



Committee on Rulemaking

Minutes

February 23, 2012

Members Attending

Neil Eisner

*Senior Fellow, Department of
Transportation*

Sally Katzen (by phone)

Senior Fellow, Podesta Group

Randy May

*Public Member, Free State
Foundation*

Elizabeth McFadden

*Gov't Member—Department
of Education*

Richard Pierce

*Public Member—George
Washington University*

Esa Sferra-Bonistalli

*Gov't Member—United
States Coast Guard*

Robert Shapiro

*Gov't Member—Department
of Labor*

Carol Ann Siciliano

*Gov't Member—Environmental
Protection Agency*

Lon Smith

*Gov't Member—Internal
Revenue Service*

Robert Rivkin (Chair)

*Gov't Member—Department
of Transportation*

ACUS Staff Attending

Emily Bremer

Staff Counsel

Jeffrey S. Lubbers

Research Director

Funmi Olorunnipa

Project Advisor

Paul R. Verkuil

Chairman

Invited Guests Attending

Jack Beermann

Consultant—Boston

University Law School

The meeting commenced at 9:39 am in the conference room of the Administrative Conference. Chairman Verkuil opened the discussion by noting that the Midnight Rules Project has captured some press interest, perhaps in part because the committee has taken it up in an election year. He explained, however, that the topic was suggested by the House at the time of the Conference's reauthorization, and so the timing is coincidental.



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The consultant on the project, Professor Beermann, discussed his research methodology. He explained that he first learned of the issue of midnight rules during the Clinton administration and had an instinctively negative reaction against the phenomenon. Press accounts frequently criticize midnight rules as lower quality rules issued in a manner that is inconsistent with democratic principles. In starting the report, Professor Beermann decided that he had to relearn the subject and start from scratch. He began by examining popular press treatment of the issue, relevant think tank reports and scholarship, and available empirical research. He also interviewed former and current officials from both incoming and outgoing administrations, as well as others interested in the issue. He explained that the study he had planned to conduct turned out to be more ambitious than was possible to complete. Judicial review decisions proved hard to track because courts do not identify the matters they work on in the same way agencies do.

Professor Beermann's research revealed that the vast majority of rules, even those issued outside of the midnight period, are routine and noncontroversial. The exceptions constitute a small percentage of the total number of rules. There was broad agreement among Professor Beermann's interviewees that a prohibition on midnight rules would be a cure worse than the disease. Such an absolute approach would create significant delay and burden without yielding much benefit. He also noted that judging the quality of a rule objectively can be difficult. Most existing studies of midnight rules have therefore relied on proxies for quality, such as the number of rules released or the number of pages printed in the Federal Register during the midnight period. Most of the interviewees had not noticed a significant difference in the quality of midnight rules as opposed to rules promulgated outside the midnight period. The occasional problems with midnight rules seem to have less to do with the quality of the rules, and more to do with the seemingly rushed process through which they were promulgated.

Professor Beermann described his proposed recommendations as moderate and designed to improve the rulemaking process to reduce the incidence of rushed rules in the midnight period. He took the Bolton memo as a model. This document was issued by Bush administration and sought to move up the deadline for promulgating controversial rules. This memo has been viewed with skepticism as a way to avoid the Congressional Review Act and hamstringing the incoming administration. But Professor Beermann found that available evidence does not support that view. Moving up the deadline for promulgating rules at the end of an administration is probably a step in the right direction. The question is whether it can be effective.

Before moving to its discussion of the draft report and recommendation, the committee approved on voice vote the draft minutes of the November 14, 2011 meeting.

Ms. Katzen opened the discussion of the draft report and recommendation. She thought Professor Beermann did a great job with the research and that the tone of the draft recommendation was good. She had just a few minor points. Ms. Katzen thought it might be worth suggesting that some of the criticism of midnight rules is not meritorious. She stumbled



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on the recommendations to incoming administrations because they appear to presume that the incoming administration has an inventory of all promulgated rules. But they do not. The recommendation could, however, ask OIRA to provide such a list. Paragraph seven of the proposed recommendation was unclear about whether it was recommending an amendment to the APA to overrule *State Farm* or was suggesting that *State Farm* is simply not a problem. She asked whether a rule's effective date might be a barrier to an incoming administration's attempt to delay or reconsider the rule. What if the particular effective date is important for regulatory purposes? The recommendations should be sensitive to that possibility. Finally, Ms. Katzen expressed concern that paragraph ten of the recommendation sounded like it was advising agencies to push through the big rules, while ignoring more routine and noncontroversial rules. This seemed like a problematic approach that would only increase the controversy over midnight rules.

