

**Midnight Rules Report
Outline
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I. Introduction to the Problem. This section will provide a brief introduction to the problem of midnight rules. There is a documented increase in regulatory activity at the end of presidential administrations, including an increase in the number of final rules promulgated in the last quarter of administrations.

The introduction will explain what is meant by midnight rules (administrative rules promulgated in the last 90 days of an administration) and will map out the major issues aired in the report, beginning with documenting the problem of midnight rules using both numerical measures of the volume of rules and analysis of some late term rules and including explanations for the midnight rules phenomenon. The primary focus is on rules because among late-term actions, rules are procedurally more difficult to change or revoke than many other actions outgoing administrations might take.

The introduction will then introduce two reasons to be concerned about midnight rules, namely the quality of the rules and undesirable political consequences. The introduction will note that it is difficult to know whether either of the problems exists generally or with regard to any particular midnight rules. This part of the introduction will zero in on the report's normative focus: What's wrong with midnight rulemaking? Are the quality and political problems real? The introduction will note that it is very difficult to measure the quality of regulations. There have been some attempts such as comparing the length of time rules are under review at OIRA, but no one has yet formulated a good measure of the quality of rules. This report will survey the literature on this and use the durability of rules as a rough proxy of quality. Specifically, this report will look at whether suspension, revocation, or amendment of regulations is higher for regulations issued during the midnight period and will discuss whether that is a sound proxy for quality of rule, including a report of the results of my new empirical study of the durability of midnight rules.

Second, there are no clear standards to judge whether midnight rules are politically undesirable. The arguments that midnight rules are politically undesirable center on two related factors, that the outgoing administration is projecting its agenda into the future after it has been replaced and that it is placing a burden on an incoming administration to sift through the high volume of material left at the end of the term. However, a great deal of midnight rulemaking may be the innocuous tendency to work to deadline, and 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. In fact, some midnight rules may help the incoming administration by finishing up the "old business" on the agenda so the new administration can focus on the "new business." Further, there is always the possibility that late term rulemaking reflects the administration's ability to finally rise above the political fray once the election is over and act in the public interest in ways that are not possible when interest group pressure is higher.

The introduction will also mention the ways that incoming administrations have dealt with midnight rulemaking, by freezing, delaying, withdrawing, suspending and reviewing regulations

issued at the end of the prior administration. The introduction will also mention possible strategies to minimize midnight rulemaking, including what the GW Bush administration attempted in its last year and the recommendations made in this report.

Finally, the introduction will mention some issues such as Executive Orders, pardons and other late-term actions that administrations take that are related to midnight rules but won't be addressed in detail in the report and will then preview the recommendations in the report.

II. Evidence that the Problem Exists. The first section of the report will discuss the evidence that midnight rulemaking is truly a problem.

The first subsection will begin with Cochran's paper that claimed a 40 percent higher volume of Federal Register pages during the last quarter of the Carter administration and claimed an average 17 percent increase in Federal Register pages during the final quarters of administrations dating back to 1948. 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>. While Federal Register pages is not a precise measure of regulatory output, it is a pretty good proxy given that so much of the work of the administrative state must be published in the Federal Register. Cochran explained this increase very simplistically as a product of the deadline of Inauguration Day when control of the government shifts to the new administration and he made predictions regarding the average quantity of additional regulatory output during midnight periods.

This section will have to discuss the proper measure of the midnight period. The worst midnight rules are those that come out after the election, but even rules issued earlier, for example once the campaign is in full swing, may be problematic if they are timed for political reasons. Why should agencies be waiting or hurrying to time their actions for maximum effect in an election? This could be an infinite regress so the 90 day measure may be the best we can do, but for many rules adopted in the final year of an administration that have been under consideration for years or that pop up suddenly, there are reasons to be suspicious of the timing. 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.

In addition to Cochran's analysis, this part of the paper will look at other studies of the problem to make sure that the existence of the problem is documented. My own empirical work (discussed in more detail below) will focus on the number of important rules issued during the midnight period and compare that to the number of rules issued in non-midnight periods and compare their durability, if possible. I will also mention other work that highlights the existence of the midnight effect including the study by Loring and Roth that documents increased rulemaking in the midnight period by NHTSA, OSHA and EPA. 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).

