective Dates of Published Rules, p. 94
    - 3. The Florida Experience with Midnight Rulemaking, p., 103
    - 4. Summary and Conclusions Concerning the Legality of Reactions to Midnight Rulemaking, p. 105
  - C. The Bush Administration's Effort to Curb Its Own Midnight Rulemaking, p. 107
- VI. Recommendations, p. 112
  - A. Prior Reform Proposals, p. 112
  - B. Proposed Recommendations, p. 119
- VII. Conclusion, p. 125

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### I. Introduction.

There is a documented increase in the volume of regulatory activity during the last 90 days of presidential administrations when the President is a lame duck, having either been defeated in a bid for reelection 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 of regulatory activity at the end of a term to the Cinderella story in which the magic wears off at the stroke of midnight.<sup>1</sup>

This Report looks closely at one species of Midnight Regulation, namely Midnight Rules. This Report defines Midnight Rules as agency rules promulgated in the last 90 days of an administration. This Report focuses on legislative Midnight Rules (normally issued under the APA’s notice and comment procedures) 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

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<sup>1</sup> See Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Ctr. at George Mason Univ., Working Paper, 2001), <http://www.mercatus.org/PublicationDetails.aspx?id=17546>.

pardon power and the ability to entrench political appointees into protected employment positions in the new administration.

This Report 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 Report 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 Report also reports on interviews of officials involved in rulemaking to inform the analysis of the causes and effects of the Midnight Rulemaking phenomenon.

This Report 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>2</sup> There are at least two possible sets of reasons to be concerned about the increase in rulemaking at the end of an administration, namely whether Midnight Rules are likely to be of lower quality than rules issued at other times during administrations and whether Midnight Rulemaking involves 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 to Midnight Rulemaking, but this Report will attempt to do so from various perspectives.

It is very difficult to measure the quality of rules. Rulemaking often involves values and policy preferences that are not subject to objective measurement for quality. Various metrics

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<sup>2</sup> For examples of negative commentary on Midnight Rulemaking of the last two transitions, see Michael Fument, *Regulatory Freight Rolls On Unchecked*, Washington 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," *The Washington Independent* (Nov. 11, 2008) available at <http://washingtonindependent.com/17813/11-hour-regulations>.

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, on the premise that low quality rules are likely to be less durable than higher quality rules.

“Durability” in this context involves whether the rules in question have been suspended, revoked, amended or rejected, in whole or in part, on judicial review. In addition to examining existing studies of the durability of Midnight Rules, this Report 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.

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 to judge 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 after it has been replaced, second that they 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. 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 enforce.

In many cases, however, Midnight Rules may not suffer from serious political problems and may actually be beneficial, both for the public generally and the incoming administration more specifically. Because of the politically innocuous human tendency to work to deadline, it is to be expected that as the end of the term nears, the pace of work will pick up as agencies try to finish the tasks on their agendas. 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 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 always 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 the problem. 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 in the GW Bush administration was reduced even though the volume of rules issued in the administration's entire final year was not lower than 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 of the administration less amenable to rescission or alteration by the incoming administration or Congress..

This Report concludes with a series of recommendations concerning Midnight Rulemaking. 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.

## **II. 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>3</sup> Cochran chose a very simple metric of regulatory output, namely 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

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<sup>3</sup> See Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Ctr. at George Mason Univ., Working Paper, 2001), <http://www.mercatus.org/PublicationDetails.aspx?id=17546>.

and does not account for the relative verbosity of rule writers, blank pages and other variations. However, as Cochran concludes, 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>4</sup> Further, all agency rules, and many other important agency actions, are published in the Federal Register. Thus, 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>5</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>6</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, 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>7</sup> the predominant factor was the presidential election which brings about the Cinderella constraint.

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<sup>4</sup> Id. at 2, n.4.

<sup>5</sup> Id. at 2.

<sup>6</sup> Id. at 3.

<sup>7</sup> 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,” id. and that for each day that Congress stays in session during the Midnight Period, Midnight Regulation increases .3 percent, which Cochran characterizes as statistically significant but small. Id. at 12. Cabinet turnover appears to be strongly associated with Midnight Regulation. The prediction 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 re-elected. Cochran



Once Cochran's study was published, documenting a long-term 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 20,000 last quarter pages.<sup>8</sup> In 2005, Jason Loring and Liam Roth published a study of the durability of Midnight Rules<sup>9</sup> in which they detailed and compared the number of rules issued by three agencies (NHTSA, OSHA and EPA) during the Midnight Periods of the administrations of George H.W. Bush (GHW Bush) and Bill Clinton. Although their focus was not on documenting the Midnight Rulemaking phenomenon, their study noted that the pace of rulemaking during the midnight Periods of the two transitions they studied increased somewhat as compared with the remainder of the administrations' last years in office.<sup>10</sup>

There have been additional studies of the pace of regulatory activity, all of which confirm in different ways the existence of the Midnight Rulemaking effect. For example, Veronique de Rugy and Anthony Davies, scholars at the Mercatus Center, found that "in 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 which a

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suggests that this may in part be due to the change in Cabinet membership that often occurs after re-election. See *id.* at 13.

<sup>8</sup> See *Congressional Review Act: Hearing Before the House Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, Comm. on Gov't Reform*, 107th Cong. (March 27, 2001) (testimony of Dr. Wendy L. Gramm, Distinguished Senior Fellow Director, Regulatory Studies Program, Mercatus Center George Mason University), available at 2001 WL 2006447. 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 (2003).

<sup>9</sup> 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 Law Review 1441 (2005).

<sup>10</sup> *Id.* at 1454 (Table 2) (40 percent of all rules issued in last eleven months of the GHW Bush administration and 51 percent of all rules issued in last eleven months of Clinton administration were promulgated during final three months).

presidential election occurred, the number of pages added exceeded the 25 percent baseline 13 out of 15 times.”<sup>11</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>12</sup> In another study using the same data set, the authors report 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>13</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>14</sup> She found an increase in rulemaking activity in most administrations’ last years, especially in cabinet departments.<sup>15</sup> More pertinent to the definition of the Midnight Period in this Report, she found increased rulemaking activity in the last quarter of the Clinton and George W. Bush administrations.<sup>16</sup> She characterizes 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

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<sup>11</sup> See Veronique de Rugy & Anthony Davies, *Midnight Regulations and the Cinderella Effect*, 38 J. Socio-Economics 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 percent baseline was not exceeded were in the Ford-Carter transition and the Reagan-GHW Bush transition. *Id.*

<sup>12</sup> 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. See *id.* at 889.

<sup>13</sup> Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 Admin. L. Rev. 163, 168 (2009).

<sup>14</sup> See Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U.L. Rev. 471 (2011).

<sup>15</sup> “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.” O’Connell, *supra* note x 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).

<sup>16</sup> O’Connell, *Political Transitions*, 105 Nw. U.L. Rev. at 505.

(the next highest were 72 and 20 actions in the third quarter of the final year for cabinet departments and executive agencies, respectively).<sup>17</sup>

O’Connell found no other factor than simple timing adequate to explain the increase in rulemaking in the last quarter of administrations.<sup>18</sup> O’Connell’s study also documents an increase in initiation of rules at the end of administrations.<sup>19</sup>

Another study documenting the existence of the Midnight Rulemaking phenomenon is a Congressional Research Service report written by Curtis W. Copeland entitled “‘Midnight Rules’ Issued Near the End of the Bush Administration: A Status Report,” CRS Report Number R4077 (August 25, 2009). The primary focus of this Report is the status of Midnight Rules issued by the GW Bush administration. The Report contains the following data concerning the volume of Midnight Rules in the GW Bush administration:

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 12866. 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).<sup>20</sup>

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<sup>17</sup> Id. at 505.

<sup>18</sup> Id. at 508.

<sup>19</sup> See id. at 499. 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 500. In another study, O’Connell noted that three departments, the Departments of Transportation, Agriculture and Labor, and two agencies, the EPA and IRS, issued more NPRMs during the final quarter of the GHW Bush administration “than during any other political transition period.” See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Va. L. Rev. 889, 948 (2008).

<sup>20</sup> Curtis W. Copeland, *The Status of “Midnight Rules” Issued Near the End of the Bush Administration: A Status Report*, CRS Report Number R4077 (August 25, 2009)

The primary focus of this Report 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 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, and it has been suggested that agencies do this to avoid the rigors of the rulemaking process and the relatively stringent judicial review of rules.<sup>21</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>22</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>23</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

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<sup>21</sup> See Mendelson, *Burrowing*, at 573-74; Peter Strauss, *The Rulemaking Continuum*, 41 *Duke L.J.* 1463, 1469 (1992)

<sup>22</sup> See 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); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

<sup>23</sup> 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").

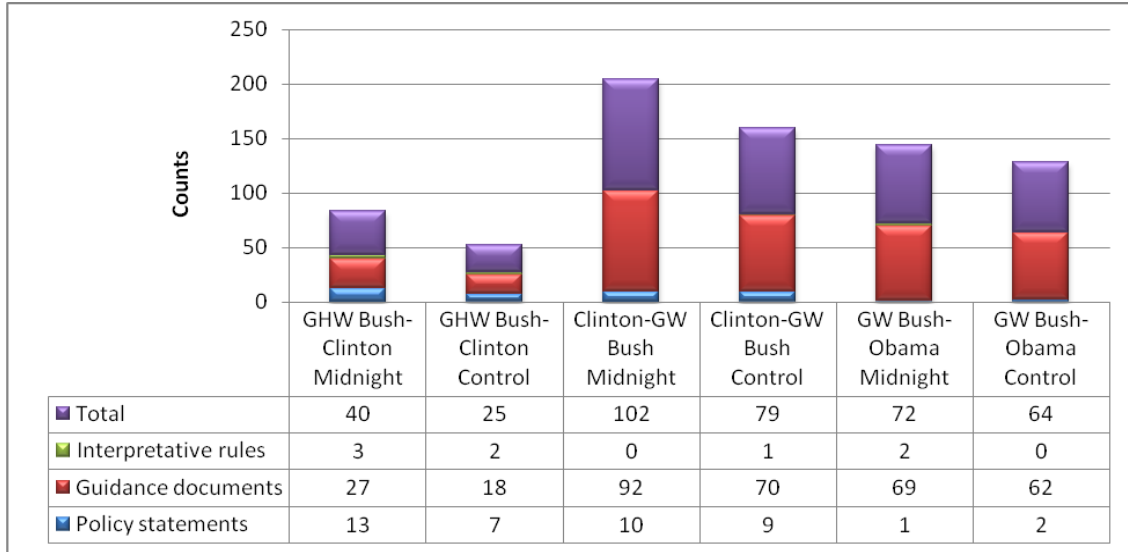
guidance documents during Midnight and a non-Midnight Periods in the last three presidential transitions, GHW Bush to Bill Clinton, Bill Clinton to GW Bush and GW Bush to Barack Obama.<sup>24</sup> My findings are that in each Midnight Period, the issuance of guidance documents, policy statement and 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:

During the 1992-93 Midnight Period, agencies under President George HW 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 compare with 64 non-legislative rules during the same period in the prior year, comprising 62 guidance documents, 2 policy statements and 0 interpretative rules.

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<sup>24</sup> 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" "INTERPRETATIVERULE" "GUIDANCEDOCUMENT" "POLICYSTATEMENT" GUIDANCE) & date(aft oct. 20 xxxx) & date(bef jan. 20, xxxx).

Table 1: Non-Legislative Rules



The issuance of Executive Orders also increases during Midnight Periods. One study 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 level.’”<sup>25</sup> President George W. Bush issued 10 Executive Orders after election day 2008, out of a total of 280 for his presidency.<sup>26</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 Jimmy Carter who issued 36 Executive Orders after election day 1980 compared to 319 during his four years in office. This means that President 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<sup>27</sup> were issued on his last day in office to carry

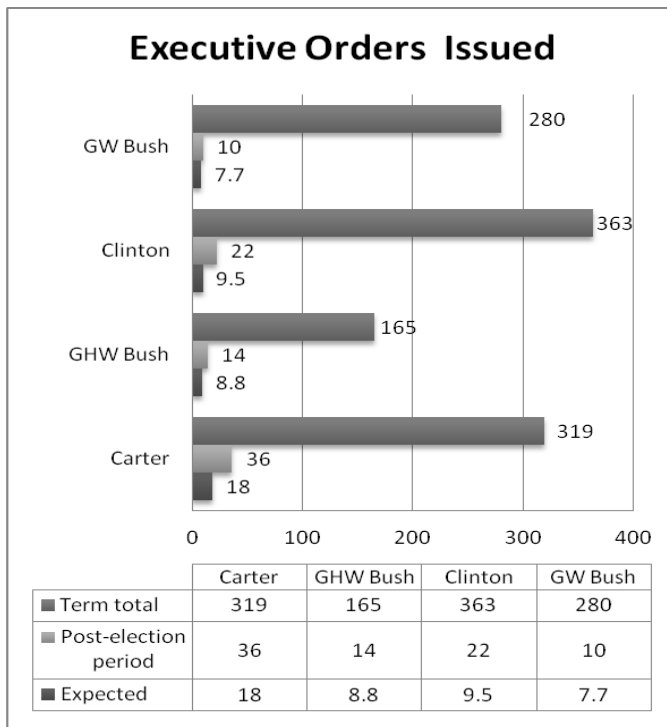
<sup>25</sup> CRS Study at 17, quoting Mayer, Executive Orders and Presidential Power at 457. In William G. Howell Kenneth Mayer, *The Last One Hundred Days*, 35 *Presidential Studies Quarterly* 533, 538-40 (2005), the authors perform a more qualitative analysis of the increased use of Executive Orders at the end of presidencies.

<sup>26</sup> The source of the data for this discussion of Executive Orders is the list of Executive Orders available at John Wooley and Gerhard Peters, *The American Presidency Project*, <http://www.presidency.ucsb.edu/>.

<sup>27</sup> Executive Orders 122276-12285, all issued on January 19, 1981.

out his agreement with the Government of Iran to free 52 Americans taken hostage at the U.S. Embassy in Tehran.<sup>28</sup> President GHW Bush issued 14 Executive Orders after Election Day, 1994, out of a total of 165 for his four years in office. At the rate for his entire presidency, President Bush would have been expected to issue 8.8 Executive Orders during the 78 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 President Carter’s. President Clinton issued 22 Executive Orders after the 2000 election out of 363 in total for his eight year presidency. Once again this represents a more than doubling of the rate of issuing Executive Orders as compared with his administration as a whole. Had he maintained his previous rate, he would have issued between 9 and 10 Executive Orders after the election.

Table 2: Executive Orders



<sup>28</sup> 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).

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>29</sup> Going back to President Truman, data published by the Department of Justice reveal that except for President Eisenhower, 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>30</sup> The increases range from relatively small, such as President Truman's increase from 22 per month to 25 per month during the Midnight Period, to dramatic increases such as President Clinton's increase from 2 per month until his final four months in office to 65 per month during those final four months in office.<sup>31</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>32</sup> Nina Mendelson

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<sup>29</sup> The pardon power is granted in U.S. Const. Art. II § 2 cl. 1 ("he shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.")

