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**GEORGE MASON UNIVERSITY**

**Analysis and Solutions of the Midnight Regulations Phenomenon.**

TESTIMONY

By

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Subcommittee on Commercial and Administrative Law

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2141 Rayburn House Office Building

<http://www.mercatus.org/>

Chairman Cohen, Ranking Member Franks, and Distinguished Members of the Subcommittee:

I appreciate the opportunity given to me today to testify on the midnight regulation phenomenon. I am a research fellow with the Mercatus Center, a university-based research, education, and outreach organization affiliated with George Mason University and located on the Arlington, Virginia campus. A core mission of the Mercatus Center is to provide a public service by conducting research in law, economics, and other social sciences that is directly relevant to the issues being deliberated by policy makers.

For over a decade, the Mercatus Center has taken a great interest in the study of regulation and the midnight regulations phenomenon in particular. In 2001, the Mercatus Center published an empirical study by scholar Jay Cochran that established the phenomenon's existence.<sup>1</sup> Later, my colleague Antony Davies of Duquesne University and I updated Cochran's model in a Working Paper published by the Mercatus Center in March 2008.<sup>2</sup> Then, in December 2008, my colleague Jerry Brito and I completed a paper published as part of the Mercatus Center Policy Series "For Whom the Bell Tolls: The Midnight Regulation Phenomenon," that updates and expands upon Cochran's work.<sup>3</sup> The *American University Administrative Law Review* will publish an expanded version of the paper in March 2009. The law review article will include a new section examining the attempt by the Bush Administration to stop the midnight regulation phenomenon during the president's last year last in office. My work with Jerry Brito is the basis for my current testimony.

## **I. The Midnight Regulation Phenomenon Does Exist.**

The ability of a lame-duck president to achieve anything in the last months of his presidency has been described "like a balloon with a slow leak that shrinks with each passing week until it hits the ground."<sup>4</sup> However, scholars today acknowledge that in the end of a term presidents manage to promulgate large number of rules and orders before they leave office extending some of their influence into the future.

Virtually every modern president has made some significant regulatory change in the final days of his administration, but it was not until the regulatory outburst in the final days of President Jimmy Carter's presidency that the term "midnight regulation" was coined.<sup>5</sup> At the time, the Carter administration set the record for number of pages printed in the *Federal Register* during the midnight period—the time between Election Day and Inauguration Day—with 24,531 pages.<sup>6</sup>

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<sup>1</sup> Jay Cochran, III, "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters" (working paper, Mercatus Center at George Mason University, 2001), [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint\(1\).pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint(1).pdf).

<sup>2</sup> Antony Davies and Veronique de Rugy, "Midnight Regulations: An Update" (working paper 08-06, Mercatus Center at George Mason University, 2008), [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806\\_RSP\\_Midnight%20Regulations.pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf)

<sup>3</sup> Brito, Jerry and Veronique de Rugy. "For Whom the Bell Tolls: The Midnight Regulation Phenomenon." *Mercatus Policy Series*, Policy Primer No. 9. Arlington, VA: Mercatus Center at George Mason University, December 2008.

<sup>4</sup> Carl Cannon, *The Long Goodbye*, NATIONAL JOURNAL, Jan. 27, 2001, at 33.

<sup>5</sup> J. Jack Faris, Small Business Focus: Watch Out for 'Midnight Regulation', NFIB Commentary, August 21 (2000) available at <http://www.nfib.com/object/1609860.html>

<sup>6</sup> Susan Dudley, *Reversing Midnight Regulations*, REGULATION MAGAZINE, Spring 2001, at 9, available at

This sudden outburst of regulatory activity is not just a characteristic of Democratic administrations. Late in his presidency, President George H.W. Bush's administration had instituted a regulatory moratorium,<sup>7</sup> but in its waning months it issued the largest number of economically significant regulations—53 rules—of the last 30 years, including a significant proposal loosening the rules on how long truck drivers could stay on the road between breaks.<sup>8</sup>

### A. Evidence of the Midnight Regulation Phenomenon

In 2001, former Mercatus Center scholar Jay Cochran examined the number of pages in the *Federal Register* as a proxy for regulatory activity.<sup>9</sup> Cochran went as far back as 1948 and found that when control of the White House switched to the opposite party, the volume of regulation in the outgoing administration's final quarter-year averaged 17 percent higher than the volume of rules issued during the same period in nonelection years.<sup>10</sup> These pages of the *Federal Register* include executive orders, proclamations, administrative directives, and regulatory documents (from notices of proposed rulemaking to final rules).<sup>11</sup> According to Cochran's analysis, the sudden outbursts are systemic and cross party lines.<sup>12</sup>

Cochran's explanation for this phenomenon is what he calls the Cinderella constraint.<sup>13</sup> He explains, "as the clock runs out of time on the administration's term in office, would-be Cinderellas—including the president, cabinet officers, and agency heads—work assiduously to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight."<sup>14</sup>

Recent Mercatus research takes a second look at the existence of the midnight regulation phenomenon.<sup>15</sup> It uses an extended data set—from 1948 to 2007—and examines monthly data instead of quarterly data. It also measures the extent of regulation differently than Cochran did: the number of *Federal Register* pages in the current month

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<http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf>.

<sup>7</sup> Gary L. Galemore, *Federal Regulatory Reforms: An Overview*, (Congressional Research Service, RL31207, January 29, at 7, (2007), available at

[https://www.policyarchive.org/bitstream/handle/10207/1312/RL31207\\_20030129.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/1312/RL31207_20030129.pdf?sequence=1)

<sup>8</sup> Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of Modern Administrative State*, 94 VA. L. REV. 889, 890 (2008).

<sup>9</sup> Jay Cochran, III, "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters" (working paper, Mercatus Center at George Mason University, 2001),

[http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint\(1\).pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint(1).pdf).

<sup>10</sup> *Ibid.*, 8.

<sup>11</sup> The *Federal Register* is the place where the executive branch agencies promulgate new rules, announce hearings, and withdraw or modify existing regulations. Short of counting every single rule issued during the midnight period—which is impossible considering the large number of new rules and the opacity of the process—using the number of pages in the *Federal Register* to measure regulatory activity is a reasonable first approximation of the total volume of regulations issued by federal agencies. Another solution is to count the number of economically significant regulations. However, that proxy too does not tell the whole story as these regulations are only a small portion of the total of regulations issued during that period.

<sup>12</sup> Cochran, "Cinderella Constraint," 15.

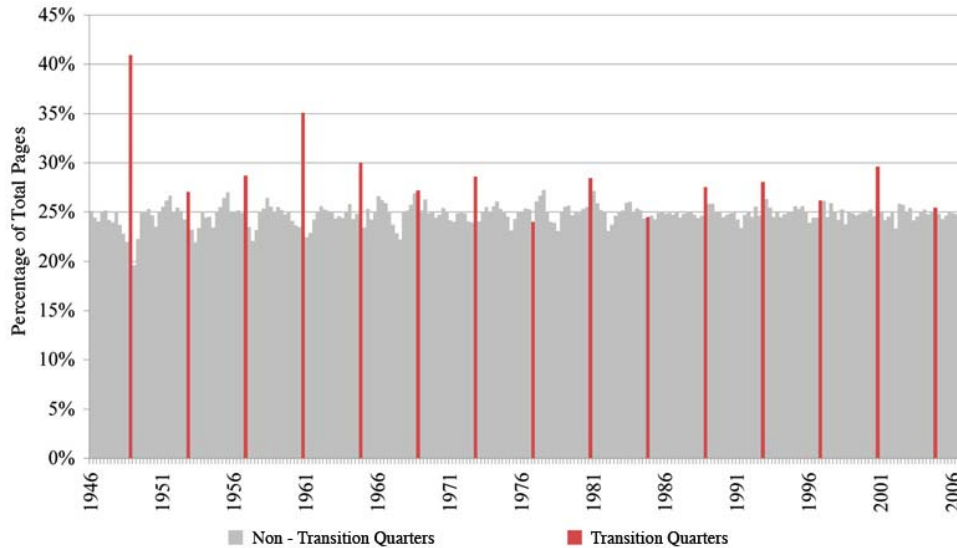
<sup>13</sup> *Ibid.*, 15. See also Jack M. Beeraman, "Presidential Power in Transition," *Boston University Law Review* 83 (2002): 947, 955.