Although the focus of the study is on rules issued during the midnight period, this subsection will also mention some non-rule actions that administrations have taken during the midnight periods

such as the issuance of Executive Orders, Proclamations and Pardons, “midnight contracting” and the phenomenon of converting political appointees to civil service protected employees at the end of the term, as discussed by Nina Mendelson in her article on the subject, *Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives*, 78 N. Y. U. L. Rev. 557 (2003). These will be discussed briefly and will not be the focus of the report.

This part will also talk about interpretative rules, policy statements, guidances and other documents issued without notice and comment. These are less likely to be problematic because they can so easily be revoked that outgoing administrations don’t seem to bother to issue many during the midnight period.

This part may also include reports of interviews with government officials concerning their perceptions of the issue.

III. This section is a more focused look at some of the major empirical issues concerning midnight rulemaking. The first part will ask the general question of how midnight rules can be evaluated, that is how can we decide if a rule is undesirable and if that undesirability is a result of being a midnight rule? The second subsection will be a discussion of my qualitative examination of a small number of midnight rules. The third subsection will review the research that has been done so far on midnight rules including scholarly opinion and empirical work. The fourth subsection will report the results of my empirical examination of midnight rules. I don’t think it will be possible to reach any strong conclusions about the quality of midnight rules, but this section will be useful to understanding the phenomenon.

A. The first subsection of this part asks the general question of how to evaluate midnight rules. Are they of lower quality or undesirable for some other reason unrelated to their simple midnight nature? This part is introductory because it foreshadows themes in the rest of the section—what are the measures of quality? Are there objective measures like length of time considered by the agency? by OIRA? See Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 Admin. L. Rev. 163 (2009); Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time* (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-40, 2008), available at <http://www.mercatus.org/PublicationDetails.aspx?id=22854>.

What about durability—might midnight rules be less durable than other rules and is lack of durability a sign of lower quality? Can you tie the quality of a rule to its timing? That is, if there doesn’t seem to be any good explanation for why the administration waited until the very end of the term to issue the rule, is that a sign of low quality or simply a signal that some principle regarding midnight rules may have been violated? Problems would include being lower quality, flying under the political radar, projecting a repudiated agenda into the future and overloading/embarrassing the incoming administration.

B. The second subsection of this part will include a discussion of various types of midnight rules including substantive rules, interpretative rules and guidance documents. One type of rule that will be looked at separately are rules specifying internal agency procedures including consultation requirements. Rules establishing internal agency procedures such as consultation

requirements are likely to involve presidential input because they involve multiple agencies, and thus they raise a separate question of whether such requirements should be adopted at a time when they will be enforced only by the incumbent's successor. Perhaps recommendations for such rules could be left for the incoming administration, but not actual changes. I also include in this disfavored category rules governing the enforcement of the strings the government attaches to exercises of the power to spend for the general welfare especially in politically charged areas. Although these may not involve presidential input since they involve only one agency, these highly discretionary rules will be enforced, if at all, by the incoming administration and it seems that reformulation should occur early in an administration rather than at the last moment. The saving grace here may be that many of these rules may procedurally easy to revise, although politically it may not be so simple.

This part will also discuss the volume of midnight rules and whether that is a problem because of the necessity of the incoming administration to take a close look at them at the beginning of the term. If it is clear that incoming administrations will find it desirable to reexamine late-term action by the prior administration, then the outgoing administration knows that midnight rules impede the transition.

This part will also discuss deregulatory action taken at the end of terms, focusing somewhat on the GW Bush-Obama transition with a discussion of whether midnight deregulation is a special case likely to present greater or lesser cause for concern. There is also a sense that midnight action in the foreign affairs area is a special case and that will be discussed here. The question is whether anything in this discussion can lead to a firm conclusion about the quality and desirability of midnight rules. See Jack M. Beermann, *Midnight Deregulation*, in A. Sarat, *Transitions Conference*, U. Alabama Press (forthcoming).