<sup>30</sup> It appears that 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. See Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 Cal. L. Rev. 1665, 1704 (2001) (discussing *In re De Puy*, 7 F. Cas. 506 (S.D.N.Y. 1869) (No. 3814), which held that a pardon is not valid until delivery and this is subject to revocation until delivery occurs).

<sup>31</sup> See L. Elaine Halchin, CRS Report for Congress: Presidential Transitions: Issues Involving Outgoing and Incoming Administrations 9 (November 25, 2008) citing data from United States Department of Justice, Office of the Pardon Attorney, available at [<http://www.usdoj.gov/pardon/>]. 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 9 pardons per month during his final four months in office.

<sup>32</sup> See CRS Report on Transitions at 22-26; CRS Report RL34706, *Federal Personnel: Conversion of Employees From Appointed (Noncareer) Positions to Career Positions in the Executive Branch*, by Barbara L. Schwemle; See also Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives*, 78 N. Y. U. L. Rev. 557 (2003).



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>33</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>34</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 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>35</sup>

In addition to conversions from political to career status, outgoing officials make important appointments and promotions in the career service.<sup>36</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

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<sup>33</sup> Mendelson, *supra* note x 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, at 2 (2002) [hereinafter GAO, 1998-2001 Personnel Practices] and 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, at 5 (1995).

<sup>34</sup> See U.S. Government Accountability Office, *Personnel Practices; Conversions of Employees from Noncareer to Career Positions May 2001-April 2005*, GAO-06-381, May 2006, pp. 4-5, cited in CRS Report on Transitions at 25 n. 91. See also CRS Report RS20730, *Presidential Transitions and Administrative Actions*, by L. Elaine Halchin, June 5, 2001, available from CRS.

<sup>35</sup> See CRS Report RL34706, *Federal Personnel: Conversion of Employees From Appointed (Noncareer) Positions to Career Positions in the Executive Branch*, by Barbara L. Schwemle, quoting U.S. Department of Homeland Security, Leadership Journal, “Transition: Heads We Win, Tails You Lose,” January 19, 2008, available at [<http://www.dhs.gov/journal/leadership/2008/01/transition-heads-we-win-tails-you-lose.html>] (footnote omitted).

<sup>36</sup> See Mendelson, *supra* note x at 606.

or programmatic commitments.”<sup>37</sup> This, she says, “seems to increase the prospect that a new President will face a resistant—even subversive—bureaucracy.”<sup>38</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>39</sup> While these actions are often significant and sometimes irrevocable (or not easily revoked) they do not warrant separate sustained attention in this Report because they do not involve important policy commitments. They often elicit criticisms similar to those leveled at Midnight Rulemaking, that 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 Report.<sup>40</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 an increase 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.

### **III. Normative Issues Surrounding Midnight Rulemaking.**

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<sup>37</sup> Id. at 610.

<sup>38</sup> Id. at 612.

<sup>39</sup> Perhaps the most famous episode in this area is President Grover Cleveland’s Midnight designation of 21 million acres of federal land as forest reserve to protect it from logging. See Combs, *supra* note x at 332. 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. President Clinton designated numerous national monuments, and expanded the boundaries of existing monuments, in this 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 x at 973-76. This designation provides even greater protection than inclusion of the land in a national park or forest.

<sup>40</sup> See generally Nancy Amoury Combs, *supra* note x.

Since the phenomenon was first widely discussed after the publication of Jay Cochran's study, Midnight Rulemaking has consistently provoked negative reactions in the media, in government and among commentators. This section asks why. Looking at the Midnight Rulemaking phenomenon from a more normative perspective involves investigating why they occur and asking whether there are categories of Midnight Rules that present distinct normative concerns not shared with other categories of such rules. The first sub-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 sub-section lists the normative arguments that have been or could be made against Midnight Rulemaking and responses to those arguments. The third sub-section offers some conclusions on these aspects of this Report's investigation.

Many of the interviewees who were consulted for this Report 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>41</sup> Hurrying is the urge of an outgoing administration to get as much done as possible at the end of the term to finish before the deadline either because of the need to finish tasks before the impending deadline or because the administration is attempting to enact as many of its policies into law as possible because it fears that the incoming administration will take a different view that will produce inferior results.<sup>42</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>43</sup> while the incoming administration puts its appointees in place, a process that seems to be taking longer in recent transitions.<sup>44</sup> This delay at the outset of a new administration may now seem inevitable given the strategies incoming administrations have adopted to deal with the problem of Midnight Rulemaking. Further, because all of the required procedural steps and substantive analyses take a long time, it should not be surprising that many rulemakings are completed very late in each administration's term, when officials hurry to finish work on rules

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<sup>41</sup> See generally Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U.L. Rev. 947 (2003).

<sup>42</sup> 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 William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 *Presidential Stud. Q.* 533 (2005).

<sup>43</sup> See O'Connell, *supra* note x at 501. ("the 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 O'Connell, *supra* note x at 515. 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.

<sup>44</sup> 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, *Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process 11-12* (2010). O'Connell reports that "the Obama Administration still had only 64.4% of Senate-confirmed executive agency positions filled 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.

that began earlier in the term.<sup>45</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.

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 rulemakings 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>46</sup> and there are suggestions that some

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<sup>45</sup> 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 x at 503.

<sup>46</sup> Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time, Patrick A. McLaughlin Mercatus Center Working Paper 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* (2008) (discussing implications of McLaughlin's study). Reece Rushing, Rick Melberth & Matt Madia, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do* (Center for American Progress, OMB Watch, January 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.

rules are rushed from proposal to completion near the end of President's terms.<sup>47</sup> While the evidence supports the former claim, the latter suggestion is more difficult to substantiate.

As discussed above, O'Connell's analysis for this Report of her data on the duration of rulemakings suggests that generally, Midnight Rules are considered for a longer period of time than non-Midnight Rules, but there is a slight increase in relatively short rulemakings (180 days or less) among rules finalized during the Midnight Period.<sup>48</sup> There are examples of Midnight Rules that went from proposal to promulgation very quickly. For example, on October 28, 2008, the Bureau of Land Management of the Department of the Interior proposed a rule eliminating the power of congressional committees to require federal lands to be withdrawn from mining in emergencies.<sup>49</sup> The proposal allowed for a very short comment period of only 17 days and the final rule was published on December 5, 2008,<sup>50</sup> just 37 days after the proposal. The administration apparently justified the short comment period on the basis that the public had the opportunity to comment on the identical proposal in 1991.<sup>51</sup> Another relatively quick regulatory process was used to promulgate a regulation governing inter-agency cooperation under the Endangered Species Act.<sup>52</sup> This rule was proposed on August 15, 2008 with a 30 day comment

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<sup>47</sup> 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. See Oil Shale Management—General, 73 Fed. Reg. 69414 (Nov. 18, 2008), discussed in O'Connell, *supra* note x 472 & n. 3.

<sup>48</sup> See O'Connell, *supra* note x at 47, Table 1. See also *id.* at 49 (“There is, however, still a quickening in the rulemaking process in the midnight quarter.”)

<sup>49</sup> PROPOSED RULES DEPARTMENT OF THE INTERIOR Bureau of Land Management 43 CFR Part 2300 Land Withdrawals; Removal of Regulations Covering Emergency Withdrawals Friday, October 10, 2008 73 FR 60212. Because this regulation arguably attaches legal consequences to action of a congressional committee, it may be unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>50</sup> RULES and REGULATIONS DEPARTMENT OF THE INTERIOR Bureau of Land Management 43 CFR Part 2300 Land Withdrawals; Amendment of Regulations Regarding Emergency Withdrawals Friday, December 5, 2008 73 FR 74039.

<sup>51</sup> Reece Rushing, Rick Melberth & Matt Madia, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do* 5, n. 10 (Center for American Progress, OMB Watch, January 2009). The USA Today blog post cited in support of this assertion no longer exists.

<sup>52</sup> RULES and REGULATIONS DEPARTMENT OF THE INTERIOR Fish and Wildlife Service DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration 50 CFR Part 402 Interagency Cooperation Under the Endangered Species Act Tuesday, December 16, 2008 73 FR 76272.

period.<sup>53</sup> The comment period was extended for an additional 30 days<sup>54</sup> and then the final rule was promulgated with minor modifications on December 16, 2008, only four months after the initial proposal.<sup>55</sup>

Another example of a relatively short process for promulgating an important rule involves the Clinton administration's Midnight Rules on air conditioner and heat pump efficiency. This rule was proposed on October 5, 2000,<sup>56</sup> and promulgated as a final rule published in the Federal Register on January 22, 2001,<sup>57</sup> after a 60 day comment period and a public hearing held a little less than a month after the NPRM was issued. This was a complex and lengthy rule which Susan Dudley says "hurtled through the regulatory process at lightning speed."<sup>58</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

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<sup>53</sup> PROPOSED RULES DEPARTMENT OF THE INTERIOR Fish and Wildlife Service DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration 50 CFR Part 402 50 CFR Part 402 Interagency Cooperation Under the Endangered Species Act Friday, August 15, 2008 73 FR 47868.

<sup>54</sup> PROPOSED RULES DEPARTMENT OF THE INTERIOR Fish and Wildlife Service DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration 50 CFR Part 402 50 CFR Part 402 Interagency Cooperation Under the Endangered Species Act Friday, September 12, 2008 73 FR 52942.

<sup>55</sup> 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 73 FR at 47869. 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, discussed below at note x.

<sup>56</sup> PROPOSED RULES DEPARTMENT OF ENERGY Office of Energy Efficiency and Renewable Energy 10 CFR Part 430 Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards Thursday, October 5, 2000 65 FR 59590.

<sup>57</sup> RULES and REGULATIONS DEPARTMENT OF ENERGY Office of Energy Efficiency and Renewable Energy 10 CFR Part 430 Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards Monday, January 22, 2001 66 FR 7170.

<sup>58</sup> See Sudan E. Dudley, *Midnight Regulation at All-Time High*, Intellectual Ammunition, March 1, 2001, available at <http://heartland.org/policy-documents/midnight-regulations-all-time-high>, quoted in Howell and Mayer, *supra* note x at 551. Dudley states that the rules were issued "[o]ver the objections of other administration officials, and contrary to many public comments." *Id.*

1995 congressionally-mandated delay, a conference on the issues in 1998 and an Advance Notice of Proposed Rulemaking issued in 1999.<sup>59</sup>

Despite these examples, it appears that short regulatory processes are the exception rather than the rule even with regard to Midnight Rules.<sup>60</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 Midnight Rule on shale oil development as having been proposed only four months before it was finalized.<sup>61</sup> While it is true that the Notice of Proposed Rulemaking was issued on July 23, 2008, slightly less than four months before the final rule, an Advance Notice of Proposed Rulemaking had been issued in August, 2006<sup>62</sup> with another notice extending the comment period issued in September 2006.<sup>63</sup> The agency also held “listening sessions” with representatives of Governors of affected states in 2006 and 2007.<sup>64</sup> Thus, this rule had been under consideration for more than two years before it was issue, hardly a last-minute rush job.

There are also 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

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<sup>59</sup> 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* at p. xx. The Abraham decision rejected the GW Bush administration’s efforts to rescind the rule promulgated in the waning days of the Clinton administration.

<sup>60</sup> 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.” Reece Rushing, Rick Melberth & Matt Madia, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do* 4-5 (Center for American Progress, OMB Watch, January 2009).

<sup>61</sup> See O’Connell, *supra* note x at 472.

<sup>62</sup> 71 FR 50378.

<sup>63</sup> 71 FR 56085.

<sup>64</sup> 73 FR 69415.



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>65</sup> Each rule is likely to 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. Second, 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 in a meaningful way, O'Connell suggests that the timing of rulemaking activity may make it more likely that the agency's ultimate decision is "arbitrary and capricious." 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>66</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.

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

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<sup>65</sup> Interview with Sally Katzen.

<sup>66</sup> See O'Connell, *supra* note x at 57, 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).

approaches. Other priorities may intrude, such as delays in rulemaking that were attributed to the need for multiple agencies to respond to regulatory issues that arose in the wake of the attacks of September 11, 2001.<sup>67</sup> There are also obvious cases of externally imposed delay, for example when Congress, via appropriations riders, prohibited the Department of Labor for issuing its ergonomics rule until the final year of President Clinton's term.<sup>68</sup> The rule on efficiency of air conditioners and heat pumps at issue in *Abraham* was also delayed by Congress during the Clinton administration.<sup>69</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, although the effects of this should be minimal in the eighth year of an administration when Midnight Rulemaking usually becomes an issue. More relevant, complex analytic and procedural requirements contribute to lengthy rulemaking processes. 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.

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

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<sup>67</sup> See Public Citizen Health Research Group v. Chao, 314 F.3d 143 (3d Cir. 2002) (relying on these factors OSHA relied on these factors to explain delay in issuing new exposure standard for hexavalent chromium).

<sup>68</sup> See Beermann, *supra* note x at 957, 961 (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. Meiners & Andrew Dorchak, *Between a Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 Admin. L. Rev. 551, 580-82 (2003).

<sup>69</sup> See Natural Resources Defense Council v. Abraham, 355 F.3d 179, 188-91 (2d Cir. 2004).

accountability problems inherent in the administrative state. However, there are difficulties and disincentives to waiting that make it somewhat less likely to occur than it might seem at first blush. 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>70</sup> 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>71</sup> There are not many instances of rules proposed just before or even after the election. Thus, the outgoing administration has normally made its intentions 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>72</sup> or will be issued so late that the incoming administration can prevent it from being published in the Federal Register.

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<sup>70</sup> [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.

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)

<sup>71</sup> Rossi, *supra* note x at 1039.

<sup>72</sup> This happened, for instance, with regard to the OSHA risk assessment proposed rule, discussed above, that was ultimately withdrawn by the Obama administration.

Despite these reasons for suspecting that waiting is not a serious problem, the accusation that Midnight Rules were timed to fly under the political radar has been leveled. 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>73</sup> One example cited is a rule promulgated soon after GHW Bush was elected President subjecting transportation workers to random drug testing.<sup>74</sup> The Teamsters Union had endorsed Vice-President Bush for President, and the article contains speculation from a trucking lobbyist that the endorsement might have been affected had this rule been issued before the election.<sup>75</sup> The Clinton administration was also accused 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>76</sup>

Waiting may be a more logical strategy when the incumbent hopes or expects the next President to be of the same political party.<sup>77</sup> Waiting may also help explain the timing of deregulatory action in the Midnight Period of the GW Bush administration. Given that lax regulation's role in 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.

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<sup>73</sup> 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 x at 9 n. 29.

<sup>74</sup> RULES and REGULATIONS DEPARTMENT OF Urban Mass 49 CFR Part 653 Control of Drug Use in Mass Transportation Operations Monday, November 21, 1988 53 FR 47156-01

<sup>75</sup> Ronald A. Taylor et al., *Here Come Ronald Reagan's "Midnight" Regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11.

<sup>76</sup> See Morriss et al, *supra* note x 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 final round of public comment, the almost eleven-month delay before the regulations issuance suggests that the post-election timing was not accidental.")