<sup>14</sup> *Ibid.*, 4.

<sup>15</sup> Antony Davies and Veronique de Rugy, "Midnight Regulations: An Update" (working paper 08-06, Mercatus Center at George Mason University, 2008),

[http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806\\_RSP\\_Midnight%20Regulations.pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf).

is represented as a percentage of total pages published during the calendar year (as opposed to simply considering the total number of pages published). This change allows the researchers to capture the increase in regulatory activity during the post-election months for a given administration relative to the administration’s annual regulatory output.



**Figure 1. Pages added to the *Federal Register* in each quarter as a fraction of pages added for the calendar year<sup>16</sup>**

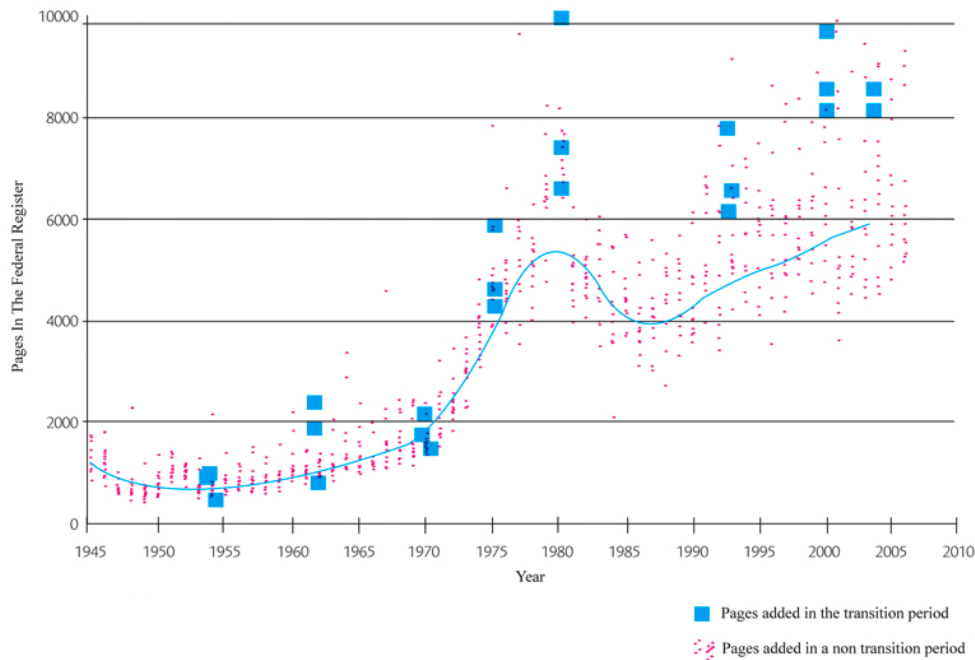
Our recent research shows that transition periods usually are accompanied by outbursts in regulatory activity, especially when the presidency switches from one party to the other. Figure 1 shows the number of pages added to the *Federal Register* between 1946 and 2006 during the last three months of a calendar year as a fraction of total pages added for the entire year (the three-month moving average). Figure 1 contrasts the growth during nontransition quarters—the quarters in which no presidential election occurs—and the growth during transition quarters—the quarters in which a presidential election does occur.

The data show that, under normal circumstances, the number of pages added to the *Federal Register* during the course of a year grows at a constant rate—it is spread equally throughout the year. In other words, 25 percent of the pages added to the *Federal Register* during a calendar year will be added each quarter. However, for quarters in which a presidential election occurred, the number of pages added exceeds the 25 percent baseline 13 out of 15 times. The two exceptions followed the elections of 1976 (Ford succeeded by Carter) and 1984 (Reagan elected to a second term).

Figure 2 also illustrates the midnight regulation phenomenon. It shows the number of pages in the *Federal Register* from 1946 to 2006. The dots represent the number of pages added in a given month, and the squares highlight the number of pages added during the months of a transition period. The solid line represents a nonlinear smoother line that reveals underlying trends in the data. Figure 2 shows that the number

<sup>16</sup> Authors’ calculation based on number of pages in the *Federal Register*.

of pages grew slowly between 1945 and 1970. After 1970, the number of pages started to grow rapidly before it decreased slightly in the 1980s. In the 1990s, it increased again, but at a slower pace than in the 1970s.



**Figure 2. Number of pages added to the *Federal Register* from 1946 to 2006<sup>17</sup>**

Pages added to the *Federal Register* during the transition periods are located well above our reference line, lending a first round of support to the theory that outgoing administrations significantly increase their regulatory activity in the months following a presidential election—especially if parties are changing. After 1970, the number of pages added to the *Federal Register* increases drastically after an election, especially in 1980, 1992, and 2000 when there was a party switch. We see a smaller increase after elections where there was no switch in the party in power, such as 1984, 1988, and 2004.

With a few exceptions, these results are quantitatively and qualitatively consistent with Cochran’s findings. For instance, they confirm a positive relationship between post-election months and regulatory output.<sup>18</sup> There is also a correlation between Congress and the existence of midnight regulations. This would mean that the more days Congress is in session the month before the start of the midnight period, the more regulations will be promulgated.<sup>19</sup> It would imply that in the last days of a presidential term, Congress too is trying to push regulations out the door. However, even though there is a statistical correlation, this doesn’t mean that one causes the other. In addition, the new data show a positive relationship between the rate of cabinet turnover and regulatory output.<sup>20</sup> The higher the rate of the executive branch turnover—for example, when the entire cabinet is

<sup>17</sup> Authors’ count of *Federal Register* pages.

<sup>18</sup> Cochran., “Cinderella Constraint,” 3.

<sup>19</sup> *Ibid.*, 5.

<sup>20</sup> *Ibid.*

about to be replaced because the incumbent president has lost reelection—the more regulations will be issued during the midnight period. As the rate of the executive branch turnover diminishes—such as following a successful reelection—fewer regulations are issued.

## B. Why Does it Happen?

So what is the cause of the midnight regulations phenomenon? It is commonly believed that as the legislative process slows down at the end of an administration's term, it becomes more difficult for a president to push through an agenda on his way out.<sup>21</sup> However, according to political scientists William Howell and Kenneth Mayer, this is not necessarily the case.<sup>22</sup> The slowdown allows the president to take actions using tools at the executive's disposal that during any other period would likely be checked and halted by the legislature.<sup>23</sup> The authors explain that with midnight regulations, executive orders, presidential proclamations, executive agreements, and national security initiatives, presidents have ample resources to make policy changes that would stand little chance in the regular legislative process.<sup>24</sup> In other words, it is easier to get things done when Congress is distracted. Another side of this argument is that during this period, the president has less political capital to get things done legislatively, so he uses tools that do not require legislative action.

Additionally, at the end of a term, the president has not only the ability, but an incentive, to use these resources to try to push through policy changes. Howell and Mayer explain that midnight regulation occurs when “political uncertainty shifts to political certitude.”<sup>25</sup> During the last 100 days of his administration, a president knows exactly who will succeed him, as well as the new president's policy positions, legislative priorities, and the level of partisan support the new president will enjoy with the new Congress.<sup>26</sup> The sitting president has every incentive to promulgate last-minute rules and regulations to deftly extend his influence beyond the day he leaves office.<sup>27</sup> For instance, John Podesta, President Clinton's chief of staff, explained in a *New York Times* interview how “starting in early 1999, we had people down in the White House basement with word processors and legal pads making lists of things we wanted to get done before we left.”<sup>28</sup> Talking about the current Bush administration, he added, “They've probably got people down there right now with chain saws and drilling rigs doing the same thing.” And he added, “I am sure they're going to want to have an impact as they walk out the door.”

