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Thank you, Mr. Chairman and Ranking Member Franks. I appreciate this opportunity to testify before the Subcommittee on Commercial and Administrative Law on the topic "Midnight Rulemaking: Shedding Some Light." I am pleased that the Subcommittee has chosen this important topic for its first hearing of the 111th Congress, and more generally by the interest of the Subcommittee in administrative law and regulatory practice.

In the first part of my remarks, I would like to focus on potentially negative and unforeseen consequences to legislative deprecation of midnight rules. I will then turn to an analysis of some of the problems that may arise should H.R. 34, a current proposal to allow an incoming administration to disapprove of midnight rules, be passed. Finally, I will turn to a broader discussion of the administrative process and how it might be strengthened to reduce idiosyncratic and unadvised executive branch decisionmaking without aggravating the "lame duck" status of an outgoing President.

1. Proposals to deprecate midnight rules in general

Under our existing administrative system, midnight regulations passed by one administration become law absent congressional action under the same terms as regulations passed at any other time in a Presidential term. There are a number of ways that this might be changed. One could imagine a statute that simply disabled a President from engaging in rulemaking in the final period before a regularly scheduled inauguration of a new President. Alternatively, a statute might provide for increased judicial scrutiny of midnight rules, for example by requiring an increased burden of persuasion on an outgoing administration in the process of judicial review.

Such proposals might have certain benefits. For example, they might make an outgoing Presidential administration less likely to pass rules simply designed to slow down the incoming administration, or to bog the incoming administration down in resource-consuming litigation. Nonetheless, there are significant drawbacks to any legislative efforts that would convert a President into, for administrative law purposes, a 15/16ths President, an individual authorized to exercise the customary powers of the executive branch except during the last three months of the Presidency. Moreover, it is difficult to justify the creation of a 15/16ths Presidency based on general concerns about the orderly process of the administrative state.

Even the claim that reform would deter an outgoing administration from hamstringing an incoming administration is questionable. Anne Joseph O'Connell has shown that "Presidents usually have started fewer, not more, rules through notice-and-comment rulemaking in the first year of their terms than in later years." While it is possible that some of this startup time is attributable to agencies' digging out from midnight rulemaking of the prior administration, this is likely to account for only a small percentage of the increase. Rather, it takes some time for an agency to become fully staffed and then to assess its priorities. Given that there is some startup time for a new Presidential administration to plan its most important objectives, midnight rulemaking on relatively routine matters may be helpful to the new administration, allowing smaller issues to be resolved, thus permitting focus on future challenges.

It is true that even with reforms deprecating midnight rules, administrative agencies would still be permitted to issue regulations, for example with delayed effective dates, or at least to write draft regulations that the next administration could consider. But once deprived of their ability to have the final say on whether regulations are issued, administrative officials may feel that they will not receive credit for any rulemaking initiatives with delayed effectiveness, and moreover they might worry that disapproval could be embarrassing. As a result, they are likely to hold off even on many regulations that the new administration would not disapprove. This will lead to a buildup of many low-profile regulatory initiatives that must be shepherded through the publication process, slowing the startup time for the new administration.

There is, moreover, good reason to think that the vast majority of regulations issued in the midnight period are relatively routine. In the last three months of the Clinton Administration, a record 27,000 pages were published in the *Federal Register*, but in similar periods during the administration, 17,000 pages were published. This is obviously a notable increase, but many of the 17,000 pages that ordinarily would be published during that period presumably contained relatively routine rules. Even on the 10,000 additional pages of rulemaking, only a relatively small number of regulations (such as the ergonomics and arsenic regulations) were especially politically controversial. Much of the 10,000 pages is probably attributable simply to procrastination, or to a desire by agency officials to finish work that they have begun. If some portion of the 27,000 pages were simply not issued in the first place, there would have been a great deal new work for the incoming administration.

One concern about midnight rulemaking is that outgoing agency officials may issue regulations specifically because they want to force the new administration to spend time undoing these regulations. But there are other ways that an outgoing administration could undermine a new administration. If new laws deprecate midnight rules, an outgoing administration might take an opposite approach, essentially ceasing work on regulations, including ones that are relatively pressing because, for example, of deadlines imposed by Congress or by the courts. These agencies might even use the legislation restricting midnight regulations as an excuse. Rather than simply giving a new administration a menu of regulations to either allow or disapprove, the outgoing administration might decide to let the new administration do the work of bringing regulations through the regulatory process. Again, this could create a backlog that could hamper a new administration as much as or even more than the issuance of midnight regulations, only a relatively small number of which a new administration is likely to invest resources in undoing. Another strategy by an outgoing administration would be to focus its resources on initiating politically controversial adjudications. Because an agency is free to develop policy in both adjudication and rulemaking, this can sometimes be an effective means of moving policy, and certainly can tie up agency resources in the next Administration.