<sup>77</sup> See Reagan Readies 451 Regulation Changes before Leaving Office, Chicago Tribune September 18, 1988 at Business p. 8, 1988 WLNR 1732356.

Waiting may also explain some presidential actions not involving rulemaking, 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>78</sup>

There are additional elements of the political background of Midnight Rulemaking that are not completely captured by the discussion of hurrying, waiting and delay but may help explain the phenomenon. One of the common criticisms of Midnight Rulemaking is that it has negative effects on the transition in two ways. First, a high volume of Midnight Rules diverts the incoming administration's time and energy from moving forward on 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 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 its own political preferences and those of the electorate that has spoken so recently.

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<sup>78</sup> For example, after issuing very few pardons during most of his eight 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 Jurist Legal Intelligence, *Clinton Pardon Grants, January 2001*, at <http://jurist.law.pitt.edu/pardons6a.htm> (last accessed Nov. 13, 2003) (providing an individualized list of each of the 141 pardons President Clinton granted during the last month 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 . . .").

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, why not years earlier so that these new requirements would have governed the outgoing administration's conduct? The answers can be fairly simple. In the consultation area, if consultation requirements are being increased, the outgoing administration had sufficient discretion to engage in the consultations anyway, and now wants to impose the requirements on its successor. If consultation requirements are being eased, the outgoing administration had discretion to basically ignore the input that is no longer going to be required and now wants to prohibit its successors from engaging in that consultation.

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>79</sup> This rule eliminated some consultations with habitat managers and biological experts and it prohibited global warming as a factor in some remaining consultations. 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

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<sup>79</sup> RULES and REGULATIONS DEPARTMENT OF THE INTERIOR Fish and Wildlife Service DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration 50 CFR Part 402 Interagency Cooperation Under the Endangered Species Act Tuesday, December 16, 2008 73 FR 76272.

seem designed primarily to limit the incoming administration's options or force it to act to rescind the rule. An 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 from 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>80</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 the 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 that they found contrary to their moral or religious values.<sup>81</sup> This new, controversial, funding requirement would be enforced only by the incoming Obama administration, which was likely to have different views on the subject.<sup>82</sup>

Another political explanation for Midnight Rulemaking and other Midnight action by outgoing administrations, offered by Howell and Mayer, is that because a lame-duck President's political capital with Congress is reduced, the President must act unilaterally to get anything done. 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.

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<sup>80</sup> See Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 65 Fed. Reg. 41,270, 41,278 (July 3, 2000) (to be codified at 42 C.F.R. pt. 59).

<sup>81</sup> Rules and Regulations, 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 FR 78072 (December 19, 2008).

<sup>82</sup> This rule was rescinded by the Obama administration. See Rules and Regulations, Department of Health and Human Services, Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 FR 9968 (February 23, 2011).

This may be counter-intuitive, but their point is 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>83</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 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 backwards at the time when they would much prefer to be moving forward on their own agendas<sup>84</sup> even when looking back at Midnight Rules may have negative political consequences.

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>85</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

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<sup>83</sup> See Howell & Mayer, *supra* note x at 539-43.

<sup>84</sup> See Nina Mendelson, *Quick off the Mark: Empowering the President-Elect*, 103 Nw. U. L. Rev. Colloquy 464 (2009); Morriss et al, *supra* note x at 557-578; Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. Rev. 1253 (2006)..

<sup>85</sup> See *National Primary Drinking Water Regulations; 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 also Brito and de Ruyg, *supra* note x at 5 (bell tolls).



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 60 days.<sup>86</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 extend the effective date of the rule for an additional nine months to allow further study.<sup>87</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>88</sup> In the final rule delaying the effective date 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 Advisor Council was studying the compliance cost issues related to the rule. When the National Science Foundation's study supported the new standard<sup>89</sup>, the EPA announced that the rule would go into effect as promulgated.<sup>90</sup>

### **B. Normative Views of Midnight Rulemaking.**

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<sup>86</sup> See National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 16,134 (Mar. 23, 2001). 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 except 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.

<sup>87</sup> National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 20,580 (Apr. 23, 2001).

<sup>88</sup> National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 28,342 (May 22, 2001).

<sup>89</sup> See SUBCOMM. TO UPDATE THE 1999 ARSENIC IN DRINKING WATER REPORT, ARSENIC IN DRINKING WATER: 2001 UPDATE (National Academy Press 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. For further discussion of the merits of the arsenic rule, see Special Report: The Arsenic Controversy, Regulation Fall 2001 at 43.

<sup>90</sup> See Press Release, EPA, EPA Announces Arsenic Standard for Drinking Water of 10 Parts per Billion (Oct. 31, 2001), *available at* 2001 WL 1337226.

Many people from different political perspectives react negatively to the phenomenon of Midnight Rulemaking.<sup>91</sup> Although the Constitution provides for a fully-empowered administration to remain in office for more than two months after the election at which the people may have chosen a new President of a different party with a different regulatory philosophy, 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. 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 subsection sets out and analyzes the major criticisms that have been leveled at Midnight Rulemaking.<sup>92</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, they should slow down after the election and leave major decisions to the new President.

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>93</sup> On this view, once an election has intervened, the agenda of the incoming President should be paramount.

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<sup>91</sup> See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Va. L. Rev. 889, 913 (2008) (noting that most commentary of Midnight Regulation and crack-of-dawn activity has been disapproving).

<sup>92</sup> For a catalog of criticisms of Midnight Rulemaking, see Brito and de Ruy, *supra* note x at 7-8.

<sup>93</sup> For example, Nina Mendelson has stated that "the agency's choice in the last few weeks regardless of the new President's views suggests an unsatisfied craving for power." Mendelson, *supra* note x at 564.

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 the other 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 bring discredit on the government and the regulatory system as a whole.<sup>94</sup> So many people find Midnight Rulemaking distasteful that episodes every four or eight years of this conduct reduces people's respect law and government regulation.

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<sup>94</sup> 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 x at 527 n. 179.

7. The Transition Objection: Another objection to Midnight Rulemaking is that it makes the transition between administrations difficult<sup>95</sup> because it distracts the incoming administration from its forward looking agenda, forces it to expend time and effort reexamining Midnight Rules and it forces incoming administrations to incur political costs when it revises or rescinds Midnight Rules and it generally.

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>96</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 Report, in general 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

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<sup>95</sup> For a general look at presidential transitions, see Beermann & Marshall, *supra* note x.

<sup>96</sup> See O'Connell, *Political Cycles*, *supra* note x 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.

term, including 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. 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, concerned perhaps with their legacies, may take beneficial actions that interest group pressures might have prevented before the election. 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, and the more practical response that the incoming administration has tools to deal with Midnight Rules. There are several replies to the charge that Midnight Rules are excessively political. First, all rulemaking and other regulatory activity 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 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>97</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 to catch up on, which would more seriously impede the transition than the relatively few controversial Midnight Rules that the incoming administration is likely to reexamine upon taking office. On the charge that Midnight Rulemaking is wasteful, because only a very small number of Midnight Rules are actually reversed by the new administration and 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, Nina Mendelson concludes that personnel burrowing can have positive side effects that may be sufficient to justify at least some of its uses. She sees the same benefits in some example 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

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<sup>97</sup> Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. Rev. 1253, 1267-68 (2006).

the election campaign<sup>98</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>99</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 above, Sally Katzen, the head of OIRA at the end of the Clinton administration, which produced a high volume of Midnight Rules, 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.

### **C. Summary.**

Based on the above analysis and the interviews I conducted in connection with this Report, it appears that Midnight Rulemaking results predominantly from hurrying to complete

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<sup>98</sup>Mendelson, *supra* note x at 627 ff. 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.

<sup>99</sup> *Id.* at 641 ff.

work that has been pending since well before the November election that 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 delay common to all rulemaking 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.

#### **IV. Evaluating Midnight Rules.**

This part of the Report 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 principle 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 sub-section of this Part



of the Report discusses the published scholarship that attempts to measure the quality of Midnight Rules.

The second sub-section of this Part discusses the results of the empirical study of the durability of Midnight Rules I conducted in conjunction with preparing this Report. 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 sub-section 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 Report 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 Jay 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>100</sup> It is, however, very difficult

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<sup>100</sup> See generally, Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 *Wake Forest Law Review* 1441, 1448 (2005).

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 connection with this Report, I asked each interviewee whether they thought that Midnight Rules were of lower quality than rules issued at other times. The answers did not reveal a general view that quality is a serious issue with regard to Midnight Rules. Although most interviewees did not think that Midnight Rules suffered from serious quality problems, 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 is that the normal review process might be rushed and thus not as effective as usual in preventing problematic rules from being issued. One 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 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 Report by Anne Joseph O'Connell<sup>101</sup> of her data reveals that Midnight Rules are generally not under consideration for a shorter period of time on average than rules issued in non-Midnight Periods. 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) 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 Report.

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<sup>101</sup> The author of this Report thanks Anne Joseph O'Connell for conducting this analysis of her data especially for this Report.

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 the Midnight Period was 487.7 days. (The average duration of all these rulemakings was 462.8 days.)<sup>102</sup> This is not much of a difference and, surprisingly, to the extent there is a difference, rulemakings that end 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 is more pronounced. Rulemakings that finished before the Midnight Period took on average 351.3 days, 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, 4664 of them (or about 25 percent) took 180 or fewer days.<sup>103</sup> Of those 4664 processes, 4448 finished outside the Midnight Period and 216 finished in the Midnight Period. With 112 total quarters and 4 Midnight quarters, equal distribution of these short duration actions would produce about 40 per quarter or 160 Midnight Rules. This means that there are proportionally more short duration actions that end during Midnight Periods (54 on average versus 40 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.

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<sup>102</sup> See also O'Connell, *supra* note x.at 513 for more information on duration of rulemaking proceedings.

<sup>103</sup> 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.

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 during Midnight Periods suggests that there may be a slight tendency during Midnight Periods to rush a small number of rules through the process.

Jerry Brito and Veronique de Rugy focused on one step of the process leading to rulemaking, review at OIRA.<sup>104</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>105</sup> They fear that at the end of administrations, “If 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>106</sup> To prove their point, Brito and de Rugy do not look at the actual duration of OIRA review of individual regulations. Rather, they examine “circumstantial evidence” and employ “deductive reasoning” to make their point.<sup>107</sup>

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<sup>104</sup> 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. 37 (2011).

<sup>105</sup> Brito & de Rugy, 61 Admin. L. Rev. at 183.

<sup>106</sup> Id.

<sup>107</sup> Id. at n. 123.

The principal pieces of circumstantial evidence that Brito and de Rugy examine 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>108</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>109</sup>

To support their conclusion, Brito and de Rugy rely on a study conducted by Mercatus Center researcher Patrick A. McLaughlin.<sup>110</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>111</sup> McLaughlin’s study revealed an increase in the number of economically significant rules submitted to OIRA for review during Midnight Periods of about six regulations per month or about seven percent.<sup>112</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 review of non-significant rules.<sup>113</sup> McLaughlin also found a significant decrease in the amount of time Midnight Rules are under review at OIRA: “when controlling for the number of economically

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<sup>108</sup> Id. at 183-84 (“[I]n real terms, OIRA’s budget has decreased since its inception.”)

<sup>109</sup> Id. at 186. See also Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 *Pub. Choice* 395, 398 (2011) (finding that, on average, review time was twenty-five days shorter during the Midnight Period).

<sup>110</sup> See Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time*, Mercatus Center Working Paper (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).

<sup>111</sup> 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.

<sup>112</sup> McLaughlin 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.

<sup>113</sup> See McLaughlin at 17-19. McLaughlin found that this ratio increased by 42 percent during the entire period studied (1981-2007) and by 55 percent during the last Midnight Period he studied, the transition between Bill Clinton and GW Bush.

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>114</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 a 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>115</sup> We also do not know how much OIRA review actually contributes to the quality of rules and there is no real metric for measuring the quality of rules.<sup>116</sup> All we really know is that during Midnight Periods, review by OIRA is abbreviated as compared with review during other periods.

Another study, by Patrick McLaughlin and Jerry Ellig, uses the Mercatus Center's Regulatory Report Card project to examine how OIRA review affects the quality of regulatory

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<sup>114</sup> McLaughlin 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 McLaughlin, 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.

<sup>115</sup> McLaughlin at 19.

<sup>116</sup> 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 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 affect 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.” McLaughlin at 26-27.

impact analysis generally and on Midnight Rules in particular.<sup>117</sup> Because they were looking only at rules proposed and issued in 2008, they defined Midnight Rules as “as any proposed regulation that had its OIRA review completed after June 1, [2008], in accordance with the Bolten Memorandum, 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>118</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 was lower for what they called prescriptive rules, which are rules that regulate conduct (as opposed to transfer rules, which are rules that involve only revenue).<sup>119</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’s 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.

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<sup>117</sup> 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.* 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, three of which involve openness, five of which involve quality of analysis and four of which involve the use of the analysis. The openness factors are accessibility of relevant documents, data documentation, model documentation (how verifiable are the models and assumptions used?) and clarity of the analysis. The 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 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. at George Mason Univ., Working Paper No. 10-34, 2010), available at <http://ssrn.com/abstract=1639747>.

<sup>118</sup> McLaughlin & Ellig, *Does OIRA Review*, *supra* note x at 196.

<sup>119</sup> See *id.* at 198-201.



Jason Loring and Liam Roth have conducted a study aimed at another possible proxy for quality of rules, durability.<sup>120</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 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 Bill Clinton and Bill 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 Orders 12,291 and 12,866. 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 is was not amended or rescinded even if it had been briefly delayed for further review pursuant to the common practices of incoming administrations.

Loring and Roth found that the three agencies issued 23 final rules during GHW Bush’s Midnight Period, 10 of which were “significant.” The same agencies published 33 regulations during the Clinton Midnight Period, 16 of which were significant.<sup>121</sup> In both administrations, EPA was the most prolific issuer of Midnight Rules, followed by NHTSA in the GHW Bush

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<sup>120</sup> Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 *Wake Forest Law Review* 1441 (2005).

<sup>121</sup> *Id.* at 1455.

administration and OSHA in the Clinton administration. The ratio of significant to non-significant rules in each administration was similar.<sup>122</sup>

The two incoming administrations reacted differently to their predecessors' Midnight Rules. The Clinton administration accepted 43% of the GHW Bush administration's Midnight Rules, it amended 48% and it rescinded 9% of the rules.<sup>123</sup> The GW Bush administration accepted 82% of the Clinton administration's Midnight Rules, it amended 15% and rescinded only 3%.<sup>124</sup> The Clinton administration was more aggressive in amending and rescinding significant Midnight Rules than with 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>125</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 such rules and amending or repealing 25%.<sup>126</sup>

Loring and Roth were struck by the low rate at which each administration rescinded Midnight Regulations, (9% by Clinton and 3% by Bush) as opposed to amending them.<sup>127</sup> They posit the Supreme Court's decision in *State Farm*<sup>128</sup> as the explanation for this. They characterize *State Farm* as holding that "even deregulation requires a reasoned justification, using the same 'arbitrary and capricious' standard under which a passed regulation must

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<sup>122</sup> Id.