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<sup>21</sup> William G. Howell and Kenneth R. Mayer, “The Last One Hundred Days,” *Presidential Studies Quarterly* 35 (2005): 533.

<sup>22</sup> *Ibid.*, 534.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 533.

<sup>26</sup> *Ibid.*

<sup>27</sup> Andrew P. Morriss et al., “Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining,” *Administrative Law Review* 55 (2003): 557

<sup>28</sup> John M. Broder, “A Legacy Bush Can Control,” *The New York Times*, September 9, 2007.

This is particularly true if the sitting president (or his party) has lost the election. In that case, the outgoing president not only has an incentive to issue midnight regulations to extend his influence beyond the day he leaves office, but he might also want to impose a cost on the incoming administration.<sup>29</sup> According to Susan Dudley, “Once a final regulation has been published in the *Federal Register*, the only lateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must develop a factual record that supports the change in policy.”<sup>30</sup> This may make it extremely costly for a new administration to change last-minute regulations issued by a previous administration.<sup>31</sup>

In fact, according to Nina Mendelson, professor of law at the University of Michigan, some last-minute rules may have such high change and deviation costs that they are close to irreversible.<sup>32</sup> Some last-minute decisions by an outgoing administration may also impose serious political costs, “including costs upon the new administration’s ability to pursue the president elect’s preferred policy agenda.”<sup>33</sup> In other words, an outgoing administration has the opportunity to seriously complicate matters for an incoming administration.

For instance, the George W. Bush administration’s decision to suspend the last-minute (January 22, 2000)<sup>34</sup> Clinton administration rule setting acceptable levels of arsenic in drinking water at 10 parts per million imposed serious political costs on the new administration.<sup>35</sup> Even though only a third of the American public approved of the rule, the suspension led to severe public criticism.<sup>36</sup> The Bush administration’s actions on the arsenic standard became a symbol of what the press liked to call the new administration’s callous attitude toward the environment.<sup>37</sup>

Furthermore, as Andrew Morris, professor of law and business at the University of Illinois, Roger E. Meiners, professor of economics and law at the University of Texas at Arlington, and Andrew Dorchak, a law professor at Case Western Reserve University Law Library explain, “by issuing regulations that make the life of the incoming administration harder, outgoing regulators can earn political capital with their core constituencies, position themselves for rewards in post-administration jobs with interest groups or in a future campaign or administration of their own party.”<sup>38</sup>

Another explanation of the phenomenon is what Boston University School of Law Professor and Harry Elwood Warren Scholar Jack M. Beermann calls “waiting.”<sup>39</sup> Waiting is a deliberate decision on the part of an administration to wait until after an election before doing something that might be perceived as controversial in order to

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<sup>29</sup> Ibid., 557.

<sup>30</sup> Dudley, “Reversing Midnight Regulations,” 9.

<sup>31</sup> Ibid.

<sup>32</sup> Nina Mendelson, “Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives,” *New York University Law Review* 78 (2003): 557–78.

<sup>33</sup> Ibid., 42.

<sup>34</sup> Howell and Mayer, “The Last One Hundred Days,” 545.

<sup>35</sup> Mendelson, “Agency Burrowing,” 561.

<sup>36</sup> Howell and Mayer, “The Last One Hundred Days,” 544.

<sup>37</sup> Michael Kinsley (2001), “Poisoning the Well,” *Slate*, April 13. See <http://www.slate.com/id/104250/>

<sup>38</sup> Morriss et al., “Between a Hard Rock and a Hard Place,” 557.

<sup>39</sup> Beermann, *Presidential Power*, 947, 957.

avoid political consequences.<sup>40</sup> At the end of a term, the political costs of taking action decrease. Because an outgoing president is unlikely to seek elective office again, he may have little need for political support, he may no longer worry about political opposition, and he may no longer need cooperation from Congress.<sup>41</sup> As a result, his administration is freer to take actions that it could not have earlier in its term for fear of provoking opposition.<sup>42</sup>

Of course, an explanation for midnight regulations could just be that some regulations that had been under review for years end up being issued in the last months before a new president takes office.<sup>43</sup> However, the fact that regulations are regularly delayed for long periods of time does not explain the systematic increase in regulatory activity at the end of presidential terms. A slightly different approach to this explanation is what Beermann calls “delay,”<sup>44</sup> by which he means a lag between the moment the regulation is proposed and the moment it is passed. One potential explanation for the lag may simply be procrastination.<sup>45</sup> However, the delay is more likely to be due to external forces. For instance, a stringent judicial review has made the rulemaking process more thorough and time consuming, and has extended the time it takes for a regulation to gain approval. As a consequence, many new regulations are naturally pushed further into the president’s term.<sup>46</sup> Also, Congress might—knowingly or otherwise—delay a regulation’s issuance. For instance, Beermann explains how the Clinton administration’s ergonomics rules, which set new workplace regulations to combat repetitive stress injuries, were significantly delayed by Congress through repeated appropriations riders prohibiting the Department of Labor from using any of its funds to promulgate a rule on ergonomic injuries.<sup>47</sup>

## II. The Midnight Regulation Phenomenon is Problematic

Now that we have established that the midnight regulations phenomenon is real and systemic, we can turn to the question of whether it is problematic.

### A. Often-Cited Concerns over Midnight Regulations:

Midnight regulations are the target of perennial criticism.<sup>48</sup> However, unless one believes that regulation of any kind is always problematic, the fact that regulatory activity increases at the end of a presidential term should not by itself be a cause for concern. It is therefore not surprising to find that objections to midnight regulations do not center simply on the increase in regulations, but on the process of their formulation.

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<sup>40</sup> Ibid., 957.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 958.

<sup>43</sup> Dudley, “Reversing Midnight Regulations,” 9.

<sup>44</sup> Beermann, *Presidential Power*, 956.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 957.

<sup>47</sup> Ibid.

<sup>48</sup> See Edward Cowen, “Administration to Kill or Put Off 36 Carter ‘Midnight Regulations,’” *The New York Times*, March 26, 1981, A1; “Here Come Ronald Reagan’s ‘Midnight’ Regs,” *U.S. News & World Report*, Nov. 28, 1988, 11; Elizabeth Shogren, “Clinton Readies an Avalanche of Regulations,” *The Los Angeles Times*, November 26, 2000, 1.



The most common criticism relates to accountability.<sup>49</sup> During the midnight period—after the November election, but before a new president is sworn in—a lame duck administration might be impervious to normal checks and balances.<sup>50</sup> In large part, Congress and the electorate provide these checks. The electorate holds the president accountable at the ballot box, while Congress has oversight over agency activity.

In the lingo of game theory, political checks depend on “repeated game-play.”<sup>51</sup> That is, an administration considering a regulation will not only take into account the current political costs and benefits of the decision they are making, but also how that decision will affect future interactions with other players (Congress and the electorate).<sup>52</sup> If there are no such future interactions, an administration will be more likely to pursue a regulatory course that might have otherwise been unpopular with Congress and the electorate.<sup>53</sup>

A president will not face another election if he has served two terms (Bill Clinton) or if he has been defeated at the polls (Jimmy Carter).<sup>54</sup> In either case, there will be an accountability deficit. Because the president knows that he will not face voters again, the president and his agencies will be less hesitant to pursue a controversial regulatory course. The accountability provided by the threat of Congressional retaliation is also weakened once the president knows that there is no “next period” in which he will need Congress’s cooperation on legislative, budgetary, and other matters.<sup>55</sup>

Some argue that this period of unaccountability is, in fact, salutary because it may be the only opportunity an administration has to take a principled stand on issues that would otherwise face swift retaliation by powerful special interests. On the other hand, the case could be made that this is also the perfect time for an administration or its party to favor a particular special interest without fear that it will be held accountable. For example, consider the controversial last-minute pardons issued by George H. W. Bush, Bill Clinton, and indeed most presidents.<sup>56</sup>

Related to the concern over accountability is the criticism that midnight regulations can be undemocratic. After the election, the people have spoken, and if they have chosen a new president with policies opposite to the sitting president, then actions by the sitting president aimed at exerting power beyond his term may be seen as

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<sup>49</sup> See William S. Morrow, Jr., “Midnight Regulations: Natural Order or Disorderly Governance,” *Administrative & Regulatory Law News*, Spring 2001, 3, 18; Morriss et al., “Between a Hard Rock and a Hard Place,” 557; and Loring and Roth, “After Midnight,” 1446.