The passage of legislation deprecating midnight rules might not even be effective in suppressing the issuance of politically controversial regulations. It might simply push the enactment of such regulations 90 days earlier, to just before the Presidential election. This has hazards of its own. Decisions on whether to complete high-profile regulatory initiatives that have been under review would likely depend increasingly on partisan political concerns. Meanwhile, although it is useful for the

electorate to focus to some extent on administrative issues, a quadrennial period of intense October rulemaking might prove to be an undue distraction from the broader themes of presidential campaigns.

Of course, the vast majority of regulations would fly under the radar of Presidential politics, without affecting campaigns one way or the other. This, however, merely emphasizes the futility of any efforts to deprecate midnight rulemaking. There is likely still to be a bump in administrative activity, just a few months earlier. To be sure, the total volume of rulemaking in an administration might be slightly lower, for there will only be a guarantee of 15/16ths the time to engage in rulemaking. But past moratoria on regulation have proven excessively crude. Perhaps the bump will be a little bit less, with a couple of controversial and high-profile initiatives abandoned every four years. But even if we assume this to be a benefit, it is a small part of the broader regulatory picture.

Some may argue that an early deadline just before the election would in fact have a broader effect on rulemaking, and that there will not be a considerable increase in rulemaking activity just before an election. One argument for this is that many midnight rules may be enacted only because of the relative lack of accountability of the executive during the midnight period. We should be skeptical, however, that the relative difference in degrees of accountability across time period makes a difference on the vast majority of rulemaking issues. Moreover, scrutinizing different variations of the claim that midnight rulemaking should be deprecated because of accountability concerns helps reveal weaknesses with this claim.

One variation defines accountability as electoral accountability. There is a vein of administrative law scholarship, particularly the breakthrough work of Jerry Mashaw, that concludes that the executive branch is the most politically accountable branch, in part because the electorate is relatively more aware of actions of the President than actions of individual members of Congress. One might accept this account and then argue that accountability varies across time. The longer the period to an election, the smaller the degree of accountability. Nonetheless, it is hazardous to try to change administrative law based on changing degrees of accountability.

Suppose, for example, that we consider regulations finalized not in January 2009, but in January 2005. In both periods, George W. Bush would never face re-election again, there would be two years for the public to forget about rules enacted in that period before a House electoral cycle, and there would be four years before another Presidential election. If deprecation of regulations is to be justified by electoral accountability, then perhaps we should extend it to a period just after a President has been re-elected. To be on the safe side, perhaps we should disable regulation in the entire second term of a Presidency. Alternatively, if the argument is that the President's power should be weakened after a public repudiation of his or her policies, perhaps we should have a system that diminishes presidential power if the President's party fares poorly in midterm congressional elections. These are, of course, facetious suggestions, but they are enough to show that the fact that a particular President will not again face the electorate cannot be a sufficient basis for making regulations disapprovable.

Another variation of this argument focuses on accountability to Congress and more broadly on the separation of powers. One might argue, for example, that when the administration is not near its

end, the President will face retaliation from acting in a way that Congress would not approve, for example in the form of increased congressional oversight of administrative agencies. Game theorists might say that the President and Congress are engaged in a multi-period cooperation game, but the midnight time frame presents a "final period" problem. There is an incentive to defect from a regime of cooperation in the last period. And so, the President may care less about accommodating congressional concerns in this final period.

This dynamic may occur to some extent, but it is difficult to determine whether reduced congressional accountability for a brief period of time is necessarily bad. For example, as Jack Beerman has pointed out, midnight regulations sometimes may consist of initiatives that otherwise would be blocked by special interests. Similarly, such regulations may consist of moderately politically unpopular changes that are nonetheless beneficial. Admittedly, sometimes regulations are unpopular for good reason. It is difficult in the abstract to determine what is the optimal degree of special interest influence on legislation and ideally how much the President and administrators should pursue what they believe is best rather than what the less informed public will support. But it certainly is not clear that having a few months in which the President has a freer hand will generally lead to worse decisions rather than better ones, let alone that essentially disabling the President for a period of time will improve decisionmaking.

A counterargument is that our government is a system of checks and balances, and that the President ought to be most restrained when such checks and balances are relatively impotent. But pursuing the goal of adjusting presidential power based on the strength of checks and balances would seem to suggest a range of radical policy changes. For example, one might imagine a regulatory regime that made it harder for the President to act when Congress is of the same party as the President. The judiciary might apply a lower standard of review to administrative action when government is divided, on the theory that congressional review will be more active and may thus serve as a substitute for judicial review. The "midnight" period cannot be singled out as the only period in which checks and balances are unlikely to be effective in limiting presidential authority.