Mr. Rivkin asked the committee whether it thought midnight rules are really a problem. Mr. May commended Professor Beermann on his balanced approach. The research convinced Mr. May that midnight rules are not a huge problem, but there are still ways to improve the process. Mr. Eisner agreed. He noted that it is not good government for staff to work hard to push rules out in one administration only to turn around and help a new administration get rid of them. But he acknowledged this phenomenon is a natural consequence of our political process. Nonetheless, the Conference can add value by recommending good practices that will improve the process.

Mr. Rivkin noted that it is not obvious all rules that are rushed to completion in the midnight period are rushed for strategic or political reasons. Often, these rules have been under consideration for a long time, and it is in the public interest to complete the work before a new administration comes in. Ms. Siciliano agreed, explaining that in her experience, agencies rush rules through in the midnight period to avoid sticking the incoming administration with the work that remains to be done on rules that have been substantially completed. Mr. Eisner added that leaving a rule for a new administration may not be an option if there is a congressional deadline for the rule's issuance.

Mr. Shapiro echoed the other members' praise for the report. Nonetheless, he noted that there are some inconsistencies in the terminology used in the draft report and recommendation. He also expressed concern that imposing specific procedural requirements on incoming and outgoing administrations might cause uncertainty for the public. Ms. Sferra-Bonistalli agreed. She also expressed some concern about the usefulness of the proposed recommendations. She thought it might be better to focus on identifying best practices for managing rulemakings to obviate the need to rush at the end of an administration. She also thought it would be helpful to clearly define the problem the recommendations are designed to address. Does the committee believe it should be curtailing midnight rules or is it focused on improving rulemaking management and making the process work better during times of political transition?



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Mr. Smith agreed and further explained that the Internal Revenue Service (IRS) rushes some rules out every year in order to provide timely tax preparation guidance. He was not aware of any problem at the IRS with midnight rules. He also noted that the public is often upset when the IRS suspends its rules because it causes substantial uncertainty. Mr. Smith was also concerned that paragraph 3, which requires agencies to explain the reason for releasing a controversial rule during the midnight period, will produce more creative writing than genuine transparency. He also thought the draft recommendation should define “controversial rule.”

Professor Pierce thought the draft recommendations would be valuable, while the draft report would be more valuable still. The draft report puts the issue in context and shows that while midnight rules are a problem, they are a manageable problem. The recommendations can improve that reality.

Professor Lubbers noted that the biggest problem may be the perception that midnight rules are lower quality rules that are rushed through the process for strategic purposes. Mr. May agreed and suggested that the bottom of page two of the draft recommendation could be revised to express this point. Professor Lubbers agreed and further suggested that that part of the recommendations should refer to “most” instead of a “majority” of rules. Professor Beermann agreed and further suggested that the recommendations will make agency officials give greater consideration to the potential problem of midnight rules, even if they end up taking the same action they would have in the absence of the recommendation.

Mr. Eisner asked why there are separate recommendations to outgoing administrations and agencies, which are essentially the same thing. He also found it hard to reconcile paragraphs one and 11 of the draft recommendation. Mr. Smith agreed. Professor Beermann explained that paragraph 11 was intended to be a more specific recommendation for agency personnel. In contrast, the recommendations to the incoming and outgoing administration are broader and address setting the tone of regulatory policy. Mr. Eisner observed that “agencies” refers to career staff that is not responsible for setting overarching policy priorities. He suggested moving paragraphs ten and 11 to the top, where they might fit better. Professor Beermann thought that would work and suggested making those paragraphs subsections of paragraph one.