C. The third subsection takes a look at the scholarship that has been done on midnight rulemaking so far, mainly concerning the quality of midnight rules. There are two sorts of scholarship, qualitative legal scholarship and empirically-oriented political science scholarship. The discussion here will focus more on the latter category because the more qualitative aspects of the legal scholarship will be covered in prior sections. Some of the empirical scholarship uses various proxies for the quality of midnight rules such as the duration of OMB-OIRA review of rules. This body of scholarship is very useful in understanding the midnight rules phenomenon, but it is unclear whether it has been useful in evaluating the quality of midnight rules. This last issue will be discussed in this section.

Included in the empirical scholarship on midnight rulemaking is the study by Loring and Roth that documents increased rulemaking by EPA, OSHA and NHTSA during the midnight period and the incoming administrations' reactions. The study shows that the Clinton administration reversed and revised many more of the Bush I administrations' midnight rules than the Bush II administration revised of Clinton's. 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)

D. The fourth subsection of this part reports the results of the study I am conducting of midnight rules. I am using durability as a proxy for quality of midnight rules, although I know that it is, at best, a weak proxy. 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 undesirability of midnight rulemaking. Rules are more difficult to revise or rescind than many other late-term actions so this study will illustrate the effort incoming administrations are spending reviewing midnight rules. 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. It then takes the rules from three non-midnight periods and does the same analysis, and then compares the durability of non-midnight rules to the durability of midnight rules. My expectation is that midnight rules will be slightly less durable than non-midnight rules and we won't be able to draw firm conclusions from the study. One note—the immediate suspensions that occur during the transition periods for rules that have not yet gone into effect cannot be counted in the study because they will seriously skew the results. I will report the results with those suspensions and also without them to ensure that the data is meaningful.

IV. This Section of the Report will report on the reactions of incoming administrations to midnight rulemaking, legal reactions to those efforts and strategies that outgoing administrations have employed to shield their midnight rules from easy reversal by the incoming administration.

A. The first subsection here spells out the ways that incoming administrations have reacted to the high volume of midnight rules, beginning with the Reagan administration's reaction to the high volume of regulatory activity at the end of the Carter administration. Recent administrations including GW Bush and Obama have employed very similar strategies. They have ordered a freeze on rules—no new rules published after the inauguration even if they were already in the queue at the Federal Register-- and a reexamination of rules that had been published but had not yet gone into effect. See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001); Memorandum from Rahm Emanuel, White House Chief of Staff, to Heads of Executive Departments and Agencies (Jan. 20, 2009), available at <http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf>. There are reasons to be cautious about whether incoming administrations have adequate tools to deal with the problem. See William G. Howell and Kenneth R. Mayer, *The Last One Hundred Days*, 35 *Presidential Studies Quarterly* 533 (2005) (discussion how interest groups will fight to retain what they gained at the end of the prior administration).

B. This subsection looks at legal reactions to the tools that incoming administrations have regarding midnight rules. There is not much case law but in at least one case, a court held that suspending the effective date of a rule that had already been issued was improper without notice and comment. *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004). There is also caselaw on whether rules can be withdrawn without notice and comment when they are promulgated late in the term. *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (finding that an agency has the power to withdraw a rule from the Federal Register before it has been made public). Mention will be made of the Governor of Florida's

recent effort to suspend all rulemaking in that state and require all rules to be submitted to a newly-created office for review. The state Supreme Court decided that this was beyond the Governor's powers. 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>. This order was replaced by Executive Order 11-72 which ended the suspension but retained the requirement that all new rules be submitted to the Office of Fiscal Accountability and Regulatory Reform. See *Whiley v. Scott*, --- So.3d ----, 2011 WL 3568804 (Fla. 2011). I do not think that this decision has similar implications for presidential efforts to suspend rulemaking at the outset of their terms because it relies on a conception of separation of powers that is inconsistent with federal law.

There is no case law that reviews rules or other agency action differently because they were promulgated during the midnight period.