<sup>123</sup> See id. at 1456, Table 4.

<sup>124</sup> See id. at 1457, Table 5.

<sup>125</sup> See id. at 1458, Table 6.

<sup>126</sup> See id. at 1458, Table 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 ff, Appendices A & B.

<sup>127</sup> See id. at 1457.

<sup>128</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)

qualify.”<sup>129</sup> They also posit 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 administration's willingness to amend nearly half (48%) of the Bush I administration's midnight regulations.<sup>130</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. As discussed below,<sup>131</sup> until *State Farm* was clarified in *Fox Television*, it was understood by some as imposing heightened scrutiny on regulatory changes as compared to initial regulatory decisions. 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.

As Loring and Roth recognize, the principal holding of *State Farm*, which has not been disavowed, is that “even deregulation requires a reasoned justification, using the same ‘arbitrary

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<sup>129</sup> See Loring and Roth at 1457.

<sup>130</sup> Id. at 1457 (footnotes omitted).

<sup>131</sup> See infra at xxx.

and capricious’ standard under which a passed regulation must qualify.”<sup>132</sup> This does not explain why administrations would prefer amendment to repeal. 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 been applied to the imposition of increased regulatory burdens. 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 the unprecedented misreading of *State Farm* offered by Loring and Roth.

Loring and Roth also offer an explanation for the Clinton administration’s greater willingness to revisit Midnight Rules than the GW Bush administration. 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

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<sup>132</sup> Id. at 1457.

Midnight Rules than would the Clinton administration accept those of GHW Bush.<sup>133</sup> This explanation is plausible but highly speculative. There are two alternative explanations that seem just as plausible, first that the very close election in 2000 meant that the incoming Bush administration did not have a strong mandate for change and second that 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 Report, 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 Congressional Research Service Report authored by Curtis Copeland on GW Bush administration Midnight Rules. This Report contains anecdotal evidence on the status of notable Midnight Rules. Copeland reports on 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>134</sup> and 25 rules that as of August 29, 2009, were under scrutiny, many of which were not in effect, having been delayed, stayed, amended or

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<sup>133</sup> Id. at 1441-42, 1456-57.

<sup>134</sup> See Copeland, *supra* note x at 6-7. The three rules are U.S. Department of Agriculture, Agricultural Marketing Service, “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 *Federal Register* 2658, January 15, 2009; U.S. Department of the Interior, Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear,” 73 *Federal Register* 76249, December 16, 2008; and U.S. Department of Homeland Security, Transportation Security Administration, “Rail Transportation Security,” 73 *Federal Register* 72130, November 26, 2008. 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 x at 7. Another rule, on “Interagency Cooperation Under the Endangered Species Act” was withdrawn pursuant to Congress’ permission. See Copeland, *supra* note x at 7 n. 25.

rescinded.<sup>135</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 that Copeland characterizes as Midnight Rules issued by the GW Bush administration, but it is likely to represent 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, but if these tendencies are not very pronounced and it is not very 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 of the Bolten Memo setting an early deadline for the completion of rulemaking<sup>136</sup> more of the administration's late term actions were completed before the Midnight Period than had been the case in prior transitions.<sup>137</sup>

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<sup>135</sup> See Copeland, *supra* note x at 7-27. Of the 25 rules, Copeland reports that as of the date of his report, 13 were fully or partially in effect, one was subject to a delay in its effective date and the other 11 were not in effect due to agency or court-imposed delays or rescissions. See *id.* at 26-27 (Table 1).

<sup>136</sup> See *infra* at xxx.

<sup>137</sup> 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 <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200810&RIN=1290-AA23>), 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,

There was a perception that the Midnight Rules issued by the outgoing GW Bush administration were predominantly deregulatory in nature.<sup>138</sup> This perception is only partly accurate. While there was a healthy amount of deregulatory Midnight Rulemaking by the GW Bush administration,<sup>139</sup> some of the GW Bush administration's Midnight Rules imposed new regulatory burdens, not in terms of new health and safety requirements, but increased compliance burdens in line with the administration's ideological commitments.<sup>140</sup> In general, the GW Bush

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Washington Post (Bus. Sec) 2008 WLNR 13682816 (July 23, 2008). The proposal was first made public via an internet posting on OMB's website on July 7, 2008 and the rule was proposed on August 29, 2008. PROPOSED RULES, DEPARTMENT OF LABOR, Office of the Secretary, 29 CFR Part 2, RIN 1290-AA23, Requirements for DOL Agencies' Assessment of Occupational Health Risks, 73 FR 50909 (August 29, 2008). That it did not appear on the Department of Labor's Unified Agenda 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 in the Unified Agenda. 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 RULES and REGULATIONS DEPARTMENT OF LABOR Office of Workers' Compensation Programs 20 CFR Part 10 Claims for Compensation; Death Gratuity Under the Federal Employees' Compensation Act Tuesday, August 18, 2009 74 FR 41617-01. 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. PROPOSED RULES, DEPARTMENT OF LABOR, Office of the Secretary, 29 CFR Part 2, RIN 1290-AA23, Requirements for DOL Agencies' Assessment of Occupational Health Risks, 74 FR 44795 (August 31, 2009).

<sup>138</sup> See Jack M. Beermann, Midnight Deregulation forthcoming in *Transitions: Legal Change, Legal Meanings* (A. Sarat, ed., U. Alabama Press); OMB Watch, Turning Back the Clock The Obama Administration and the Legacy of Bush-era Midnight Regulations ("Many of these so-called midnight regulations were deregulatory in nature, targeting public protections for the environment, workers, and the general citizenry."); Matthew Blake, "The midnight deregulation express: In his last days in power, George W. Bush wants to change some rules," The Washington Independent (Nov. 11, 2008) available at <http://washingtonindependent.com/17813/11-hour-regulations>.

<sup>139</sup> The OMB Watch report contains numerous examples. Here are two of them: On December 19, 2008, the EPA published a rule reclassifying certain fuel wastes which would allow them to be burned rather than disposed of in a more sensitive manner as hazardous wastes. RULES and REGULATIONS, ENVIRONMENTAL PROTECTION AGENCY, 40 CFR, Part 261, Expansion of RCRA Comparable Fuel Exclusion, 73 FR 77954 (December 19, 2008). This rule was withdrawn by the Obama administration. RULES and REGULATIONS, ENVIRONMENTAL PROTECTION AGENCY, 40 CFR, Part 261, Withdrawal of Emission-Comparable Fuel Exclusion Under RCRA, 75 FR 33712 (June 15, 2010). On December 18, 2009, the EPA promulgated a rule exempting farms from the obligation to report emissions from animal wastes. See CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 FR 76948 (December 18, 2008). This rule apparently remains in effect.

<sup>140</sup> 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. See RULES and REGULATIONS DEPARTMENT OF LABOR Employment Standards Administration 29 CFR Parts 403 and 408 RIN 1215-AB62 Labor Organization Annual Financial Reports, 74 FR 3678 (January, 21, 2009). This rule was rescinded by the Obama administration. See RULES and REGULATIONS DEPARTMENT OF LABOR Employment Standards Administration 29 CFR Parts 403 and 408 RIN 1215-AB62 Labor Organization Annual Financial Reports. 74 FR 52401 (Oct. 13, 2009). 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

administration's Midnight Regulations reflect 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 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-oriented programs such as environmental regulation and consumer protection is often difficult to explain given 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 it is not certain that the portrayal is accurate, this is how the Bush Midnight deregulation was portrayed by some, and the ideological nature of the Midnight Rules imposing increased reporting and other regulatory burdens exacerbates this perception. In the end, 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

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services based on religious or moral grounds. Rules and Regulations, 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 FR 78072 (December 19, 2008). This rule was rescinded in large part by the Obama administration. See Rules and Regulations, Department of Health and Human Services, Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 FR 9968 (February 23, 2011). In the article cited above entitled "The Midnight De-Regulation 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 The Midnight De-Regulation Express, *supra*.



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. This study looks at the durability of the Midnight Rules of the last three administrations. While durability is a weak proxy for quality of Midnight Rules, using durability has another advantage, which is that 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, we have designated the final three months of each administration as the Midnight Period. This captures all rules issued from October 20 of the election year through Inauguration Day. A question might be raised as to why the approximately two week period before the election is included, since much of the discussion of Midnight Regulation focuses on post-election activity. Although this concern is legitimate, the three month period 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 thus reduce the 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, even though 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, may be 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. Given all of these factors that pull in different directions, the three month period at the end of an administration is a reasonable resolution 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.

The study takes all the OIRA-reviewed rules during the last three Midnight Periods and checks whether they have been suspended, rescinded, amended, or rejected (in whole or in part) on judicial review.<sup>141</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.

Here's how the study was conducted. With the aid of three research assistants, I conducted a search for "final rules" using the Office of Information and Regulatory Affairs (OIRA) official website. 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 backed up also by using 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. Finally, I used the Westlaw search engine to

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<sup>141</sup> The judicial review aspect is not yet complete and it may not be feasible to complete it 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.

identify actions of judicial review that resulted from both the original final rules and their amendments.

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, amendments, and judicial review actions 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 like midterm elections, which may distort regulatory activity eliminated the second year following a presidential election as a potential control term. The first year of a presidential administration was also disqualified 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 and judicial review during the last three Midnight Regulations 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

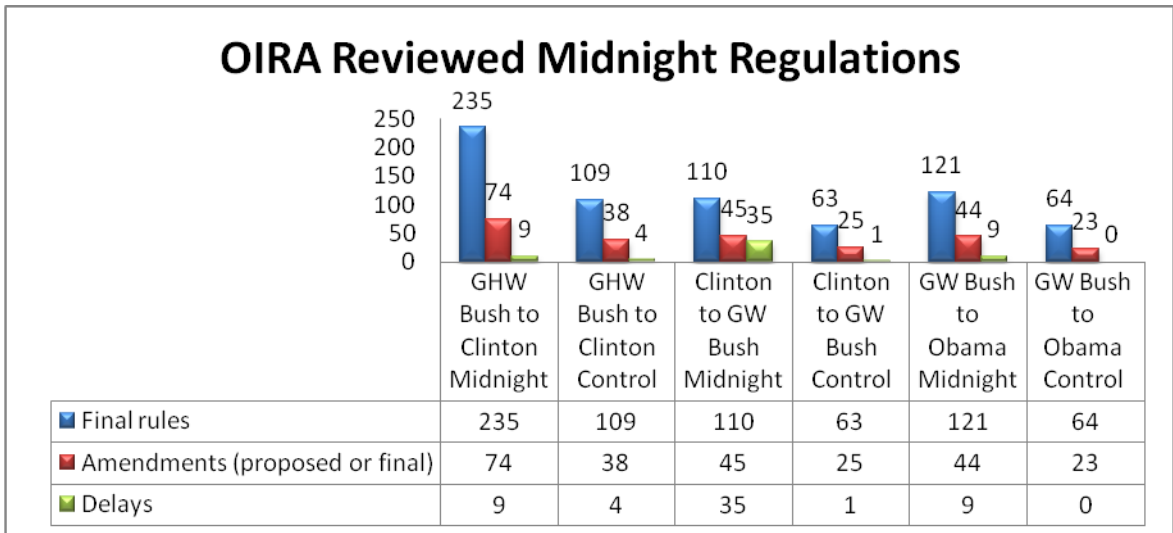
- Code of Federal Regulations citation
- Date rule was published in the Federal Register
- Date the rule became effective
- Summary of the rule
- Amendment’s Federal Register citation, date of publication, date it

became effective, and summary

- Judicial review summary<sup>142</sup>

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 have been amended or had amendments proposed, as compared with 109 during the control period, of which 38 have been amended or had

<sup>142</sup> As noted, it is not clear that this aspect of the study will be completed.

amendments proposed.<sup>143</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 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 percent of Midnight Rules were either amended or had amendments proposed as compared to 34.9 percent in the control period. In the Clinton to GW Bush transition, 40.1 percent of Midnight Rules were either amended or had amendments proposed as compared to 39.7 percent of rules issued during the control period. In the GW Bush-Obama transition, Midnight and control period rules had amendments adopted or proposed in almost identical proportions, 36.3 percent of the Midnight Rules and 35.9 percent 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, which confirms the sense of most of the interviewees that there are not significant qualitative differences between Midnight Rules and non-Midnight Rules.

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<sup>143</sup> 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, the number of rules subject to OIRA review declined significantly. See Curtis W. Copeland, Congressional Research Service, *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 Executive Order 12,286).

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

As part of the preparation of this Report, interviews were conducted with experts on Midnight Rulemaking, including interviews of 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 viewed Midnight Rulemaking as a legitimate exercise of government power on the view that the outgoing administration retains full power to act until the moment of transition, although principled objections to Midnight Rulemaking were also expressed 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 also expressed the view, including officials involved in reviewing rules at the outset of the new administration, that incoming administrations have adequate tools to deal with any problematic Midnight Rules and that Congress can also address problematic examples, as it does at all times. 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 a tool used to make life difficult 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 interviewee with long experience inside government expressed the view that rulemaking 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 concerns expressed 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. It was 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.

## **V. Reactions of Incoming Administrations to Midnight Rulemaking.**

As the Midnight Rulemaking phenomenon became a common feature of presidential transitions, it has produced legal and political consequences. This Section of the Report details three aspects of the reactions that Midnight Rulemaking has spawned. The first part of this Section analyzes the strategies that incoming administrations have developed to deal with the high volume of late-term rules they have confronted upon taking office. The second part of this Section discusses the sparse caselaw on the legality of the strategies employed by incoming administrations to deal with Midnight Rulemaking. The third part of this Section explores an effort by the administration of George W. Bush to avoid producing Midnight Rules by finishing its regulatory work earlier than previous administrations.

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

On January 29, 1981, on his ninth day in office, President Ronald Reagan issued a memorandum<sup>144</sup> directed to twelve department heads<sup>145</sup> and the Administrator of the EPA,

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<sup>144</sup> President Reagan's Memorandum is reproduced in Appendix XXX, and is also available at [#axzz1b4iGvpBn](http://www.presidency.ucsb.edu/ws/index.php?pid=44134).

<sup>145</sup> The memorandum was directed to the following Department Heads: the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Secretary of Energy and the Secretary of Education.

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>146</sup> The memorandum was a precursor to President Reagan's creation of the centralized review process that was established by Executive Order 12291, and its 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 President 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>147</sup>

President Reagan's memorandum served as a model for the actions of subsequent administrations dealing with Midnight Rules and gaining control of administrative agencies.<sup>148</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 have 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

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<sup>146</sup> 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. "

<sup>147</sup> Executive Order 12291, 46 FR 13193, which established centralized review of agency regulations by the Office of Management and Budget, was issued on February 17, 1981. 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. The fact sheet is available here:

[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 the American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=43425#ixzz1iLPpYk97>

<sup>148</sup> Anne Joseph O'Connell endorses these strategies. See O'Connell, *supra* note x at 529-30.



published.<sup>149</sup> On January 20, 2001, President George W. Bush’s Chief of Staff, Andrew Card, issued a memorandum directed to the “Heads and Acting Heads of Executive Departments and Agencies” directing them: not to send any proposed or final regulation to the Federal Register unless the proposed or final regulation has been reviewed by an agency head appointed by President Bush; to withdraw any regulations that have been submitted to the Federal Register, but not yet published, so that they can be so reviewed; and to postpone the effective date of published, but not yet effective, regulations for sixty days.<sup>150</sup>

On January 20, 2009, President Barack Obama’s Chief of Staff, Rahm Emanuel, issued a memorandum<sup>151</sup> instructing Executive Departments and Agencies not to issue new rules until they have been reviewed and approved by an appointee of President 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>152</sup>

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<sup>149</sup> See Notice, Office of Management and Budget, Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993).