Mr. Eisner suggested referring to “incumbent” administrations instead of “outgoing” administrations, to accommodate the reality that one administration may be followed by another of the same party, thereby reducing the potential for a significant change in policy priorities.

Professor Lubbers suggested that paragraph one should focus on managing the rulemaking process over time so as to avoid the need to rush rules out at the end of an administration. Professor Beermann agreed, noting that prioritization was the key to paragraph ten. He noted that a “high priority” rule was not necessarily a “controversial rule,” and suggested that perhaps the paragraph would be more accurate if phrased positively. Agencies should simply be cautioned not to try to do more than is really possible. Mr. Eisner suggested



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that organizing, rather than prioritizing, is the key. Ms. Siciliano thought that this point could be captured in first sentence of paragraph one and paragraph ten might then not be necessary.

Consistent with the tenor of the committee's discussion, Mr. Eisner suggested revising paragraph one to recommend that "incumbent administrations should manage rulemaking to ensure adequate consideration of rules throughout the process to avoid the perception that rules are rushed through at the end of an administration." Ms. McFadden was concerned about the phrase "adequate consideration" because it might suggest that midnight rules not usually given adequate consideration. It appeared that the committee didn't agree with that view. Mr. Rivkin agreed, clarifying that the recommendation should be aimed at preventing the minor problems with midnight rules and dispelling the perception that midnight rules are poorer quality rules. Professor Beermann cautioned that the problems critics seize on are the few rules that have not received adequate consideration because of the rush to promulgate.

Mr. Rivkin asked the committee members what it wanted to do with paragraphs ten and 11. Professor Beermann responded that paragraph ten should be rephrased to discourage agencies from trying to do too much. Mr. Eisner further suggested that it should encourage agencies to organize and prioritize rulemaking activities over time in an effort to ensure rules are completed in a timely manner without the need to rush. Mr. May and Mr. Rivkin thought the committee's aim could be accomplished by blending paragraphs ten and 11.

Ms. Siciliano suggested that the problem with midnight rules was finishing them, not initiating them, during the last 90 days of an administration. She asked whether the rest of committee agreed. Ms. McFadden agreed. Professor Beermann noted that there is an increased volume of Notices of Proposed Rulemakings (NPRMs) issued during the midnight period. Many are abandoned by the new administration.

Ms. Sferra-Bonistalli cautioned against phrasing paragraphs one and two so as to impliedly issue a moratorium on midnight rules. She suggested that the recommendation should focus on the types of midnight rules that should be curtailed, rather than suggesting all midnight rules are bad and should be avoided. Mr. May thought this could be accomplished by encouraging agencies to address significant or controversial rules earlier to avoid perception of a strategic rush.

Mr. Eisner suggested that paragraph ten be revised to recommend "where possible, incumbent administrations should consider issuing as early as possible before an election any proposed rulemaking or completed rulemaking that might be perceived as politically illegitimate." Several members were uncomfortable with this language. Professor Beermann suggested saying that "outgoing administrations should consider adopting deadlines to require or encourage agencies to put NPRMs out for comment well ahead of an election and complete rulemaking before the election if possible." Mr. Eisner asked why the recommendation should



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focus on all rulemakings, instead of just those that are controversial and may create the appearance of political illegitimacy.

Mr. Rivkin asked whether all of the members agreed that the recommendation should focus on significant and controversial rulemakings. Professor Pierce noted that negative perception of midnight rules is based in part on the numbers of rules issued and pages published in the Federal Register. The recommendation should address that part of the problem. Ms. Sferra-Bonistalli was concerned that that might add to the perception that rules should come out well ahead of a political transition. Ms. Siciliano added that rules published later are the most likely to be reviewed by a new administration and are easiest for the new administration to undo. The public doesn't understand that. Mr. Eisner also noted that deadline for agencies to submit economically significant rules for OMB review is in May.

Mr. Rivkin was required to leave the meeting early. Professor Pierce took on the responsibilities of the Chair.