2. Problems with H.R. 34

A current bill to address the alleged dangers of midnight rulemaking is H.R. 34. Under the bill, "a midnight rule shall not take effect until 90 days after the agency head is appointed by the new President." One danger of deprecating midnight rules through legislative action is that the legislation may present unanticipated interpretive challenges. All legislation presents this danger to some extent, but the costs of ambiguity are particularly high here, because there may be uncertainty concerning the validity of large numbers of regulations, and private parties may face sanctions for failing to comply both with the old regime and with the new one.

Some problems with the language of H.R. 34 should be easily fixable. For example, the current definition of a "midnight rule" applies to "a rule adopted by an agency within the final 90 days a President serves in office." This would appear to apply regardless of the reason that a President leaves office, including if he or she dies or resigns. Another provision, governing exceptions to the statute,

refers to a "President serving his final term." This definition is only a little better, as it does not make unmistakable whether a President who has been voted out of office after one term, but could run for another term later, should be counted as "serving his final term." A better definition would make clear that the legislation applies to every President who either has not run for re-election or has been voted out of office, in the 90-day period preceding the regularly scheduled inauguration of the next President. The statute also ideally would make clear that it would apply only once some official determination is made of who has won the Presidential election.

An additional interpretive problem arises from the exceptions provision, what would become § 555a(b)(2). The President is permitted to order that a midnight rule should take effect under several identified conditions. This raises interesting questions. Is this order subject to judicial review? Under what standard? If the President does certify a midnight rule so that it does take effect, can it still be disapproved by the new agency head?

The disapproval process itself presents interpretive questions. Can an agency head in a multimember agency act alone to disapprove of a regulation, even when the various members of the agency ordinarily would need to vote to take agency action? What standard of judicial review, if any, applies to an action of disapproval? Is disapproval a form of administrative action that requires no justification whatsoever? The Administrative Procedure Act, at least in theory, allows challenges to be brought based on both agency action and inaction, so even if we count an agency's issuance of a regulation and then disapproval thereof collectively as inaction, it would appear that there might be some ground for judicial review. This is especially true when an agency is issuing regulations expressly required by Congress or the courts by a particular date. Even if a failure to issue regulations in the first place were effectively unenforceable, a decision to disapprove mandated regulations might be legally questionable.

Finally, the retroactivity provision itself presents interesting issues. For example, can liability attach to a private party that has complied with a new regulation after its effective date but not with the preexisting regulation? There would appear to be strong reasons for providing a safe harbor to a private party that has dutifully followed the new regulatory regime, even if policy should subsequently revert to the old regulations. This is especially so where regulations have criminal consequences, given the constitutional proscription of ex post facto laws and bills of attainder. Another peculiarity of the retroactivity provision is that President Bush alone would be unable to take advantage of the exceptions provision, because the bill was not signed into law during his Presidential term. Does there thus remain in the retroactivity period any exception for regulations that may be necessary, for example because of an imminent threat to health or safety, if not so certified by the President?

These are, of course, only some interpretive issues, and doubtless others will arise. At the same time, we can expect constitutional challenges to the creation of a 15/16ths Presidency, and considerable uncertainty among private parties in diverse circumstances regarding not merely some provision of a particular regulation, but whether an entire set of regulations is valid. Even if one views the 15/16ths Presidency as beneficial, one might think it would be better to allow Congress and the agencies to use ordinary procedures to undo regulatory initiatives that they dislike than to confront the many

complications that would result should this statute become law. This is especially so for regulations passed at the end of President Bush's Administration. Because the political branches today are all of the same party, there is the least need for a crude and automatic mechanism to undo the Bush Administration's last rulemakings.

3. Administrative reform with a full-term presidency

The existence of problems in any attempt to deprecate midnight rulemakings does not mean that midnight rulemakings themselves are without their problems. Midnight rulemaking, however, can be seen as problematic not so much in and of itself but as problematic in what it signals more generally. Because midnight regulations occur so near the transition, they highlight the fact that different administrations are likely to pursue different objectives. Some may be inclined to accept this as democracy in action, and surely even in a hypothetical ideally functioning democracy, policy would change from administration to administration in response to the evolution of voters' views.

But the changes in policy have historically been relatively large in comparison to any underlying changes in long-term popular views about appropriate regulatory policy. It is possible to see this not as a virtue of the democratic process, but as an unfortunate symptom of its crudeness. On this view, an ideal administrative system, while allowing each new administration some discretion, would also seek to constrain executive action so that the difference in regulatory outputs from one administration to another is minimized. And indeed, our administrative process can be seen as a tool that ensures that much of the regulatory state's administrative functioning will operate more or less the same regardless of the incumbent of the Oval Office.