<sup>50</sup> Morriss et al., “Between a Hard Rock and a Hard Place,” 557.

<sup>51</sup> *Ibid.*, 556–57.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> A two-term president might also be constrained until after the election because a controversial regulatory initiative might affect the campaign of his party’s nominee to succeed her. However, once the election is decided, that constraint is removed.

<sup>55</sup> According to Morriss et al., the incentive to defect is strongest when the incoming president is of the opposite party [see critique above about wording. Suggest “there is minimal incentive to defer to Congress and the electorate when the incoming president...”]. Morriss et al., “Between a Hard Rock and a Hard Place,” 557. This is because “the outgoing administration has little incentive to leave unfinished business for the incoming administration” whose policies will likely be opposite. *Ibid.*

<sup>56</sup> Kelly Wallace, “Former President Bush Granted Last-Minute Pardon to Contributor’s Son,” *CNN.com*, March 7, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/03/07/bush.pardon/index.html>; P.S. Ruckman, “‘Last-Minute’ Pardon Scandals: Fact and Fiction” (delivered at the Annual Meeting of the Midwest Political Science Association, April 15–18, 2004, Chicago, IL), <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf>.

undemocratic.<sup>57</sup> As explained earlier, one way a lame-duck president can exert power beyond his term is by adopting a procedural rule that constrains the executive's own power, but doing so only at the very end of his term so that the constraint effectively affects only his successor.<sup>58</sup> Another way is to force an incoming president to expend political capital reversing his predecessor's last-minute decisions. During the midnight period, an administration may issue rules in a politically charged area that it knows its successors will surely reverse.<sup>59</sup> Such late timing "suggests that there was no hope that the rules would actually be implemented, but rather were passed in an attempt to embarrass the new administration by forcing it to revise or repeal the rules."<sup>60</sup>

Another criticism of midnight regulations is the inefficiency and wastefulness inherent in trying to exert influence beyond one's administration. Putting aside concerns about democracy, enacting regulations contrary to the next president's policy agenda likely wastes the government's time and resources.<sup>61</sup> The outgoing administration wastes energy by enacting regulations that will no doubt be reversed, and the incoming administration must then take the time to undo them.<sup>62</sup>

Finally, there are criticisms based on principle. According to Beermann, "in addition to purely legal questions, the problem of 'midnight regulations' raises interesting normative questions concerning what constitutes appropriate behavior for an outgoing president and administration."<sup>63</sup> Federal Circuit Judge S. Jay Plager, a former OIRA Administrator under President George H W Bush, debating Clinton OIRA Administrator Sally Katzen on the question of midnight regulations, has said "he believes public virtue suffers from the rush to publish."<sup>64</sup> According to a report of the debate, Judge Plager criticized the rush to regulate at the end of an administration as "unseemly," and argued that "the haste with which midnight regulations are pushed out the door results in 'a certain amount of sloppiness' and 'makes control of the regulatory apparatus appear to be a Washington game.'"<sup>65</sup> Professor Nina Mendelson echoes Judge Plager, writing that "something about this activity strikes us as unseemly."<sup>66</sup>

The accountability and democracy deficits during the midnight period, as well as the perceived inefficiency and unseemliness of a rash of last-minute regulations, are frequently cited as the main problems with midnight regulations and are very serious concerns. However, in the balance of this article, we will focus on a less-touted problem of midnight regulations: the concern that an increase in the number regulations in a given period could overwhelm the institutional review process that serves to ensure that new

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<sup>57</sup> Mendelson, "Agency Burrowing," 6.

<sup>58</sup> Beermann, *Presidential Power*, 951–52. For example, Beermann explains that the Clinton Justice Department changed procedural rules that gave former DOJ employees the power to access work documents, but did so in the last few days of the administration. Mendelson, "Agency Burrowing," 600.

<sup>59</sup> Beermann, *Presidential Power*, 951–52.

<sup>60</sup> *Ibid.*, 951.

<sup>61</sup> *Ibid.*, 951, 972.

<sup>62</sup> Efficiency and waste is one of three concerns over midnight regulations identified by Judge Plager. Morrow, *Midnight Regulations*, 3 and 18. "[Plager] believes the ramming of regulations on the way out and the attempt to neutralize them on the way in amounts to an enormous waste of time and effort for both administrations." *Ibid.*, 3.

<sup>63</sup> Beermann, *Presidential Power*, 951.

<sup>64</sup> Morrow, *Midnight Regulations*, 3.

<sup>65</sup> *Ibid.*

<sup>66</sup> Mendelson, "Agency Burrowing," 564.

regulations have been carefully considered, are based on sound evidence, and can justify their costs.

## B. Midnight Regulations and Regulatory Process:

Every administration since Richard Nixon's has come to view regulatory analysis as a useful tool to ensure the effectiveness of regulation. To the extent we believe that the regulatory review is beneficial—at least marginally—then midnight regulations are problematic because they undercut the benefits of the review process.

The calculus is simple.<sup>67</sup> As we have seen, at the end of each administration—and especially between administrations of opposite parties—there is a dramatic spike in regulatory activity. However, there is no corresponding increase in the resources available to OIRA during those times of increased activity. 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>68</sup>

Since it was invested with regulatory review authority in 1981, OIRA's budget, in real 2007 dollars, has decreased from \$9.4 million in 1981 to \$7 million in 2007.<sup>69</sup> Staffing at OIRA has also decreased consistently and dramatically—from 90 full-time equivalent (FTE) employees in 1981, to just 50 today.<sup>70</sup> The budget and staffing decreases, however, have probably had no effect on the quality of the review process. As explained earlier, since 1993 OIRA has only had to review significant regulations, and the number of rules that it has been asked to review has dropped by 70 percent since then. Therefore, the number of rules reviewed per staffer has declined since 1981.

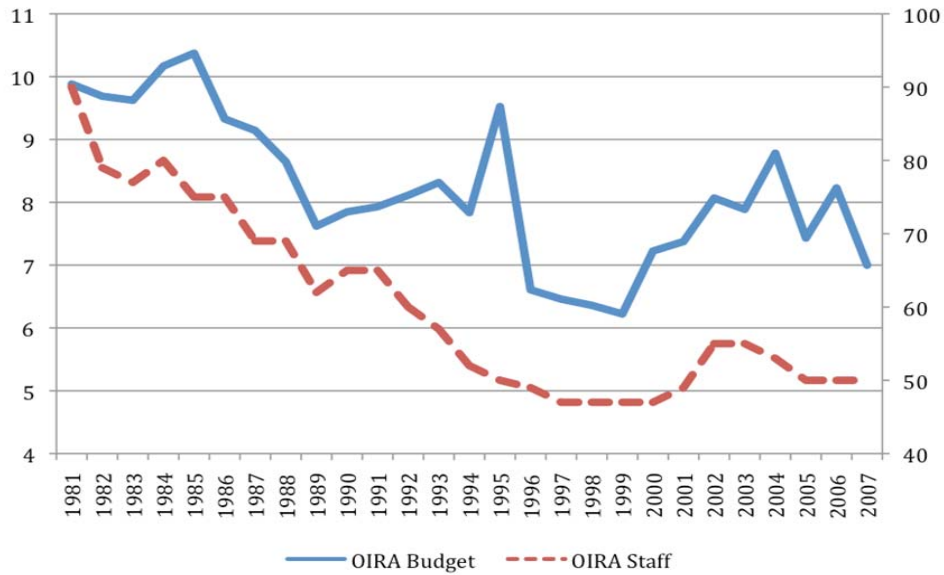
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<sup>67</sup> The calculation rests of two assumptions: first that there is no slack in OIRA's current staff and that each employee is already producing at its full capacity and second, that more time will automatically mean better review.