This subsection will also look at some issues that might arise concerning procedural and substantive review of agency action during the midnight period. As a procedural matter, do incoming administrations violate the APA when they put the brakes on midnight rulemaking the way the last few administrations have? As a substantive matter, what is the administration's burden under the arbitrary, capricious standard if it wants to reverse or revise midnight rules shortly after they were promulgated. The Loring and Roth study blames the Airbags case, *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983) for being inflexible on rescission of rules. The Supreme Court's clarification in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) is relevant insofar as it appears that the Court reads the APA to more freely allow revision and rescission of rules than was previously thought. This subsection will also briefly mention the Congressional Review Act and whether it is likely to be an effective tool against midnight rulemaking. It is worth mentioning in this report mainly because the only time the CRA was successfully used by Congress, it was when the review came after a presidential transition.

C. In this subsection I look at the GW Bush administration's effort to avoid the midnight rule problem by moving to an earlier deadline that would mean that all rules would be published and effective before Inauguration Day. President Bush's Chief of Staff issued a memorandum requiring all rules to be proposed by June 1, 2008, and finalized by November 1, 2008. 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 deadline was not met, and the administration then established a process to determine which rules would be allowed to go through after the deadline. See Susan Dudley, "Regulatory Activity in the Bush Administration at the Stroke of Midnight," *Engage*, v. 10 p. 27 (2009). The strategy worked to a certain extent in that the percentage of midnight rules was much lower in the last year of the GW Bush administration than in others. The purpose of this subsection is to set out and evaluate this strategy with an eye toward whether this is something that should be included in our recommendations.

This section may also report on interviews of government officials on their views of midnight rulemaking.

V. Normative Issues Surrounding Midnight Rulemaking

This section steps back and looks at the midnight rulemaking phenomenon from a more normative perspective, investigating why midnight rulemaking occurs and whether there are categories of midnight rules with different normative implications. This section is necessary to inform recommendations.

A. Political Background. This subsection looks at the reasons for midnight rulemaking to prepare to ask whether midnight rules are normatively undesirable. This section will first raise various possible explanations for why midnight rulemaking happens. This part will draw heavily on my earlier work on this subject that discussed hurrying, delay and waiting as explanations for midnight rulemaking. We will look for evidence of the different explanations in various examples of midnight rules. See generally Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U.L. Rev. 947 (2003).

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, satisfy constituencies and project its agenda into the future. This is the conventional understanding reflected in Cochran's emphasis on the "Cinderella" constraint.

Delay includes innocuous factors like procrastination, external factors such as appropriations riders and procedural requirements and the heavy substantive burden of documentation that an agency must satisfy to promulgate rules that will survive hard look judicial review.

Waiting involves an outgoing administration waiting until the midnight period usually so that rules can be promulgated after the election when accountability is lower. This is viewed as the most problematic sort of midnight rulemaking because it seems to exacerbate accountability problems inherent in the administrative state. However, there are difficulties and disincentives to waiting that make it somewhat less likely to occur than it might seem at first blush, making hurrying and delay the more likely explanations for midnight rulemaking. The disincentives to waiting include the lack of political benefit from the promulgation and operation of the rule and the fact that the rule might not be enforced with enthusiasm by the incoming administration. The fact that many midnight rules depend on enforcement by what might be a reluctant incoming administration highlights the fact that the motivation for issuing rules so late may be more related to politics than to policy. Here I will discuss Jim Rossi's argument that the whole issue is a red herring raised to attack President Clinton and then popularized thereafter. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 Duke L.J. 1016 (2001). His basic point is that even most midnight rulemakings are the product of a lengthy process and thus they are not produced under the political radar. Further, he argues that incoming administrations use settlement of litigation to moderate the effects of midnight rules.

(One way of testing whether waiting actually exists might be to see if re-elected Presidents issue a significant number of rules in the period immediately after their re-election. This is not currently one of the factors I am looking at in my study, but I intend to investigate whether data on this already exist and I may explore modifying my study to look at this. This data would be informative because if there a flurry of rulemaking after a successful re-election effort indicates that the incumbent administration was timing some activity to avoid scrutiny in the election.)