<sup>150</sup> 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. See Memorandum to Agency Heads from Mitch Daniels, OMB Director, January 26, 2001, reproduced in the Appendix to this Report. This Memorandum also instructed agencies to inform OMB before publishing any rules not subject to OIRA reviews.

<sup>151</sup> Executive Office of the President, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009).

<sup>152</sup> 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 at <http://ombwatch.org/reg/PDFs/OrszagMemo09-08.pdf> and in the Appendix to this Report. The memorandum instructs agency heads to be selective concerning the postponement of effective dates of regulations, not to postpone effective dates for more than 60 days, 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

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 30 days “to allow interested parties to provide comments about issues of law and policy raised by those rules.”

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 President 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 are not reported, except in one case in which a rule was withdrawn later on the ground that it should not have been published because it was pending at OFR when the Card Memorandum was issued.<sup>153</sup>

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present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.

<sup>153</sup> See [Civilian Health and Medical Program of the Uniformed Services \(CHAMPUS\): Methodology for Coverage of Phase II and Phase III Clinical Trials Sponsored by the National Institutes of Health, 66 Fed. Reg. 9199, 9199 \(Feb. 7, 2001\)](#), 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.

According to an OFR official interviewed for this Report, 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>154</sup>

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 Office of Federal Register (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 OFR for publication in the Federal Register.<sup>155</sup> The second stage is what is known as “filing for public inspection” which happens on the second working day after the document is submitted to OFR for documents received before 2 pm and on the third working day after the document is submitted for documents received after 2 pm.<sup>156</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>157</sup> The third stage is actual publication in the Federal Register which

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<sup>154</sup> See Jack, *supra* note x 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 Mgmt. & Budget, Office of Info. & Regulatory Affairs, *Making Sense of 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/omb/inforeg/costbenefitreport.pdf](http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf).

<sup>155</sup> In addition to the statutes and regulations cited in this section, 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.

<sup>156</sup> 1 CFR § 17.2.

<sup>157</sup> See 44 U.S.C. § 1507 (“filing 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 to be published by Congress.

happens on the working day after filing.<sup>158</sup> There are also provisions for faster filing and publication in emergencies.<sup>159</sup>

OFR regulations allow for withdrawal of documents from the Federal Register by the submitting agency (not anyone else). OFR regulations do not mention withdrawal before filing, so presumably this can be freely done. Because 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>160</sup> states that 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 is and, in some circumstances, whether OFR is convinced that there are adequate reasons for withdrawal.<sup>161</sup> When an agency requests withdrawal of a document that has already been filed for public inspection, OFR insists on a legal justification such as the discovery of a legal mistake in the drafting of the document. If OFR is not convinced that there is an adequate reason for withdrawal, it may, in conjunction with the agency, consult OMB or the Office of Legal Counsel 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 also have successfully delayed the effective dates of published Midnight Rules that had not yet gone into effect.<sup>162</sup> For example, on February 4, 1981, the Reagan

Administration’s Secretary of Transportation issued a blanket notice postponing the effective

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<sup>158</sup> The Federal Register Filing and Publication schedule is contained in 1 CFR § 17.2.

<sup>159</sup> See subpart C of 1 CFR part 17.

<sup>160</sup> See 1 CFR § 18.13.

<sup>161</sup> Any document withdrawn after filing remains available for public inspection at the OFR even if it is not published in the Federal Register. 1 CFR § 18.13.

<sup>162</sup> 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 x at 1484-88.

dates of all Department rules covered by the memorandum.<sup>163</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. It is not completely clear 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 administration's own agenda.<sup>164</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>165</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>166</sup> In the notices announcing suspensions, agencies in the Reagan administration relied on APA § 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 therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The Reagan administration also found "good cause" for making the delay in the effective dates effective immediately, i.e. without waiting

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<sup>163</sup> See Department of Transportation, Notice of Postponement of Pending Regulations, 46 Fed. Reg. 10706 (Feb. 4, 1981).

<sup>164</sup> 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.

<sup>165</sup> See William G. Howell and Kenneth R. Mayer, *The Last One Hundred Days*, 35 *Presidential Studies Quarterly* 533 (2005) (discussing how interest groups fight to retain what they gained at the end of the prior administration).

<sup>166</sup> APA § 553(b)(A) and (B) contain several exceptions to the notice and comment requirement. Relevant here, notice and comment may be dispensed with "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

thirty days as specified in APA § 553(d). For example, the Department of Transportation’s notice suspending the effective dates of numerous Midnight Rules found good cause for dispensing with notice and comment in the nation’s “economic condition” and the need for time to review regulations with imminent effective dates:

[T]he Department is convinced that the economic condition of the Nation is such that the government must rethink the need and burden of each of the below listed regulations. For a new Administration and any new Department head to accomplish this objective effectively, some time is needed for adequate review. Sixty days is the minimum period to accomplish such a review and we believe the impact of such a delay will be minimal. For these reasons, the Department is convinced that good cause exists for postponing for up to 60 days the effective dates of the covered pending regulations and that the end result of such a delay—a more cohesive and effective regulatory program—is in the public interest. For these reasons and because many of the covered rules are scheduled to become effective very shortly, additional notice and public procedure on this change of effective dates is impracticable, unnecessary and contrary to the public interest and good cause exists for making these postponements effective immediately.<sup>167</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 because the review was necessary for the health of the economy.<sup>168</sup> In at least one instance, a notice of postponement of an effective date by the National Park Service in the Department of the Interior was justified merely by the existence of President Reagan’s directive, with no finding of good cause for delay and no specification that the usual thirty day delay of rules’ effectiveness was

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<sup>167</sup> RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Office of the Secretary Postponement of Pending Regulations Wednesday, February 4, 1981 46 FR 10706. Similar language was used in support of delay without notice and comment in several additional Department of Transportation notices. See, e.g., RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Federal Aviation Administration, Amendments of Effective Date of Part 125 and Amendments Adopted in Relation to Part 125 Wednesday, February 4, 1981 46 FR 10705-02; RULES AND REGULATIONS DEPARTMENT OF TRANSPORTATION Office of the Secretary, Postponement of Pending Regulations Thursday, February 5, 1981 46 FR 10906-02

<sup>168</sup> RULES and REGULATIONS DEPARTMENT OF THE TREASURY Bureau of Alcohol, Tobacco and Firearms Standards of Fill for Wine; Deferral of Effective Date Tuesday, February 17, 1981 46 FR 12493-01. The Department of the Treasury used very similar language in RULES and REGULATIONS DEPARTMENT OF THE TREASURY Napa Valley Viticultural Area; Deferral of Effective Date Tuesday, February 17, 1981 46 FR 12493-02 and RULES and REGULATIONS DEPARTMENT OF THE TREASURY Completely Denatured Alcohol Formula No. 20; Deferral of Effective Date Tuesday, February 17, 1981 46 FR 12494-01

waived.<sup>169</sup> During the Reagan administration, when rules were postponed again beyond the initial 60 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 the Department of Transportation 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 further information would be provided beyond that already in the record of this rulemaking." The need for time to perform a review of the benefits of the rule was cited as the reason for the further delay,<sup>170</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 § 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 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. Further suspensions of the effective dates of rules to allow for review under Executive Order 12,291 were ordered apparently without notice and comment.<sup>171</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

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<sup>169</sup> 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." See RULES and REGULATIONS DEPARTMENT OF THE INTERIOR National Park Service Special Regulations, Areas of the National Park System; Glacier Bay National Monument Tuesday, February 17, 1981 46 FR 12496-0

<sup>170</sup> RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Research and Special Programs Administration, Transportation of Liquids by Pipeline; Addition of Water to Pipelines Transporting Anhydrous Ammonia Monday, April 6, 1981 46 FR 20556

<sup>171</sup> RULES AND REGULATIONS, DEPARTMENT OF THE INTERIOR, Extension of Effective Dates for Final Rules; Request for Comments, 46 FR 19233 (March 30, 1981). Comments were requested on whether the rules were "major rules" under Executive Order 12,291.

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.” The notice did not refer to the Panetta Memorandum delaying rules at the outset of the administration.<sup>172</sup> In a famous non-Midnight example, in its first month in office, the Clinton administration suspended the effectiveness 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, without notice and comment, and it did not promulgate a substitute for more than seven years.<sup>173</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>174</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

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<sup>172</sup> See RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES Health Care Financing Administration 42 CFR Parts 435, 436, and 440 Medicaid Program; Eligibility and Coverage Requirements Friday, February 19, 1993 58 FR 9120 (“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 FR 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. RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Federal Transit Administration 49 CFR Part 665 Bus Testing Program; Modification to Interim Final Rule; Delay in Application Date for Small Vehicles Tuesday, February 23, 1993 58 FR 10989.

<sup>173</sup> Rules and Regulations, Department of Health and Human Services, Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 FR 41270 (July 3, 2000).

<sup>174</sup> RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES Public Health Service 42 CFR Part 59 Standards of Compliance for Abortion-Related Services in Family Planning Service Projects Friday, February 5, 1993 58 FR 7462. This Rule had been issued by the Reagan administration and then reinterpreted during the administration of GW Bush. See *National Family Planning and Reproductive Health Ass'n. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).



comment.<sup>175</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. 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, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Agency's implementation of this rule 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. section 553(b)(B) and 553(d)(3), in that seeking public comment is impracticable, 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 sell [sic] as contrary to the public interest in the orderly promulgation and implementation of regulations.<sup>176</sup>

If the regulation was still under review when the 60 day delay expired, in some cases this same language was used to justify further delays without notice and comment.<sup>177</sup> In one case, when comments were taken on whether to retain the rule, a further delay in the effective date was

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<sup>175</sup> United States General Accounting Office, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's January 20, 2001, Memorandum, GAO-02-370R 6 (Feb. 15, 2002).

<sup>176</sup> Department of the Interior, National Parks Service, Special Regulations: Areas of the National Park System: Delay of Effective Date, 66 Fed. Reg. 8366, 8367 (Jan. 31, 2001). 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., RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES Food and Drug Administration 21 CFR Parts 10, 14, and 16 Revision of Administrative Practices and Procedures; Meetings and Correspondence; Public Calendars; Partial Stay, Amendments, and Correction Thursday, March 1, 2001 66 FR 12848-0 (initial delay); RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES Health Care Financing Administration 42 CFR Parts 400, 430, 431, 434, 435, 438, 440, and 447 Medicaid Program; Medicaid Managed Care: Further Delay of Effective Date Monday, June 18, 2001 66 FR 32776-01 (second delay); RULES and REGULATIONS DEPARTMENT OF THE INTERIOR Bureau of Land Management 43 CFR Part 3160 Oil and Gas Leasing: Onshore Oil and Gas Operations Tuesday, August 7, 2001 66 FR 41149-01 (third delay)

<sup>177</sup> RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES Health Care Financing Administration 42 CFR Parts 400, 430, 431, 434, 435, 438, 440, and 447 Medicaid Program; Medicaid Managed Care: Further Delay of Effective Date Monday, June 18, 2001 66 FR 32776-01.

ordered without notice and comment using the same language, with an additional justification, that time was needed to review comments received.<sup>178</sup>

A report prepared by the GAO provides details on the number and nature of rules postponed by the GW Bush administration pursuant to the Card Memorandum.<sup>179</sup> The Government Accountability Office summarized the effects of the Card Memorandum as follows:

Our review of readily available documentation 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, 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>180</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

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<sup>178</sup> RULES and REGULATIONS DEPARTMENT OF THE INTERIOR Bureau of Land Management 43 CFR Part 3160 Oil and Gas Leasing: Onshore Oil and Gas Operations Tuesday, August 7, 2001 66 FR 41149.

<sup>179</sup> United States General Accounting Office, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s January 20, 2001, Memorandum, GAO-02-370R (Feb. 15, 2002).

<sup>180</sup> United States General Accounting Office, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s January 20, 2001, Memorandum, GAO-02-370R 2-3 (Feb. 15, 2002).

Memorandum were delayed.<sup>181</sup> Second, agencies did not postpone the effective dates of rules when there was sufficient time before that date to review the rules.<sup>182</sup> Third, the GAO reports 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>183</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. 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>184</sup>

The GW Bush administration’s review of the previous administration’s rulemaking activities extend beyond rules that had actually been finalized in the Midnight Period. Anne Joseph 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>185</sup> According to O’Connell, proposed rules that span a presidential transition are 14% more likely to be withdrawn than other rulemaking proposals.

When time allowed, the Obama administration sought comment on whether the effective dates of rules should be postponed.<sup>186</sup> Like prior administrations, when time did not allow, the

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<sup>181</sup> See *id.* at 4, Table 1.

<sup>182</sup> *Id.* at 4-5.

<sup>183</sup> *Id.* at 5.

<sup>184</sup> *Id.* at 7. In most cases, the rules went into effect without further notice in the Federal Register.

<sup>185</sup> O’Connell, *supra* note x at 473. See also *id.* at 508, Figures 10 and 39 (detailing the number of withdrawn rules in President Clinton’s third year (383) and President GW Bush’s second year (433)).

<sup>186</sup> See, e.g., U.S. Department of Labor, Employee Benefits Security Administration, “Investment Advice—Participants and Beneficiaries,” 74 *Federal Register* 6007, February 4, 2009, seeking comment on proposal postpone, for 60 days, the effective date of rule scheduled to take effect on March 23, 2009. Two more final rules

Obama administration did not seek comment on whether effective dates should be postponed, but this was clearly a disfavored strategy since comments were sought in one instance, 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>187</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 periods. Further, a new practice in the Obama administration was for agencies to reopen the comment period for at least 30 days on virtually all rules postponed, as instructed by the Emanuel Memorandum, to receive comments on whether the rules should be retained or altered in any way. 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 notice and comment in the particular cases.

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 30 waiting period for putting new rules into effect) were to allow the public to comment on the

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were subsequently issued staying the effective date of the rule in question twice. See U.S. Department of Labor, Employee Benefits Security Administration, "Investment Advice—Participants and Beneficiaries," 74 *Federal Register* 11847, March 20, 2009; U.S. Department of Labor, Employee Benefits Security Administration, "Investment Advice—Participants and Beneficiaries," 74 *Federal Register* 23951, May 22, 2009. This example is discussed in Curtis Copeland's CRS report, *supra* note x 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 RULES and REGULATIONS DEPARTMENT OF LABOR Employee Benefits Security Administration 29 CFR 2550 Investment Advice-Participants and Beneficiaries Friday, November 20, 2009 74 FR 60156-01 (withdrawal of GW Bush administration rule); RULES and REGULATIONS DEPARTMENT OF LABOR Employee Benefits Security Administration 29 CFR Part 2550 Investment Advice—Participants and Beneficiaries Tuesday, October 25, 2011 76 FR 66136-01 (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.