<sup>68</sup> We must acknowledge that to prove this conclusively would require judging against objective criteria every OIRA-produced regulatory review issued during each period of November 8 to January 20 for the last 27 years—a massive undertaking. We instead opt to make the case through circumstantial evidence and deductive reasoning.

<sup>69</sup> Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Year 1983*, I-C7 (OIRA's actual 1981 budget listed as \$4,332,000); Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Year 2009*, 1058 (OIRA's actual 2007 budget listed as \$7,000,000).

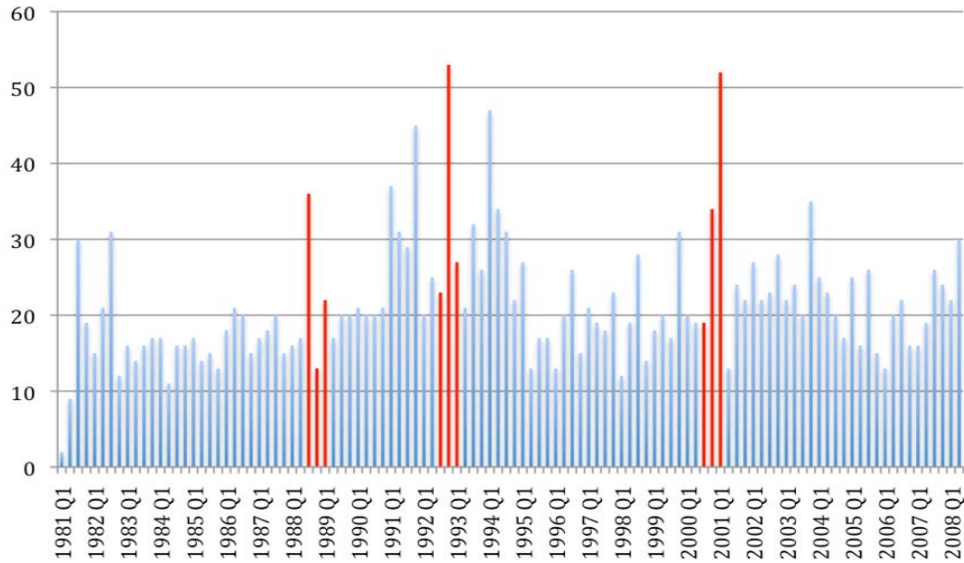
<sup>70</sup> Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* 30–31 (December 2002), [http://www.whitehouse.gov/omb/inforeg/2002\\_report\\_to\\_congress.pdf](http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf) (reports staffing figures for OIRA from 1981 through 2003); E-mail from John F. Morrall III, Branch Chief for Health, Transportation, and General Government in the Office of Information and Regulatory Affairs of the Office of Management and Budget, (July 3, 2008, 12:23:21 EDT) (providing OIRA staffing data for 2004 to 2008).



**Figure 4. OIRA annual budget (in millions 2007 dollars – left axis) and staff (in number of FTEs – right axis)<sup>71</sup>**

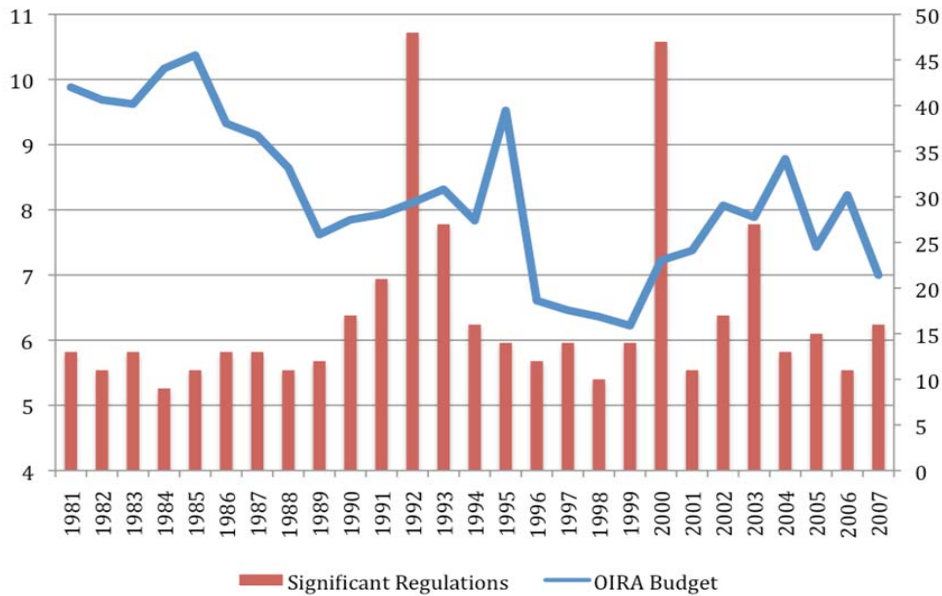
At the same time, we see spikes in the number of economically significant regulations OIRA must review during the final quarters of presidential terms.

<sup>71</sup> Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Years 1983 to 2009*.



**Figure 5. Economically significant regulations reviewed by OIRA (by quarter; presidential transitions highlighted)<sup>72</sup>**

As Figure 4 shows, during midnight periods, the same number of staff, with the same resources, must review an increased number of regulations. During the midnight periods of the George H.W. Bush and Clinton presidencies, when the transition was to a president of the opposite party, we see the number of economically significant regulations that OIRA is asked to review more than double from the same period in the immediately preceding years. However, there is no concurrent increase in the resources available to OIRA.



<sup>72</sup> Quarterly figures generated using OIRA’s online “review counts” database. General Services Administration, OIRA Review Counts Database, *RegInfo.gov*, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init>.

**Figure 6. OIRA budget (in millions 2007 dollars – left axis) superimposed over number of economically significant regulations reviewed by OIRA from Nov. 8– Jan. 20 of each year (right axis)<sup>73</sup>**

As a consequence, we can expect the amount of time and attention devoted to each regulation reviewed to be considerably less during midnight periods. One possible way to measure time and attention is by examining the number of days OIRA takes to review a proposed regulation. On its Web site, OIRA announces both the date it receives a regulation for review and the date when it completes that review.<sup>74</sup> New Mercatus Center research by Patrick McLaughlin examines whether increases in regulatory activity, such as those that occur during midnight periods, cause average review time to decrease.<sup>75</sup> He calculates the monthly average review time (i.e., how many days pass between when each rule is received and when the review is finished) and tests whether the number of regulations submitted to OIRA each month for review affects review time.<sup>76</sup>

While controlling for differences in administrations, McLaughlin finds that during the midnight period at the end of the Clinton administration, review time decreased significantly.<sup>77</sup> Relative to the mean review time between 1994 and 2007 (all full years of data available since the passage of Executive Order 12866), the Clinton midnight period witnessed a decrease in mean review time of about 27 days—a reduction by half in review time.<sup>78</sup> Because there is only one midnight period in the timeframe examined, McLaughlin investigates a possible underlying cause of the decreased review time: an increased workload for OIRA.