The importance of this can be seen by focusing on the few areas of administrative practice in which the President has the power to act simply by issuing Executive Orders, without public participation or notice-and-comment of any kind. In some of these areas, policy lurches from one ideological position to another as soon as the new President is sworn into office. One day, we have a restriction on abortion funding, and the next we do not, until the White House switches back to the other party. Yet it is remarkable how few areas of policy operate this way. We do not switch from a market-oriented health care system to a government-operated one, or between high emissions limits and low emissions limits the moment a new President comes into power. The administrative process moves slowly and consistently. Like the judicial doctrine of stare decisis, the existing regulatory system ensures that policy moves relatively slowly. The policies in place at any given time are some compromise among the varying ideological views of administrations over the previous several decades.

Why is this? Why does an incoming administration not simply gut all of the regulations from its predecessors that it dislikes in favor of its own preferred administrative approach? Agencies cannot overturn statutory commands, but that is only a partial explanation, given the wide variety of possible approaches that statutes allow for, especially in our age of *Chevron* deference to administrative determinations. Rather, the answer is that changing the law is time-consuming. To issue regulations, an agency must go through the notice-and-comment process, and to pass muster under the "hard look" doctrine, it must provide at least a reasonable response to those who disagree with its approaches. This

process ultimately will allow an agency to accomplish virtually anything clearly consistent with statutory requirements, but the process is sufficiently cumbersome that an agency faces real tradeoffs.

Some critics have therefore decried the administrative process as "ossified." Perhaps. But if requirements of notice-and-comment decisionmaking and the institution of hard look review were eliminated altogether, then we could expect regulation to veer from one extreme to another with a change in presidential administrations, in the same way that we seen on the small handful of issues governed by Executive Orders. In effect, there would be two copies of the Code of Federal Regulations: one for when a Democrat was in power and one for when a Republican was in power, with each President perhaps picking some regulations from the other team when taking office, in the same way that a President might pick one or more Cabinet members from the opposite political party today.

The existing system of rulemaking avoids this, encouraging incremental reform. The head of an administrative agency has a budget to allocate to different priorities. Sometimes, an administrative agency head might pursue a relatively radical course in comparison to the preexisting regime, but relatively large changes require more paperwork, because there are more plausible objections to them. And so, in a typical administration, there may be some large-scale changes and a number of smaller-scale changes in the regulatory framework, but the overall framework typically looks more or less the same at the end of the administration as at the beginning. The system of hard look review ensures that even as the President exercises the full constitutional power of his office, the administrative state will move only to some degree in the direction of his or her preferences. For more radical reform without the burdens associated with notice-and-comment decisionmaking, the President must persuade Congress to act.

A regulatory regime creating a 15/16ths Presidency would constrain the administration still further, ensuring even greater levels of administrative continuity. It is impossible to conclude in the abstract whether our administrative system allows a single administration to effect too much change or too little. But even if the answer is that administrative agencies have too much leeway to move policies over to their ideological priorities, disallowing midnight regulations is a crude response. Such an approach covers nonideological regulations along with politically salient ones, and it artificially freezes policy in favor of the status quo. It is easy to see this by imagining more drastic versions of the midnight rule, such as a rule that would invalidate rulemaking in the last year or last two years of a Presidential administration. Only those who are so distrustful of government that they are willing to void regulations sight unseen should be in favor of such crude approaches.

There are other regulatory tools that can help achieve the beneficial ends of regulatory continuity without artificially freezing the administrative process. For example, recent Supreme Court efforts to prevent agencies from skirting the notice-and-comment process are likely to help promote greater consistency in administrative policy from one administration to another, and any legislative efforts in that direction could help as well. Any reforms that would increase the weight that administrative agencies must give to scientific consensus similarly could improve regulatory consistency and outcomes. In short, there are ways to avoid the dangers of midnight rulemaking—the prospect of ideological and arbitrary decisionmaking—all day long.

I will conclude by highlighting the one area of administrative reform that is perhaps most likely to have these salutary consequences. The continued use and improvement of cost-benefit analysis and other forms of regulatory review can help ensure that administrative outcomes depend on a systematic tallying of the effects of regulations, reducing the risk that midnight regulations and others will depend on ideology or caprice. Some legal scholars have attacked President Obama's nominee to head the Office of Information and Regulatory Affairs in part because of his past support for cost-benefit analysis. Yet many of these scholars' critiques of cost-benefit analysis could equally be translated into proposed improvements to the methodology. Both Congress and the Administration could greatly advance the goals underlying the midnight rulemaking reform by strengthening both the framework of cost-benefit analysis and the institutional resources that OIRA has to review agencies' actions to ensure their consistency with the Administration's objectives and with our broader regulatory history and tradition.

Thank you again.