<sup>187</sup> See U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "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 *Federal Register* 6557, February 10, 2009.

rules and to allow the agency time to consider any new comments received.<sup>188</sup> For 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>189</sup> In language that was used in several other notices, the agency explained its decision not to seek comment on the delay as follows:

We ordinarily publish a notice of proposed rulemaking in the Federal Register to provide a period for public comment before the provisions of a notice such as this take effect, in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). We also ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the APA (5 U.S.C. 553(d)). However, we can waive both the notice and comment procedure and the 30-day delay in effective date if the Secretary finds, for good cause, that it is impracticable, unnecessary or contrary to the public interest to follow the notice and comment procedure or to comply with the 30-day delay in the effective date, and incorporates a statement of the finding and the reasons in the notice.

This action delays the effective date of the November 25, 2008 final rule that was promulgated through notice and comment rulemaking. 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>190</sup>

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<sup>188</sup> 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.

<sup>189</sup> Department of Health and Human Services, Centers for Medicare & Medicaid Services, Medicaid Program; Premiums and Cost Sharing, 74 Fed. Reg. 4888 (Jan. 27, 2009).

<sup>190</sup> 74 Fed. Reg. at 4888-89. An example using similar language is RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES Centers for Medicare & Medicaid Services 42 CFR Part 414 Medicare Program; Changes to the Competitive Acquisition of Certain Durable Medical Equipment, Prosthetics, Orthotics and

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>191</sup>

In some cases, agencies gave reasons for delay without advertent to APA § 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 containing the following language, which cites 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 OPPS 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>192</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

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Supplies (DMEPOS) by Certain Provisions of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) Thursday, February 19, 2009 74 FR 7653-01.

<sup>191</sup> RULES and REGULATIONS DEPARTMENT OF AGRICULTURE Forest Service 36 CFR Parts 223 and 261 Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products Thursday, January 29, 2009 74 FR 5107. 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., RULES and REGULATIONS ENVIRONMENTAL PROTECTION AGENCY 40 CFR Parts 51 and 52 Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation Friday, February 13, 2009 74 FR 7284.

<sup>192</sup> RULES and REGULATIONS DEPARTMENT OF DEFENSE Office of the Secretary 32 CFR Part 199 TRICARE; Hospital Outpatient Prospective Payment System (OPPS): Delay of Effective Date and Additional Opportunity for Public Comment Friday, February 6, 2009 74 FR 6228-01.

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 60 days.<sup>193</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>194</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>195</sup> The comment period on whether to implement the delay was a relatively brief 10 days because otherwise the rule would have gone into effect before decision on that issue, but the comment period on the substantive merits of the rule was 30 days. Since nothing was being done without notice and comment, there was no finding of cause for proceeding without those procedures, but there is also no discussion of why it is 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 March 30, 2009, effective date of a rule published on January 27, 2009, should be extended for 60 days “[i]n accordance with the memorandum of January 20, 2009, from the assistant to the President and Chief of Staff, entitled ‘Regulatory Review,’ and also to consider the rule ‘generally.’”<sup>196</sup> The comment period was 30 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 Barack Obama became President. It is not clear how, in light of the Emanuel

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<sup>193</sup> RULES and REGULATIONS DEPARTMENT OF LABOR Employment Standards Administration 29 CFR Parts 403 and 408 Labor Organization Annual Financial Reports Tuesday, February 3, 2009 74 FR 5899.

<sup>194</sup> Id.

<sup>195</sup> Id.

<sup>196</sup> PROPOSED RULES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 24 CFR Parts 5, 92, and 908 Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Proposed Delay of Effective Date Wednesday, February 11, 2009 74 FR 6839

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. As Curtis Copeland reports, the implementation of some rules has been delayed while the agency acts on petitions for reconsideration. The APA grants all interested persons the right to petition for the “issuance, amendment, or repeal of a rule.” 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>197</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>198</sup>

Another set of tools that incoming administrations have to mute the consequences of Midnight Rules involves 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, Curtis Copeland reports on two instances in which a final Midnight Rule was not being enforced by the Obama administration.<sup>199</sup> The first is an HHS Midnight Rule that was issued on December 8, 2009, with an effective date of January 20, 2009.<sup>200</sup> This rule requires HHS to collect information, which cannot be done by a federal agency without OMB approval under the

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<sup>197</sup> See 42 U.S.C.A. § 7607(d)(7)(B).

<sup>198</sup> See Copeland, *supra* note x at 26.

<sup>199</sup> See Copeland, *supra* note x at 30-31.

<sup>200</sup> U.S. Department of Health and Human Services, Office of the Secretary, “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* 78072, December 19, 2008.



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. Subsequent to the publication of Copeland's report, HHS proposed and adopted a final rule rescinding in part and revising the December, 2009, rule.<sup>201</sup> The other example involves a Department of the Interior Midnight Rule on shale oil deposits on federal land.<sup>202</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. 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>203</sup> A new solicitation, with revised terms, was issued on November 3, 2009.<sup>204</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 Professor Jim 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>205</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 at least one case, a federal court issued an injunction requiring implementation of a Midnight

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<sup>201</sup> RULES and REGULATIONS DEPARTMENT OF HEALTH AND HUMAN SERVICES 45 CFR Part 88 Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws Wednesday, February 23, 2011 76 FR 9968-02

<sup>202</sup> U.S. Department of the Interior, Bureau of Land Management, "Oil Shale Management; General," 73 *Federal Register* 69414, November 18, 2008, discussed in Copeland, *supra* note x at 31.

<sup>203</sup> See U.S. Department of the Interior, Bureau of Land Management, "Potential for Oil Shale Development; Withdrawal of the Call for Nominations—Oil Shale Research, Development, and Demonstration (R, D, and D) Program and Request for Public Comment," 74 *Federal Register* 8983, February 27, 2009.

<sup>204</sup> NOTICES DEPARTMENT OF THE INTERIOR Bureau of Land Management Notice of Potential for Oil Shale Development: Call for Nominations-Oil Shale Research, Development and Demonstration Program Tuesday, November 3, 2009 74 FR 56867-02

<sup>205</sup> Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 *Duke L.J.* 1016, 1039-40 (2001).

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>206</sup> Business interests joined the 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, but although the agency sought comments on the suspension, which is 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>207</sup> The court enjoined the suspension on the ground that the agency violated APA § 553 by not considering comments on the merits of the action it took, which was to reinstate, perhaps temporarily, the 1987 rule.<sup>208</sup>

A final strategy that incoming administrations might use against Midnight Rulemaking is to support rejection under the Congressional Review Act (CRA), 5 U.S.C. §§ 801 et seq. or other negative action in Congress. Under the CRA, Congress created an expedited procedure 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 is the subject of a separate ACUS Report and thus is not considered in any depth here. The important point for purposes of this Report is to note that CRA rejection is

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<sup>206</sup> The rule at issue concerned visas for temporary agricultural workers. See U.S. Department of Labor, Employment and Training Administration, and Wage and Hour Division, "Temporary Employment of H-2A Aliens in the United States," 73 FR 77110, December 18, 2008. This example is discussed at various places in Copeland's CRS report. See Copeland, *supra* note x at 22-23, 32.

<sup>207</sup> PROPOSED RULES DEPARTMENT OF LABOR Employment and Training Administration Wage and Hour Division 20 CFR Part 655 29 CFR Parts 501, 780, and 788 Temporary Employment of H-2A Aliens in the United States Tuesday, March 17, 2009 74 FR 11408 ("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.")

<sup>208</sup> North Carolina Growers' Ass'n, Inc. v. Solis, 644 F. Supp. 2d 664 (M.D.N.C. June 29, 2009) (grant of temporary injunction). See also North Carolina Growers' Ass'n, Inc. v. Solis, slip opinion, 2011 WL 4708026 (M.D.N.C., Oct. 4, 2011) (granting summary judgment to plaintiffs on same grounds).

more likely to be effective with regard to Midnight Rules because at other times, it would seem likely that the President would veto Congress's resolution rejecting a rule.<sup>209</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 November 7, 2008, for a period of six and one-half months.<sup>210</sup> During that period, the agency proposed and adopted a final rule rescinding the rule in question, basically for policy reasons concerning the delivery of health care services affected by the rule.<sup>211</sup> Under some circumstances, support from the incoming administration for congressional action directed at Midnight Rules might support 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 issued by their predecessor, sometimes quite recent ones.<sup>212</sup> For example, on January 30, 2009, President Obama revoked two of George W. Bush's Executive Orders concerning regulatory planning and review, one issued in 2002 and the other issued in 2007.<sup>213</sup> Interpretative rules, policy statements, guidance

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<sup>209</sup> Presentment to the President is required under *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>210</sup> See Copeland, *supra* note x at 20, discussing implementation of U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Medicaid Program; Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition," 73 *Federal Register* 66187, November 7, 2008.

<sup>211</sup> See Copeland, *supra* note x at 20 & n. 117-118, citing U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "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 *Federal Register* 31183, June 30, 2009.

<sup>212</sup> See CRS Report on Transitions at 11-12 n. 38.

<sup>213</sup> Barack H. Obama, Executive Order 13497 - Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, revoking Executive Order 13258 of February 26, 2002, and Executive Order 13422 of

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>214</sup>

Incoming administrations thus have powerful tools to deal with the previous administration's Midnight Rules, but there are reasons to be cautious about whether these tools are adequate to deal with the entire problem. One issue has to do with 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>215</sup> As is discussed below, if an outgoing administration 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 might not meet the technical definition of Midnight Rules, similar concerns arise if an administration engages in a high volume of regulatory activity earlier in its eighth year.

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January 18, 2007, concerning regulatory planning and review, which amended Executive Order 12866 of September 30, 1993.

<sup>214</sup> See *supra* note x.

<sup>215</sup> See generally O'Connell, *supra* note x.

Incoming administrations' reactions to Midnight Rules and leftover rulemaking proposals may also be embodied in or affected by the new administration's regulatory agenda.<sup>216</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. The administration may choose to allow Midnight Rules to take effect 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 the reactions of incoming administrations to the 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 were 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 decided 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 again for several reasons, this has not happened very often. For one, 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 further delay, except in those cases in which additional delays have been ordered without notice and comment.

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<sup>216</sup> See O'Connell, *supra* note x at 532..

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

The Office of Legal Counsel (“OLC”) provided an opinion to the Reagan administration on the legality of President Reagan’s order to agency and department heads delaying the effective dates of rules for 60 days and ordering a freeze until the centralized review process could be put into place.<sup>217</sup> OLC concluded that President Reagan’s order was lawful. As to rules that had not yet been finalized and published, OLC concluded that the delays are lawful because the APA does not impose any procedural requirements on such an action and 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>218</sup>

The OLC opinion offered a different analysis of the President’s power to delay the effective dates of rules that had been published but had not yet reached their effective dates. Here, the opinion first proposed that a 60 day extension of the effective date of a rule was within the agency’s power because while the APA prescribes only a 30 day minimum between promulgation and legal effect, it does not prohibit or even discourage agencies from providing more than 30 days notice of the effective date of rules. 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>219</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>220</sup> The opinion does acknowledge that extensions of effective

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<sup>217</sup> Office of Legal Counsel U.S. Department of Justice, Presidential Memorandum Delaying Proposed and Pending Regulations January 28, 1981. This opinion is available in the USAG database on Westlaw.

<sup>218</sup> Id. at \*1.

<sup>219</sup> Id. at \*2.

<sup>220</sup> Id. at \*2

“[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,

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>221</sup>

The OLC opinion also concludes that even if a delay in a rule's effective dates is considered rulemaking, agencies will 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>222</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 disagrees with the OLC opinion and has argued strongly that the delays imposed by incoming administrations are unlawful. In this note, the author argues that

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

Id., footnote omitted.

<sup>221</sup> Id. at \*3. 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.

<sup>222</sup> Id. at \*3.

“As a matter of administrative law doctrine, they 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 power. Therefore, a reviewing court should invalidate such delays if they ever are attempted again.”<sup>223</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 but for different reasons. “Those 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>224</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: “the 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>225</sup> This argument depends on the principle that agencies may justify rulemaking based only on reasons embodied in the statute that forms the basis for the rules.<sup>226</sup>

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<sup>223</sup> Note, B.J. Sanford, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. Rev. 782 (2003).

<sup>224</sup> See *id.* at 803.

<sup>225</sup> *Id.* at 803.

<sup>226</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (“To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.”)



Another commentator has taken a more equivocal position on the legality of the actions of incoming administrations directed at Midnight Rules.<sup>227</sup> This comment concludes that in most cases, a 60 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>228</sup> However, the comment concludes that in some cases, a 60-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 relied on the blanket explanation that all of the delays were mere procedural rules.”<sup>229</sup>

Assuming that delays in effective dates are rules presumptively subject to notice and comment, this comment 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 bases 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>230</sup> The comment did allow that notice and comment for a brief delay might be “unnecessary” and thus survive scrutiny under APA § 553 because the delay “will not substantially affect a party's rights and

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<sup>227</sup> See 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 (2002).

<sup>228</sup> Id. at 1507.

<sup>229</sup> Id. at 1507-08 (footnote omitted).

<sup>230</sup> Id. at 1509-10.

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>231</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 order agencies to withdraw regulations from the Federal Register before they are published is lawful and renders the withdrawn rule null and void. 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 (9<sup>th</sup> Cir. 1996). In *Kennecott Utah Copper*, 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>232</sup> On January 21, 1993, the second full day of the Clinton administration, the DOI withdrew the rule before it was published. After the DOI promulgated substitute regulations less favorable to industry, Kennecott Copper sought 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 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>233</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

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<sup>231</sup> Id. at 1511.

<sup>232</sup> *Kennecott Copper*, 88 F.3d at 1200.

<sup>233</sup> Id. at 1206-07.

agencies to correct mistakes and avoid the “needless expense and effort of amending regulations through the public comment process” later.<sup>234</sup>

The Court also rejected the claims, brought by different petitioners, that DOI could not withdraw the rule without allowing notice and comment before DOI could withdraw the rule. 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. Although the court rejected this argument, on the ground that “the two sets of regulations did not cover the same issues,”<sup>235</sup> for two different reasons, it held that the challengers were not entitled to notice and comment on the withdrawal of the rule from the OFR. First, the court held that the withdrawn rule had never gone into effect as a binding rule.<sup>236</sup> Second, the withdrawal was not a rule within the APA’s definition of that term mainly because the withdrawn rule had never gone into effect. Not being a rule, notice and comment was not required before the agency withdrew the not-yet published document.<sup>237</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*<sup>238</sup>, an asylum applicant relied, in part, on a rule that had been sent to OFR by the outgoing administration of GHW Bush but was withdrawn before publication by the incoming Clinton administration. 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 subsequently published; therefore, it has no legal effect and is not binding on this court.”<sup>239</sup>

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<sup>234</sup> 88 F.3d at 1206. See supra at x for an explanation of OFR procedures and the withdrawal of unpublished rules.