While OIRA is charged with reviewing all proposed significant regulations, the most important are those considered “economically significant”—those regulations that are expected to have an annual effect on the economy of \$100 million or more. McLaughlin finds that the proportion of economically significant rules to all rules reviewed by OIRA spikes dramatically during midnight periods in general.<sup>79</sup> He further finds that, in or out of the midnight period, an increase in this proportion negatively affects the review time for all regulations.<sup>80</sup> Holding constant the number of regulations reviewed that are not economically significant, one additional economically significant rule submitted to OIRA in a given month decreases the average review time for all regulations by half a day.<sup>81</sup> This suggests a diminished level of scrutiny that undermines the benefits of regulatory review.

### **III. What Can be Done about it?**

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<sup>73</sup> Ibid. OIRA budget derived from Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Years 1983 to 2009*.

<sup>74</sup> See note 96 above.

<sup>75</sup> Patrick A. McLaughlin, “Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time,” (working paper 08-40, Mercatus Center at George Mason University, July 29, 2008), [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WPPDF\\_Empirical%20Tests%20for%20Midnight%20Regulations.pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WPPDF_Empirical%20Tests%20for%20Midnight%20Regulations.pdf).

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid., 25.

<sup>80</sup> Ibid., 22.

<sup>81</sup> Ibid., 25.

Several solutions to the midnight regulations problem have been proposed and tried. These have largely addressed the democracy deficit caused by midnight regulations. In Part III we examine some of these proposals and make our own suggestion to address the effects of midnight regulations on regulatory review.

#### A. Rescinding and Postponing Regulations

The most common way presidents have dealt with their predecessor's last-minute regulatory activities has been to delay the effects of new rules and to rescind unpublished rules. A new regulation cannot gain the force of law until it is published in the *Federal Register*.<sup>82</sup> Even then, once a regulation is published in the *Federal Register*, it does not become effective until a later time in order to allow regulated parties to come into compliance.<sup>83</sup> Generally, the minimum time in which a new rule can become effective after publication is 30 days, although agencies often set effective dates of 60 days or more.<sup>84</sup> At any point before a regulation is published in its final form in the *Federal Register*, the agency may rescind the rule at will.<sup>85</sup> Once a final regulation is published, however, to repeal it an agency must engage in the same type of lengthy notice-and-comment rulemaking process it undertook to create the rule.<sup>86</sup>

With these constraints in mind, we see that the most direct course for a new president to address his predecessor's midnight activity is to "stop the presses" at the *Federal Register* until the new administration can review unpublished rules and decide which to keep and which to rescind. As for regulations that have recently been published but have not yet become effective, the president can instruct agencies to delay their effective dates, but not postpone them indefinitely.<sup>87</sup>

This is precisely what Ronald Reagan did. First on January 29, 1981, the Reagan administration issued a memorandum that told agencies to postpone the effective dates of all final rules for 60 days. Then, he issued Executive Order 12291 less than a month after he took office.<sup>88</sup> As explained in Part II.B.1 of this paper, that order created the formal regulatory review process we know today. It also suspended the effective dates of recently published rules "to permit reconsideration in accordance with [the] Order,"<sup>89</sup> and

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<sup>82</sup> *U.S. Code* 5 § 552(a)(1)(D) (2006).

<sup>83</sup> *U.S. Code* 5 § 553(d) (2002).

<sup>84</sup> *Ibid.* There is an exception to the 30-day rule. If an agency evokes the good cause exception, it can make the rule effective immediately.

<sup>85</sup> William M. Jack, "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 Car Memorandum," *Administrative Law Review* 54 (2002): 1479, 1488–97.

<sup>86</sup> Beermann, *Presidential Power*, 982–84.

<sup>87</sup> Jack, "Taking Care," 1503–11 (explaining, *inter alia*, that while the effective dates of rules may be delayed for good cause, they cannot be delayed indefinitely, and that courts will also likely be skeptical of a simultaneous across-the-board claim of good cause by a large number of agencies). See also Peter D. Holmes, "Paradise Postponed: Suspensions of Agency Rules," *North Carolina Law Review* 56 (1987): 645. Whether delay of effective dates is legally problematic or not, the fact remains that both Ronald Reagan and George W. Bush (each one a president who took over from the opposite party) have ordered the preceding administration's rules delayed as a first order of business. Jack, note 11 and accompanying text.

<sup>88</sup> Executive Order 12291, *Federal Register* 46 (February 17, 1981), 13193, <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

<sup>89</sup> *Ibid.* § 7(a).

directed agencies to refrain from publishing any new major rules until they had undergone regulatory review.<sup>90</sup>

Since Reagan, most presidents taking over from a president of the opposite party have ordered a similar regulatory moratorium.<sup>91</sup> For instance, George W. Bush, the day he took office, issued a directive ordering agencies to halt rules from being published in the *Federal Register* and to “temporarily postpone the effective date of regulations for 60 days.”<sup>92</sup> President Barack Obama’s Chief of Staff, Rahm Emanuel, also issued a memo withdrawing rules not yet published in the *Federal Register*.<sup>93</sup>

## B. Congressional Review Act

The Congressional Review Act of 1996 (CRA) presents another tool to address the problem of midnight regulations.<sup>94</sup> It creates an expedited process for Congress to repeal any regulation.<sup>95</sup> A rule can be overturned by simple majority vote in each house, and consideration of a repeal measure is fast tracked in the Senate.

The CRA requires agencies to submit all rules to Congress before they can take effect.<sup>96</sup> In order for the CRA’s expedited repeal procedures to have effect, a joint resolution of disapproval must be introduced in either the Senate or the House within 60 days of continuous session after the rule has been submitted to Congress or published in the *Federal Register* (whichever is later).<sup>97</sup> If a resolution of disapproval passes both houses of Congress and the president signs it, then the regulation is repealed and “is treated as though the rule never took effect.”<sup>98</sup> Additionally, the agency may not issue another rule that is “substantially the same” unless later “specifically authorized” by subsequent legislation.<sup>99</sup>

Therefore, to the extent Congress is concerned that regulations issued during the midnight period suffer from a lack of accountability or regulatory review, it could quickly act to overturn them. However, the CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party.<sup>100</sup> If the

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<sup>90</sup> *Ibid.* § 7(d).

<sup>91</sup> Interestingly, President Clinton didn’t instruct agencies to delay the rules. On January 22, 1993, Leon E. Panetta, the Director of OMB for the incoming Clinton administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the *Federal Register* for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the *Federal Register* all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures. See <http://www.prop1.org/rainbow/adminrec/930122lp.htm> for a copy of this memorandum.

<sup>92</sup> Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, *Federal Register* 66 (January 24, 2001), 7702.

<sup>93</sup> 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>

<sup>94</sup> *U.S. Code* 5 § 801 et seq. (2008).

<sup>95</sup> Daniel Cohen and Peter L. Strauss, “Congressional Review of Agency Regulations,” *Administrative Law Review* 49 (1997): 97, 100–01 (explaining the expediting nature of the Act.).

<sup>96</sup> *U.S. Code* 5 § 801(2008).

<sup>97</sup> *U.S. Code* 5 § 802(a); Cohen and Strauss, *Congressional Review*, 99.

<sup>98</sup> *Ibid.*, 102; *U.S. Code* 5 § 801(a)(4)(b)(1).

<sup>99</sup> *U.S. Code* 5 § 801(b)(2)

<sup>100</sup> Julie A. Parks, “Lessons in Politics: Initial Use of the Congressional Review Act,” *Administrative Law Review* 55 (2003): 187, 199 (arguing that the repeal of the Clinton OSHA ergonomics standard—the only time the CRA has been used—could only have occurred because the new President and the Congress were of the same party).



party of the outgoing president controls the Congress, and the incoming president is of the opposite party, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor, and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules.