Mr. Shapiro directed the committee's attention to line 58, on page three of the recommendation, suggesting that it should include a definition of the kind of rules that cause concern when issued during the midnight period. He further suggested removing the suggestion in paragraph three that an explanation for the timing of a midnight rule be included in the preamble. That might create a basis for judicial review of the agency's decision to issue the rule during the midnight period. Professor Lubbers observed that Mr. Shapiro's point would not apply with respect to NPRMs, which are not subject to judicial review. He further explained that there are many subjects address in the preambles of final rules. Explanations cannot go in the operative text of the regulations, so there is nowhere else to put them aside from in the preamble.

Professor Lubbers asked whether the committee agreed that defining "controversial" was not necessary because the available definition of a "significant" rule is adequate. There was general agreement on this point.

Mr. Smith suggested removing "proposed and" from the recommendation, in order to focus on final rules. There appeared to be general agreement on this point.

Professor Pierce moved the discussion to paragraph five. Mr. Smith expressed concern that it would apply to all revenue rulings. He also wondered whether the requirement to provide an explanation for the timing of a rule would really be effective. Several members asked why guidance was included in the recommendation. Professor Beermann replied that late-issued guidance is part of the perception problem.

On paragraph seven, Mr. May suggested replacing "should solicit public comments" with a less formal phrase, such as "should seek public input." He asked whether the paragraph was intended to encourage the use of full notice and comment procedures. Professor Beermann replied that his intention was to encourage agencies to use notice and comment wherever



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possible. He noted that this is the approach the Obama Administration took, and that it is in the spirit of several previous Conference recommendations.

Moving back to paragraph four, Professor Lubbers asked whether the committee would be comfortable removing the entire paragraph because it expands the recommendation to address materials that are already included in the technical definition of a rule under Executive Order 12866. The committee discussed whether there is a such thing as “guidance” under the Administrative Procedure Act. Professor Beermann expressed concern that defining “rule” according to E.O. 12866 would narrow the recommendation. Several members suggested that moving the issue of guidance to the preamble might solve some of the problems.

Ms. Sferra-Bonistalli suggested that the recommendations should focus on the real problem, which is the promulgation of binding rules at the very end of an administration. She suggested that eliminating paragraph four and moving the discussion of guidance to the preamble. Professor Pierce further suggested that the preamble should explicitly define “rules” according to the APA. On a motion, the committee voted to take this approach.

Professor Pierce then moved the discussion to paragraph five. Ms. Siciliano asked why rules governing internal operations were singled out. Professor Beermann explained that it was an issue he found particularly interesting and problematic. If an administration has been operating under the old rules throughout its term, why should it make new rules for the new administration? The practice seems particularly bad with respect to funding rules. But Professor Beermann had difficulty finding many examples of this problem. Professor Lubbers observed that including these rules seemed inconsistent with the recommendation’s general focus on legislative rules. Professor Pierce and Ms. Siciliano agreed. On a voice vote, the committee agreed to strike paragraph five and address procedural rules in the preamble.

Moving on to paragraph six, Mr. Shapiro asked what the Office of Legal Counsel’s opinion would be on the suggestion that a new administration has a role in the process before the transition takes place. Is that even allowed? It seems like the outgoing administration would be likely to object. Professor Pierce explained that such collaboration does happen. The best example is the cooperation between the Treasury and the Federal Reserve when the economy was collapsing in late 2008. Professor Beermann observed that the recommendation encourages, but does not require collaboration. Mr. Eisner asked whether it might be illegal for the incumbent administration to share certain information with non-governmental members of the incoming administration. Mr. Shapiro suggested that this concern could be addressed by recommending that “post-election, the outgoing administration should consider sharing appropriate information about pending rulemaking actions and new regulatory initiatives with the incoming administration.” The committee approved of this change on a voice vote.

On paragraph seven, Professor Beermann explained that the aim was to encourage the use of notice and comment for delayed rules, which allowing the agency to rely on the record from



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previous comment periods. Mr. Eisner noted that this is how it works on reconsideration. Professor Pierce cautioned that agency processes can vary. Ms. Siciliano suggested that the important point was to encourage agencies to take public input on what midnight rules to review. Given the complexities of the issue, however, she proposed tabling this and the remainder of the recommendations for the next committee meeting. There was general agreement on this course of action

The meeting was adjourned at 12:28 pm.