<sup>235</sup> 88 F.3d at 1208.

<sup>236</sup> 88 F.3d at 1208.

<sup>237</sup> 88 F.3d 1209.

<sup>238</sup> *Chen v. Immigration and Naturalization Service*, 95 F.3d 801 (9<sup>th</sup> Cir. 1996).

<sup>239</sup> *Chen*, 95 F.3d at 805.

There are several additional decisions either affirming or assuming that the unpublished rule at issue in *Chen* has no legal effect because it was withdrawn before publication.<sup>240</sup>

In one case, *Xin-Chang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994), *reversed*, *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995), the District Court held that the withdrawn rule involved in *Chen* was effective even though it had not been published. This court viewed publication as a formality unrelated to the legal effectiveness of the rule, which the court viewed as 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, as applied in *Morton v. Ruiz*, 415 U.S. 199 (1974), an unpublished rule cannot be used against a member of the public. 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>241</sup> This conclusion was rejected on appeal by the Second Circuit, which held that the unpublished rule never became effective.<sup>242</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>243</sup>

An official at OFR has confirmed that many rules arrive at OFR with instructions to insert an effective date, often 30 or 60 days after publication. OFR regulations contain

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<sup>240</sup> See *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4<sup>th</sup> Cir. 1995); *Wang v. Slattery*, 877 F. Supp. 133 (S.D.N.Y. 1995); *Si v. Slattery*, 864 F. Supp. 397 (S.D.N.Y. 1994); *Fei v. Carroll*, 866 F. Supp. at 287; *Gao v. Waters*, 869 F. Supp. at 1480.

<sup>241</sup> *Xin-Chang v. Slattery*, 859 F. Supp. at 712.

<sup>242</sup> *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995).

<sup>243</sup> *Id.* at 749.

instructions for computing effective dates based on agency instructions.<sup>244</sup> The reasoning in *Zhang* raises the possibility that the court would not allow an incoming administration to withdraw a rule that had an effective date designated when it was sent to the Federal Register, which may be true for 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 become effective by withdrawing it from the OFR.<sup>245</sup>

There is at least one state supreme court decision holding against the authority of an incoming governor to order withdrawal of unpublished rules from the state equivalent of the Federal Register. In New Mexico, upon taking office, incoming governor Susana Martinez issued an Executive Order suspending “all proposed and pending rules and regulations under the Governor’s authority for a ninety day review period.”<sup>246</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. (The Register is published only twice per month, allowing ample time for the incoming administration to address these recently promulgated rules.) 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

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<sup>244</sup> 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 CFR § 18.17. 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 the agency 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 specify specific effective 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.

<sup>245</sup> *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.”)

<sup>246</sup> *New Energy Economy, Inc. v., Martinez*, 247 P.3d 286, 288 (N.M. 2011).

agencies involved were not under the Governor's authority because they are statutorily removed from control by the Secretary.<sup>247</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 Acting Cabinet Secretary of the New Mexico Environment Department rather than the chairs of the agencies that had promulgated the rules.<sup>248</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 agency.

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>249</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>250</sup> In *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982), the Third Circuit invalidated the Reagan administration's suspension of a Carter administration Midnight Rule<sup>251</sup>

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<sup>247</sup> See *id.*, 247 P.3d at 293.

<sup>248</sup> See *id.*, 247 P.3d at 288.

<sup>249</sup> See *Env'tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983).

<sup>250</sup> See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 119-122 (4<sup>th</sup> ed. 2006).

<sup>251</sup> 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.

on discharge of waste into public water treatment works, which had been promulgated to comply with the government's obligations under a settlement agreement. The rule, published on January 28, 1981, carried an effective date of March 13, 1981, but, on February 12, 1981, pursuant to President Reagan's instructions, the effective date of the rule was postponed until March 30, 1981. Then, on March 27, 1981, the EPA administrator indefinitely postponed the effective date of the rule, relying solely on Executive Order 12291 as authority for the postponement. 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.

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>252</sup> The court next determined that the postponement was subject to the APA's notice and comment requirement because it "has a substantial impact upon the public and upon the regulated industry."<sup>253</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 requirement of Executive Order 12291. 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>254</sup> The decision thus appears to

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<sup>252</sup> *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982) ("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 *EDF v. Gorsuch*, 713 F.3d 802 (D.C. Cir. 1983), appears to agree with this conclusion.

<sup>253</sup> 683 F.2d at 764.

<sup>254</sup> *Id.* at 765-66. In fact, this is exactly what the EPA did while the litigation challenging the March 27 postponement was pending.

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*, 653 F.2d 573 (D.C. Cir. 1981), the court of appeals approved a six month "Midnight Suspension" of the effective date of a rule that the agency had promulgated two years earlier. The regulation at issue, promulgated in 1978, required mines to equip their miners with certain safety equipment by December 21, 1980. On December 5, 1980, without notice and comment, the Department of Labor extended the compliance date to June 21, 1981, by which time Ronald Reagan would have assumed the presidency, succeeding Jimmy Carter. 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. 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. The court then characterized the case as "close", but found good cause for acting without notice and 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>255</sup>

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<sup>255</sup> 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 RULES and REGULATIONS DEPARTMENT OF LABOR Mine Safety and Health Administration 30 CFR Part 75, Self-Contained Self-Rescue Devices; Emergency Temporary Standard, [52 FR 24377](#), Tuesday, June 30, 1987.



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.

There is another court of appeals decision that disallowed the suspension of a Midnight Rule, *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), but it arose in a special situation in which the relevant statute prohibits the agency from “backsliding” and thus may not be generalizable. 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>256</sup> two days after George W. 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, advertent to the Card Memorandum, DOE issued a final rule without notice and comment<sup>257</sup> delaying the effective date of the new efficiency standards until April 23, 2001, or approximately sixty days after the original effective date.<sup>258</sup> On July 25, 2001, DOE published an NPRM proposing to withdraw the January 22 rule and substitute less stringent efficiency standards.<sup>259</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, 42 U.S.C.A. §6295( o)(1). The anti-backsliding provision in substance makes it unlawful for DOE to relax any previously adopted efficiency standards, and the Bush administration’s definitional provisions were designed to make clear that its actions with regard

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<sup>256</sup> ECPCP-ECSCACHP, 66 Fed. Reg. 7,170 (Jan. 22, 2001).

<sup>257</sup> 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. ECPCP-ECSCACHP, 66 Fed. Reg. at 8,745

<sup>258</sup> ECPCP-ECSCACHP, 66 Fed. Reg. at 8,745.

<sup>259</sup> ECPCP-ECSCACHP, 66 Fed. Reg. 38,822 (July 25, 2001).

to these rules did not constitute backsliding. On judicial review, the Second Circuit held that 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*.<sup>260</sup>

For purposes of this Report, the most interesting aspect of *Abraham* was the court's rejection of DOE's claim that it has inherent power to suspend the effective date of published rules before their effective dates.<sup>261</sup> In this particular case, it might have been possible 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 even under the DOE's interpretation of the anti-backsliding provision, it had the substantive effect of allowing DOE to substitute less stringent standards,<sup>262</sup>

The court also rejected 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 DOE during the two administrations as a single entity, and thus because the emergency (the imminent effectiveness of the new rules) necessitating quick action was created by DOE itself, there was no good reason for suspension without notice and comment.<sup>263</sup>

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<sup>260</sup> 355 F.3d at 198-200.

<sup>261</sup> 355 F.3d at 202-04.

<sup>262</sup> 355 F.3d at 204-05.

<sup>263</sup> 355 F.3d at 205. ("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.")

The court also rejected the argument that the notice and comment procedures DOE conducted on the replacement standards cured any defect in the process for suspending the rule. 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>264</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 announce 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>265</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.

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<sup>264</sup> 355 F.3d at 206 n. 14.

<sup>265</sup> 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.

In another case, discussed above, a federal district court found an agency's suspension of a Midnight Rule<sup>266</sup> contrary to the APA but not on grounds applicable to most Midnight Rule suspensions. In *North Carolina Growers' Ass'n, Inc. v. Solis*, 644 F. Supp. 2d 664 (M.D.N.C. 2009), the court granted a temporary injunction against the suspension, with notice and comment, of a Midnight Rule concerning visas for temporary agricultural workers.<sup>267</sup> The Department of Labor, in the notice requesting comments on the possibility of suspension, stated that the suspension was necessary because it did not have the time or resources to implement the new rule.<sup>268</sup> The court found that the Department of Labor had violated the APA not by suspending the rule but by 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>269</sup> Because most postponements or suspensions done 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 § 553 does not necessarily affect most suspensions or postponements of Midnight Rules.

There is a body of non-Midnight case law that subjects rule suspensions to judicial review on substantive and procedural grounds.<sup>270</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, capricious standard of

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<sup>266</sup> See U.S. Department of Labor, Employment and Training Administration, and Wage and Hour Division, "Temporary Employment of H-2A Aliens in the United States," 73 *Federal Register* 77110, December 18, 2009. This example is discussed at various places in Copeland's CRS report. See Copeland, *supra* note x at 22-23, 32.

<sup>267</sup> See also *North Carolina Growers' Ass'n, Inc. v. Solis*, slip opinion, 2011 WL 4708026 (M.D.N.C., Oct. 4, 2011) (granting summary judgment to plaintiffs). This example is discussed at various places in Copeland's CRS report. See Copeland, *supra* note x at 22-23, 32.

<sup>268</sup> PROPOSED RULES DEPARTMENT OF LABOR Employment and Training Administration Wage and Hour Division 20 CFR Part 655 29 CFR Parts 501, 780, and 788 Temporary Employment of H-2A Aliens in the United States Tuesday, March 17, 2009 74 FR 11408.

<sup>269</sup> *North Carolina Growers' Ass'n, Inc. v. Solis*, 644 F. Supp. 2d 664 (M.D.N.C. June 29, 2009) (grant of temporary injunction). See also *North Carolina Growers' Ass'n, Inc. v. Solis*, slip opinion, 2011 WL 4708026 (M.D.N.C., Oct. 4, 2011) (granting summary judgment to plaintiffs on same grounds).

<sup>270</sup> See O'Connell, *supra* note x at 530 n. 198.

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

The GW Bush administration relied on an additional justification for postponing effective dates without notice and comment, that such actions are “rules of procedure” exempt from the notice and comment requirements of APA § 553. There is no caselaw on the specific question whether this application of the procedural rule exception to notice and comment is correct. 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 § 553’s notice and comment 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 § 553’s notice and comment requirements. *See, e.g., Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir.1974). In later cases, the courts, having recognized that many rules that are truly procedural can have substantial impacts on regulated parties, have moved away from concern over 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*, 834 F.2d 1037 (D.C. Cir. 1987). 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 value judgment or puts a stamp of approval or disapproval on a given type of

behavior.”<sup>271</sup> A brief delay of the effective date of a rule 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>272</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 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>273</sup> In *State Farm*, the Supreme Court rejected the argument that rescissions should be reviewed on an extra-deferential standard because, being deregulatory in operation, they should be treated like decisions not to regulate.<sup>274</sup> Rather, the Court held that

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<sup>271</sup> 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.

<sup>272</sup> 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. Examples include *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984) and *Bachow Communications 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). 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. See *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements* (Recommendation No. 92-1).

<sup>273</sup> 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”).

<sup>274</sup> See *id.* at 40-44.

rescissions should be reviewed under the arbitrary and capricious standard that applies to most rules issued after notice and comment.<sup>275</sup>

*State Farm* was originally understood potentially to be a serious impediment to rescission or revision of Midnight Rules. More than one scholar took *State Farm* to place serious restrictions on agencies' ability to rescind or amend their rules.<sup>276</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.*, 129 S. Ct. 1800 (2009), the Court read the APA to more freely allow revision and rescission of rules than was previously thought.<sup>277</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 rule than the prior rule but rather whether it is adequately supported by the rulemaking record. This should allow incoming administrations more freedom to rescind and revise Midnight Rules than was previously thought existed 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 Experience with Midnight Rulemaking.**

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<sup>275</sup> See *id.* at 43.

<sup>276</sup> See Beermann, *supra* note x at 1010; Loring and Roth, *supra* note x at 1457.

<sup>277</sup> 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.*" 463 U.S., at 42 (emphasis supplied). 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." 129 S. Ct. at 1810. 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.

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 of Florida 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 12,866 and related orders, to be administered by the Office of Fiscal Accountability and Regulatory Reform (OFARR).<sup>278</sup> After the transition period was over, Governor Scott replaced this order with an order omitting the suspension of rulemaking but reiterating that all rules must be reviewed by OFARR before issuance.<sup>279</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>280</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>281</sup> 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

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<sup>278</sup> See Executive Order 11-01, Governor Rick Scott, State of Florida, Suspending Rulemaking and Establishing the Office of Fiscal Accountability and Regulatory Reform, January 4, 2011 <http://www.flgov.com/wp-content/uploads/orders/2011/11-01-rulemaking.pdf>.

<sup>279</sup> Executive Order 11-72.

<sup>280</sup> See *Whaley v. Scott*, --- So.3d ----, 2011 WL 3568804 (Fla. 2011).

<sup>281</sup> *Id.* at xxx (emphasis in original).



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>282</sup>

Although it seems extremely unlikely, 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. However, 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 President Reagan’s issuance of Executive Order 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, as exemplified by the acceptance of withdrawal of rules before publication pursuant to presidential directives, federal law is not likely to follow Florida’s precedent.

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

a. 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

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<sup>282</sup> Id. at xxx.

expressed by the District Court in the *Xin-Chang*<sup>283</sup> decision, which was not completely rejected by the Second Circuit, that publication is a formality and that a rule, at least one benefiting a member of the public, becomes effective when it finalized at the agency. As to rules that had not been submitted to 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, although 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>284</sup>

**b.** The power of agencies to delay the effective dates of rules that have been published but have not yet reached their effective dates without notice and comment and simply to allow the new administration to review them is uncertain. On whether notice and comment is required to delay the effective date of a published rule, the weight of the authority is mixed. 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>285</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 they 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 caselaw there is appears to reject the view that that the desire of the new administration to review Midnight Rules before they go into effect provides

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<sup>283</sup> *Xin-Chang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994), *reversed*, *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995).

<sup>284</sup> Cf. *Public Citizen Health Research Group 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).

<sup>285</sup> See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982);

good cause to proceed without notice and comment.<sup>286</sup> The GW Bush administration may 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>287</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..<sup>288</sup>

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

On May 9, 2008, President Bush's 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>289</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.*" (emphasis supplied).

These deadlines, June 1 for proposing rules and November 1 for finalizing rules, would mean that the Bush Administration would issue virtually no Midnight Rules under the definition used in this Report. All proposals would be public and subject to comment well before the

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<sup>286</sup> *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004); *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982). *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.

<sup>287</sup> *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

<sup>288</sup> *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982).

<sup>289</sup> Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008), available at <http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf>. This Memorandum is reproduced as Appendix XXX.