It should therefore not be surprising that the CRA has only been used to successfully repeal a regulation once. The target was a controversial OSHA ergonomics regulation promulgated in the last few months of the Clinton administration.<sup>101</sup> It was disapproved by joint resolution of a Republican-controlled Congress and signed by President Bush.<sup>102</sup>

Despite its practical constraints, congressional action to check midnight regulatory activity may yet be a useful tool. First, it should be noted that Congress has the inherent power to repeal federal regulations at any time and the CRA exists only to facilitate and expedite the process of congressional regulatory review and disapproval.<sup>103</sup> With this in mind, independent of the CRA approach, one approach a new president could take is to conduct a review of rules promulgated during his predecessor's midnight period, identify any rules that are worthy candidates for repeal, and submit them to Congress as a package.<sup>104</sup> The package approach can make it easier for Congress to take action on midnight regulations by focusing its attention on just one resolution. A package might also help overcome the influence that special interests opposed to repeal would otherwise exert if the regulations were considered individually.<sup>105</sup>

Although the CRA would not control the package approach, it nevertheless would help facilitate it. Under the CRA, rules submitted to Congress less than 60 days (60 legislative days in the House and 60 session days in the Senate) before a Congress adjourns are treated as if submitted on the 15th legislative day of the next Congress.<sup>106</sup> This means that all rules submitted to Congress during an outgoing administration's midnight period would be treated as if submitted in January.<sup>107</sup> More interestingly,

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<sup>101</sup> *Ibid.*, 193–94.

<sup>102</sup> *Ibid.*, 197–99.

<sup>103</sup> Cohen and Strauss, "Congressional Review of Agency Regulations," 99.

<sup>104</sup> This is theoretically a solution that couldn't be put in place under the current rules. However, it is useful to think about. As it is now, packaging or bundling of rules is not allowed under the CRA.

<sup>105</sup> Morriss et al., "Between a Hard Rock and a Hard Place," 594–95. "[W]hen a rule's impacts are concentrated in a particular region or on a particular industry, there may not be sufficient political support to change the rule." A package approach would be similar to strategies employed by Congress to shut down military bases. While Congress can recognize a glut of bases, and the need to close some, individual state delegations will oppose closing the military base in their area. To address this collective-action problem, Congress enacted the Base Closure and Realignment Act: Under this act, a federal advisory committee, known as the Base Closure Commission, was required to develop a recommended list of bases to be closed or realigned. This list would then be submitted as a package to Congress for review. The act required Congress to consider the Commission's list as a single package; Congress could not alter or delete specific recommendations, but could only enact a joint resolution disapproving the Commission's entire list within forty-five days. If Congress failed to disapprove the entire list, the Secretary had to implement the recommended closures and realignments within six years.

Benjamin L. Ginsberg et al., "Waging Peace: A Practical Guide to Base Closures," *Public Contract Law Journal* 23 (1994): 169, 172.

<sup>106</sup> *U.S. Code* 5 § 801(d); Cohen and Strauss, "Congressional Review of Agency Regulations," 101.

<sup>107</sup> The midnight period begins on November 8, the day after the presidential election. The earliest day a new Congress may adjourn is January 3. *U.S. Const. amend. XX*, §2. Even if a Congress does not adjourn until the day before the new one is to begin (January 2), any rule submitted after November 8 will be submitted less than 60 days before it adjourned. Therefore, for purposes of the CRA, it will be treated as having been submitted on the fifteenth legislative day of the new Congress. *U.S. Code* 5 § 801(d). The earliest this can be is January 18th.

because of the way days are counted, rules submitted as early as May in an election year may be rolled over to the next session, and would be considered submitted on the 15th legislative or session day—which could be February.

### C. The Brito & deRugy Solution: Addressing the Oversight Problem

The most common solutions to the midnight regulations problem suggest steps that an incoming president can take to undo his predecessor's last-minute actions. Another approach would be to try to prevent the midnight regulation phenomenon, or at least mitigate its negative effects.

Professor Andrew Morriss and his coauthors have argued that the root cause of the midnight regulations problem is bad incentives: “Regulators in the lame duck period are not only freed from political fallout from their actions but have positive incentives to cause problems for the incoming administration.”<sup>108</sup> They suggest changing those incentives by giving presidents the authority to easily repeal any regulations promulgated during the predecessor's midnight period by simply publishing a notice in the *Federal Register*.<sup>109</sup> (Judge Plager has even suggested a moratorium during the midnight period that would prohibit new regulations altogether.<sup>110</sup>) This would certainly address accountability concerns. Last-minute regulations that a president wants to ensure will not be subject to easy repeal would have to be promulgated before the midnight period, while there is still political accountability. However, to the extent regulatory activity continues to spike at the end of an administration—albeit sooner than has previously been the case—the strain placed on the regulatory review process will remain.

The Bush Administration made such an attempt to “resist the historical tendency of administrations to increase regulatory activity in their final months.”<sup>111</sup> On May 9, 2008, White House Chief of Staff Joshua B. Bolten sent a memo to all executive agency heads instructing them to abstain from regulation in the last months of the administration except in extraordinary circumstances.<sup>112</sup> According to the memo, new regulations were to be proposed no later than June 1, and issued as final no later than November 1.<sup>113</sup> If the memo had had its intended effect, we would not have seen a spike during the midnight period. Unfortunately, the memo was not successful.

In the first seven years of the Bush Administration, the average number of significant regulations reviewed by OIRA was 7 per month.<sup>114</sup> Over the last three months of the term, however, that number doubled to 14.<sup>115</sup> Despite the Bolten Memo, OIRA reviewed 42 significant regulations in the period between Election Day and Inauguration

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<sup>108</sup> Morriss et al., “Between a Hard Rock and a Hard Place,” 597.

<sup>109</sup> *Ibid.* At the same time, a president (on average) does not want to be seen as a person who repeals regulations that, as portrayed by the press, save lives. It seems politically more feasible to pass regulations than repeal them.

<sup>110</sup> Morrow, *Midnight Regulations*, 18. “[Judge Plager] suggested a more effective measure would be to have Congress pass a law prohibiting submission of final regulations during the interregnum.”

<sup>111</sup> See 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> [hereinafter Boltem Memo].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Monthly figures generated using OIRA's online “review counts” database. See RegInfo.gov, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Aug. 15, 2008).

<sup>115</sup> *Id.*

Day.<sup>116</sup> This is little different from the 48 significant regulations Clinton's OIRA reviewed during its midnight period.<sup>117</sup>

While one could argue that there might have been a greater spike but for the Bolten Memo, the data suggest the memo's June 1 deadline for agencies to wrap up their regulations merely pushed back the beginning of the midnight period. During the period of June 1 to November 1 at the end of their respective presidencies, Bill Clinton's OIRA reviewed 36 significant regulations, while George H.W. Bush's OIRA reviewed 43.<sup>118</sup> During the June-November 2008 period covered by the Bolten Memo, however, that number grew to 58 significant regulations reviewed.<sup>119</sup>

The Bolten Memo created an incentive for agencies to issue regulations before the November 4 election, while the Administration was still technically politically accountable. That is a laudable achievement. However, it seems as if the toll exerted on OIRA was just as strong during the June-November period as during the midnight period proper.

Another way of changing the incentives of regulators touched on by Morriss and his co-authors is to increase the costs to bureaucracies of regulating during the midnight period. They suggest only allowing emergency regulations to be put forth during the midnight period, or limiting the size or number of regulations allowed during the midnight period.<sup>120</sup> They argue, "If agencies faced a 'budget' of regulations, they would have to make choices on which subjects to 'spend' their budget."<sup>121</sup> This approach certainly would help to make regulators more accountable—especially if promulgating significant regulations could be banned altogether during the midnight period. However, a limit on the size or number of regulations during the midnight period does nothing to prevent spikes in regulation. As we have seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.

If what we wish to accomplish is to prevent spikes in regulation that exceed OIRA's capacity to conduct proper regulatory reviews, then limits must exist at all times. By having permanent caps we could ensure that at no time—before or after the midnight period—will the pace of regulatory activity outstrip the resources available to OIRA.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Morriss et al., *supra* note 26, at 597.