In addition to the abstract discussion of the three reasons for midnight rulemaking, this part of the paper will discuss some examples drawn from recent transitions. The Clinton-Bush examples will be the ones highlighted in my published work including rules relating to abortion funding and the arsenic in drinking water rule that received a great deal of attention when it was suspended by the incoming GW Bush administration. I will look at rules issued in the waning days of additional administrations to illustrate the problem.

B. The Second subsection will be a normative look at midnight rulemaking. What's wrong with midnight rulemaking or why are people so upset by the phenomenon? Many possibilities are discussed: 1. Maybe they are of low quality because the process is rushed. 2. Maybe they are normatively undesirable because they represent an effort to project a rejected policy agenda into the future. 3. Maybe they are bad because they represent the use of the power of the presidency for purely political purposes by a. rewarding political allies on the way out the door; b. making the transition difficult for the new (other party) administration by overloading it with rules that it will have to sort through and expend political capital on reversing or revising; c. enacting regulations that will only apply to the new administration. This raises the question of why, if rules are necessary and important enough to promulgate, did it take almost eight years to do so.

C. This section will conclude by tying together what we know about the extent of the problem of midnight rulemaking and whether we can make any firm conclusions concerning the reasons for midnight rulemaking. Just how great is the Cinderella effect? Is there evidence of a great deal of hurrying, waiting and delay?

This part may also include reports on interviews of government officials involved in the midnight rulemaking problem.

VI. Recommendations

This section details the recommendations we have concerning midnight rulemaking. This will be developed in discussions with ACUS but I have some ideas to put forward at this time. First, should we consider a blanket ban on rulemaking during the midnight period? My inclination is to reject any blanket ban on rulemaking during the midnight period but I am open to consideration of this. I am inclined in favor of requiring an explanation of the timing of rules that are issued in the last quarter of an administration as part of the Concise General Statement. Although this would not prevent midnight rulemaking, it might slow it down if agencies are required to come up with a colorable explanation for the timing.

My general inclination is to focus on enhancing the power of the incoming administration to suspend, amend and rescind midnight rules rather than hamstringing the outgoing administration. Perhaps a provision should be recommended that says that within a certain period, the incoming administration has the power, without notice and comment, to revoke or amend rules if the revocation or amendment could be justified based on the original rulemaking record. Perhaps this should apply only to rules issued in the last 90 days of an administration. I would also allow delay based purely on the timing of the midnight rule and/or allow the new administration to reopen any midnight rules for notice and comment. (In fact, I would favor allowing agencies to revise rules within 90 days of issuance any time, not just during the midnight period but that's beyond the scope of this report.) Another recommendation might be for the outgoing administration to consult with the incoming administration's transition team on major rules that are scheduled for promulgation during the midnight period. See Nina Mendelson, *Quick Off the Mark? In Favor of Empowering the President-Elect*, 103 *Nw. U. L. Rev. Colloquy* 464 (2009).

The report might urge all administrations to do their best to have all rules out by the deadlines like the ones set during the last year of the GW Bush administration and might urge Courts to be open to suspension, revision and revocation of midnight rules as long as the incoming administration's product would be justified by the original rulemaking record.

This section will also discuss Representative Nadler's bill attacking midnight rulemaking which I critiqued in my article *Combating Midnight Regulation*, 103 *Northwestern Law Review Colloquy* 352 (2009).

If it were possible to fine tune a requirement, I would be in favor of a ban on internal procedural rules such as inter-agency consultation requirements because these are likely to be initiated at a relatively high level in the administration and will be enforced only by the incumbent's successor. I would give special attention to possibly banning rules concerning standards governing enforcement of restrictions on receiving government grants and similar rules during the midnight period for similar reasons—they involve highly discretionary government action and will be enforced, if at all, by the incoming administration. It's difficult to imagine why they were promulgated so late—they are not substantive rules designed to deal with an ongoing policy problem that might come up late in the term.

Of course, the actual recommendations are subject to further discussion.