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 30 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 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 action by the new Congress under the CRA and rules that are not. A Report prepared by the Congressional Research Service stated the following conclusion 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 111th 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>290</sup>

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<sup>290</sup> See L. Elaine Halchin, CRS Report for Congress: Presidential Transitions: Issues Involving Outgoing and Incoming Administrations 7 (November 25, 2008).

The Bolten Memo did not succeed in eliminating Midnight Rulemaking in the G.W. Bush administration, but it reduced it at least somewhat. According to Susan Dudley, OIRA administrator at the end of the G.W. Bush administration, the number of post-election rules issued in 2008-09 was 100 as compared to 143 in 2000-01, although the number of post-election economically significant rules was much closer, 37 in 2008-09 as compared to 41 in 2000-01.<sup>291</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 as compared to 72 final rules in the final three weeks of the Clinton administration.

Susan 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>292</sup> There was great pressure to waive the deadlines, which the Bolten Memo had promised would occur only in “extraordinary circumstances.” Dudley reports that Bolten decided to allow waivers in four circumstances. 1. 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.” 2. “Final regulations that an agency identified as a high priority *and* had provided adequate public notice and opportunity for comment (generally defined as having met the June 1 deadline for publication of the proposed rule).” 3. “Regulations that faced statutory or judicial deadlines were also granted

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<sup>291</sup> See Susan Dudley, “Regulatory Activity in the Bush Administration at the Stroke of Midnight,” Engage, v. 10 p. 27 (2009) at 28.

<sup>292</sup> Id. at 27.

exceptions, even if they did not meet the first two criteria.” and 4. “[R]egulations that were considered presidential priorities.”<sup>293</sup>

Susan 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>294</sup>

Dudley recommends that future administrations issue similar memoranda, perhaps earlier in their administrations, to reduce Midnight Rulemaking as much as possible.<sup>295</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>296</sup> This would arguably 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. Dudley's figures bear this out to some extent. She reports that the GW Bush administration issued more regulations (212) in the June to January period of its last year than did the Clinton administration (201).<sup>297</sup> In 2008, the final full year of the GW Bush administration, Anne Joseph O'Connell found 649 final actions by Cabinet agencies and 118 actions by Executive Branch agencies for a

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<sup>293</sup> Id. at 28.

<sup>294</sup> Susan Dudley, Observations on OIRA's Thirtieth Anniversary, 63 Admin. L. Rev. 113, 124-25 (2011).

<sup>295</sup> Id. at 125; interview with Susan Dudley conducted on November 15, 2011.

<sup>296</sup> See Christopher Carlberg, "Early to Bed for Federal Regulations: A New Attempt to Avoid 'Midnight Regulations' and Its Effect on Political Accountability," Essay, 77 G.W.L. Rev. 995, 997 (2009); O'Connell, supra note x at 504 (characterizing Bolten Memo as "unprecedented steps to make the rules issued in [the GW Bush administration's] final year harder to overturn"). Carlberg does conclude that placing a moratorium on regulations during the Midnight Period "increases political accountability by prohibiting regulation promulgation during the period the outgoing President is least politically accountable." Carlberg, supra at 1001.

<sup>297</sup> Dudley, supra note x at 28.

total of 767 total final actions.<sup>298</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 actions. The difference in 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>299</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>300</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

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<sup>298</sup> These figures are drawn from the text of O'Connell's article and from supporting data supplied by O'Connell and on file with the author of this report.

<sup>299</sup> See supra xxx.

<sup>300</sup> O'Connell, supra note x at 504.

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 is unlikely to issue a similar directive in 2012 while President Obama is standing for re-election. If President Obama is re-elected, the opportunity for a directive like the Bolten Memo will arise in 2016. If President Obama is not re-elected, the issue will not arise until at least 2020.

## **VI. 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>301</sup> Judge Plager is quoted as suggesting:

a more effective 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>302</sup>

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<sup>301</sup> See William S. Morrow, Jr., "Midnight Regulations: Natural Order or Disorderly Governance," *Administrative & Regulatory Law News*, 3, 18 Spring 2001.

<sup>302</sup> *Id.* at 18.



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.

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 Gerald Nadler (D-NY), introduced a Bill entitled the “Midnight Rule Act” with the stated purpose to “To delay the implementation of agency rules adopted within the final 90 days of the final term a President serves.” H.R. 34, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. 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.” “Midnight Rule” was defined as “a rule adopted by an agency within the final 90 days a President serves in office.” The Bill allowed the outgoing President to avoid the 90 day delay by making a determination, in an Executive Order, that the rule is necessary due to an imminent threat to health, 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>303</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 in which 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 to put 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 slightly different rule. It would be preferable if the incoming administration could issue a new rule based on the original rulemaking record,<sup>304</sup> supplemented by comments solicited by the incoming administration.

Another proposal aimed at the power of outgoing administrations was made by Mercatus Center researchers Jerry Brito and Veronique de Rugy. 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

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<sup>303</sup> For a more complete analysis of Representative Nadler's proposal, see Jack M. Beermann, *Combating Midnight Regulation*, 103 *Northwestern Law Review Colloquy* 352 (2009).

<sup>304</sup> See Ronald 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).

Executive Order 12,866. Their proposal is to “cap the number of significant rules an agency is allowed to submit to OIRA during a given period.”<sup>305</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>306</sup>

Assuming that the volume of rules during the Midnight Period is a serious problem, Brito & 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>307</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.

On another level, the focus on OIRA review seems misplaced. OIRA review is not a legislatively mandated element of the rulemaking process. 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 determine whether the somewhat more rapid review during the Midnight Period is adequate. 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. Perhaps a revised Bolten Memorandum could incorporate this suggestion, but it seems to

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<sup>305</sup> Brito & de Ruyg, *supra* note x at 18.

<sup>306</sup> *Id.* at 19.

<sup>307</sup> Brito & De Ruyg, *supra* note x at 18.

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>308</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 making Midnight Rules subject to suspension without notice and comment. He suggests “automatically extending them [or] making them subject to extension without notice and comment.” 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

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<sup>308</sup> See Morriss et al, *supra* note x at 597.

be repealed without a new rulemaking process but simply by issuing a notice in the Federal Register.”<sup>309</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, 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>310</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 encourage Congress to use the Congressional Review Act to override Midnight Rules. As discussed above, the CRA has been used only once, to void President 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

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<sup>309</sup> Morriss et al, supra note x at 597.

<sup>310</sup> Id.

administrations recommends Congress legislatively reject.<sup>311</sup> This seems even less likely to succeed in Congress than CRA rejection since there is likely to be a group in Congress with sufficient strength to prevent passage of the bill that supports at least one of the rules in the package. 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." These criticisms depend on particular underlying views of the Midnight Rulemaking problem. 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 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 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. Susan Dudley, OIRA Administrator at the end of the GW Bush administration, viewed the Bolten Memo as consistent with her principled stand against Midnight Rulemaking.<sup>312</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. Additionally, the incoming

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<sup>311</sup> Brito and de Ruyg, *supra* note x at 16.

<sup>312</sup> Interview with Susan Dudley.

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.

Anne Joseph 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. She is skeptical of the utility of any of the many reforms that have been proposed:

The desirability of any of these proposals is not immediately clear, either on social welfare or democratic legitimacy grounds. Even assuming that midnight or crack-of-dawn regulations are troubling on efficiency or legitimacy grounds, many of these proposals may create more problems on balance. Agencies and political actors would presumably react strategically to these 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.

## **B. Proposed Recommendations.**

Midnight Rulemaking is a complex subject that defies simple characterizations or solutions. The scholarly and media reaction to the phenomenon has been virtually universally

negative. Analysts from all points on the political spectrum seem to agree that there is something wrong with the increase in regulatory output, especially final rules, during the Midnight Period. Some analysts believe, as a matter of principle, that administrations should wind down, rather than ramp up, in their final days. They are concerned that Midnight Rules are timed to minimize political accountability and to maximize influence beyond the outgoing administration's term. This appears unseemly and gives rise to at least an appearance of impropriety. This is especially true when an outgoing administration unveils a major initiative late in its second term and then finalizes action on the issue after the November election. Others are more concerned with the quality of Midnight Rules that may have been rushed through steps that are vital to ensuring that regulations are considered carefully. Further, Midnight Rulemaking forces incoming administrations to expend substantial time, energy and sometimes political capital to reexamine Midnight Rules and remedy perceived problems with them.

Despite all of these concerns, a dispassionate look at Midnight Rules reveals that most were under consideration long before the November election and many are relatively routine matters not implicating new policy initiatives by outgoing administrations. While there are isolated cases of Midnight Rules that may have been timed to avoid accountability or that represent efforts to increase late-term output to extend the outgoing administration's policies into the future, the overwhelming majority of Midnight Rulemaking appears to be the result of simple hurrying to finish tasks that would inevitably be delayed or derailed by the transition in presidencies. The unseemly appearance of Midnight Rulemaking may be worse than the reality, although there is no question that Midnight Rulemaking puts the new administration in the awkward position of finding it necessary to review a substantial corpus of rules and other actions to ensure quality and consistency with the new administration's policies.



Proposals to prohibit outgoing administrations from promulgating rules in the Midnight Period represent a cure that is likely to be worse than the disease. Numerous programs created by Congress require substantial, constant regulatory activity. If rulemaking is shut down for weeks or months during the transition period, the most significant result might be to create an even greater workload for incoming administrations than they confront now in reviewing Midnight Rules. An end-of-term freeze would also exacerbate the typical slowdown in regulatory activity at the outset of new administrations. The quality of government operations may suffer and new administrations would find it more difficult to administer congressionally-mandated regulatory programs.

Reforms aimed at Midnight Rulemaking should take cognizance of these concerns and should be aimed as precisely as possible at Midnight Rulemaking activity that raises the greatest causes for concern. Reforms should target the problems of quality and perceived political illegitimacy that arise from rules that are rushed through the regulatory process or that are initiated late in the outgoing administration's term. Reforms should be aimed both at curbing suspect Midnight Rulemaking by outgoing administrations and at enhancing the powers of incoming administrations to deal with Midnight Rulemaking.

**Recommendations:**

1. Rulemaking should not be frozen during the Midnight Period. Although Midnight Rulemaking has excited widespread criticism, continued regulatory activity is necessary for proper operation of the government during the Midnight Period, and a freeze would leave the incoming administration with a high volume of unfinished tasks to complete.

2. Outgoing administrations should manage the transition in a way that ensures that all rules receive adequate consideration at all steps of the rulemaking process. Substantial new

initiatives late in the term should be avoided whenever possible. If the volume of regulatory activity near the end of the term becomes overwhelming, agencies should focus on high priority actions and leave lower priority matters to the incoming administration.

3. Outgoing administrations should consider adopting deadlines like those in the Bolten Memo, to require or encourage agencies to put all rulemaking proposals out for public comment well before the November election and to finish all rulemaking before the election. In particular, absent an emergency, no major or potentially controversial rulemakings should be initiated after or close to the date of the election., unless the agency reasonably believes that the incoming administration would not object. Adhering to the Bolten Memo's deadlines would have had positive effects: the volume of Midnight Rulemaking would have been significantly reduced and the incoming administration would not have had so many new rules to review, allowing it to focus more on its own policy agenda.

4. When an outgoing administration issues a significant or controversial rule during the Midnight Period, it should publicly explain the timing of the rule in the Concise General Statement of Basis and Purpose required by the APA. The same policy should be followed when an outgoing administration issues a non-legislative rule such as an interpretative rule, general statement of policy or guidance document. The explanation should include statements as to why the rule was issued so late in the term and why it was better to issue it now rather than leave it for the incoming administration.

5. Outgoing 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. It is more appropriate for the outgoing

administration to suggest such changes to the incoming administration but to leave the final decision to those who would operate under the new requirements or restrictions.

6. Congress should authorize incoming administrations to briefly suspend the effective dates of published rules for up to 60 days to provide the administration an opportunity to review the rules. Unless otherwise specified by law, notice and comment should be employed before the suspension whenever possible even if the comment period is likely to be very short. If advance notice and comment before an effective date is delayed is not possible because the rule's effective date is imminent, incoming administrations should solicit comments while the rules are under review on whether the rule should be allowed to go into effect immediately and on whether the rule itself should be retained, rescinded or amended.

7. In all cases, incoming administrations should solicit comments on whether Midnight Rules under review should be amended, rescinded or retained. In such cases, the incoming administration should be allowed to rely on the original rulemaking record as well as any new comments received to support its ultimate decision of whether to retain, rescind or amend the Midnight Rule.

8. Incoming administrations should publish the results of their review of Midnight Rules as soon as a final decision is made to either retain the rule or propose amendments or rescission. Currently, when a decision is made to allow a rule to go into effect, that decision is rarely announced.

9. The Office of Federal Register should maintain its current practice of allowing withdrawal of rules before filing for public inspection and should not allow rules to be withdrawn once they have been filed for public inspection or published except as allowed for sufficient reason during non-Midnight Periods.

Absent Congressional action, Recommendations 6 and 7 may be problematic.

Recognizing agency power to extend the effective dates of published rules without notice and comment may be contrary to the weight of current law, which treats such postponements as rules presumptively subject to the APA's notice and comment requirements. In ordinary cases, postponement of an effective date may not be within any of the exceptions to the APA's notice and comment requirements. Further, the caselaw seems to require a reason beyond the incoming administration's desire to review a rule for postponing it. Recommendation Number 7 may be problematic because of its provision allowing the incoming administration to amend or rescind a rule based largely on a different view of the record of the original rulemaking. In my view, this should not be controversial. The record of a Midnight Rule is likely to be relatively recent during the period when the incoming administration is reviewing it. It might be more problematic if a rule's effective date comes long after a rule has been promulgated. Some rules have effective dates years after promulgation, for example to allow an industry to prepare for a major change. For example, the Carter administration's rule requiring airbags in new automobiles was issued in 1977 with a stated effective date of September 1, 1981,<sup>313</sup> when the first airbag would actually be required. Agencies may have recognized this potential problem and remedied it by including both effective dates and compliance dates in their rules.<sup>314</sup> Specifying an effective date that is earlier than the compliance date may be done by agencies for a simpler reason, namely to ensure that they are codified in the Code of Federal Regulations earlier. OFR does not codify rules in the Code of Federal Regulations until their effective dates,

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<sup>313</sup> Modified Standard 208, 49 C.F.R. § 571.208 (1978).

<sup>314</sup> For example, the outgoing GW Bush administration published a final rule on Advance Information on Private Aircraft Arriving and Departing the United States on November 19, 2008. It listed an effective date of December 18, 2008, but then went on to specify a "Compliance Date" of May 18, 2009. 73 FR 68295 (November 18, 2008) ("Private aircraft pilots (or their designees) must comply with the requirements of this final rule on May 18, 2009.") See also Administrative Procedure Act, 5 U.S.C. § 553(d) (2000) (requiring the publication of a rule to be made not less than thirty days before its effective date).

and in many cases, agencies want their rules codified as the governing legal norm before compliance is actually expected. In any case, the original rulemaking record should be substantially supplemented by comments made pursuant to a new solicitation before a rule that has been on the books for years should be amended or rescinded.

## **VII. 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.