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

<sup>122</sup> Morriss et al., "Between a Hard Rock and a Hard Place," 597.

<sup>123</sup> *Ibid.*

prevent spikes in regulation. As we have seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.

If what we wish to accomplish is to prevent spikes in regulation that exceed OIRA's capacity to conduct proper regulatory reviews, then limits must exist at all times. Having permanent caps would ensure that at no time—before or after the midnight period—will the pace of regulatory activity outstrip the resources available to OIRA. One way to cap regulations mentioned by Morris et al. is to limit the size of regulations.<sup>124</sup> However, simply setting a maximum cost cap for individual regulations will likely have little effect on regulatory spikes. One could still see a dramatic increase in regulations that individually fall short of the cap. Additionally, the approach is rigid. A draft regulation that exceeds the cap may nevertheless be beneficial, yet impossible to enact.

An alternative approach is to cap the total costs of regulation an agency may impose in a single year. This approach is known as a “regulatory budget,” and it allows agencies to pursue their regulatory priorities, regardless of the cost of each individual regulation, so long as the agency's total activity for the year stays under the cap.<sup>125</sup> Senator Lloyd Bentsen, who twice introduced legislation to create a regulatory budget, has explained:

A regulatory budget would put an annual cap on the compliance costs each agency could impose on the private sector through its rules and regulations. The process for establishing the annual regulatory budget would resemble the process currently used to set the fiscal budget—we would have a proposed budget from the president and annual budget resolutions from the budget committees. This would make it possible to coordinate the regulatory and fiscal budgets. We need a regulatory budget in order to reduce the impact of unnecessary, excessive, and conflicting government regulations.<sup>126</sup>

A regulatory budget is a reasonably good idea that would work to keep in check the costs imposed on society by regulation. Obviously, regulators have an incentive to underestimate the cost of a regulation, and such a requirement would only increase the pressure to do so. In addition, it would be relatively easy to do considering the large degree of subjectivity attached to cost-benefit analysis. Yet, it would still be useful and better than the current situation where agencies have no obligations to try to limit the total amount of compliance costs.

Additionally, regulatory budget caps might help address the midnight regulations problem by moderating the sort of steep regulatory spikes we see at the end of presidential terms. However, a regulatory budget approach proves too much for our purposes. As noted earlier, our concern in this article is not the reduction of regulation

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<sup>124</sup> Ibid.

<sup>125</sup> See Clyde Wayne Crews Jr., *Promise and Peril: Implementing a Regulatory Budget* (Washington, DC: Competitive Enterprise Institute, 1996), <http://cei.org/pdf/1549.pdf>; Robert W. Hahn, “Achieving Real Regulatory Reform,” *University of Chicago Legal Forum* 1997, 143, 152–53 (advocating use of a regulatory budget).

<sup>126</sup> Crews, *Promise and Peril*, 3 (quoting Sen. Lloyd Bentsen).

*per se*, but that regulations receive an adequate amount of time and attention during the regulatory review process.

In theory, an agency should be allowed to regulate as much as it needs to, as long as there is good economic analysis that justifies the need. The OIRA review process is the check that helps ensure sound economic analysis of significant regulations. Therefore, a less restrictive and more politically feasible solution to the midnight regulations problem is to cap the *number* of significant regulations an agency is allowed to submit to OIRA during a given period.

Because OIRA has up to 90 days to review significant regulations,<sup>127</sup> a rolling 90-day window might be an appropriate period. That is, an agency would be allowed to submit no more than *X* number of significant regulations for review in any 90-day period. The number *X* would be based on the resources—budget and staff—available to OIRA. The number should be well above the “normal” levels of regulatory activity we see during non-midnight periods; the cap should only be approached during the periods of dramatic spikes seen at the end of presidential terms.

A flexible number cap is a practical approach. Unlike a regulatory budget approach, which has been politically unfeasible so far, there would be no limit to the total cost of an agency’s regulations.<sup>128</sup> An agency would be able to regulate as it sees fit. The only limitation is that it cannot exceed OIRA’s capacity to adequately check its work. In practice, this means that an agency will not be able to promulgate an abnormally large number of significant regulations in a short period, so the agency must therefore prioritize its proposed regulations.

Capping the *number* of regulations an agency can submit in a given period rather than the *total cost* also makes sense because there are fixed costs for reviewing each rule. When a regulation is submitted to OIRA, a “desk officer” that is specialized in regulations from a particular set of agencies conducts the review.<sup>129</sup> A spike in the number of reviews a particular desk officer must complete would seem to affect the quality of his work more than the total cost of the regulations. Additionally, if the desk officer charged with reviewing Department of Education regulations is flooded with proposed regulations from that agency, for example, the work cannot simply be shifted to the Homeland Security desk officer. It therefore makes sense to cap the number of regulations that can be submitted to OIRA by agency rather than in total.

Finally, because the number cap would exist only to ensure quality review, not to limit the amount of regulation, it should be based on the resources available to OIRA and especially the desk officers and other regulatory review staff available.<sup>130</sup> What this

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<sup>127</sup> Executive Order 12866, § 6(b)(2)(B).

<sup>128</sup> Currently the United Kingdom has designed such a budget cap which is scheduled to start a trial run in 2009 and be fully operational in 2010.

<sup>129</sup> Copeland, *Federal Rulemaking*, 1257, 1273–74, 1277.

<sup>130</sup> Curtis W. Copeland explains the staff resources available to OIRA:

When OIRA was created in fiscal year 1981, the office had a “full-time equivalent” (FTE) ceiling of 90 staff members. By 1997, OIRA’s FTE allocation had declined to 47—a nearly 50 percent reduction. Although Executive Order 12,866 (issued in late 1993) permitted OIRA to focus its resources on “significant” rules, this decline in OIRA staffing also occurred during a period in which regulatory agencies’ staffing and budgetary levels were increasing and OIRA was given a number of new statutory responsibilities.

means is that the ceiling on the number of regulations that can be processed by OIRA in a given period can be raised by increasing the resources available to it.<sup>131</sup> In this way, Congress and the president can always choose to allow for regulatory spikes while preserving quality review.<sup>132</sup>

A cap could be implemented by presidential directive or by statute. The regulatory review process is completely a creature of executive order, the constitutionality of which has largely been recognized.<sup>133</sup> If the president has the authority to devise and enforce a system that checks his administration's regulatory decision making, it follows that he should be able to outline procedural rules to ensure that system's quality. Congress has also previously flirted with the idea of codifying the OIRA regulatory review process into law,<sup>134</sup> and if it ever did, it would be able to include our proposed safeguards.

#### IV. Conclusion

The midnight regulation phenomenon is a well-documented one. The reasons behind it range from the desire of the outgoing administration to extend its influence into the future as well as the opportunity to impose costs on the incoming administration. In fact, the high political costs faced by a new administration to overturn these last minute rules makes it an effective strategy for the outgoing administration to project its influence beyond its term.

Midnight regulations are problematic. In particular, if we accept that regulatory review is beneficial, then midnight regulations raise serious concerns. All things being equal, and taking into consideration the decreasing number of regulatory review staff available to OIRA, the sudden increase in regulations requiring review during the midnight period leads to a diminished review process and weakened oversight.

Until now, the most common solutions to the midnight regulations problem have suggested steps that an incoming president can take to undo his predecessor's last-minute actions. Our solution tries to mitigate the negative effects of midnight regulations by changing the incentives on the outgoing administration. We suggest placing a cap on the number of economically significant regulations OIRA can be expected to review during a

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Starting in 2001, OIRA's staffing authorization began to increase somewhat, and by 2003 it stood at 55 FTEs. Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics. OIRA representatives indicated that these new hires reflected the increasing importance of science-based regulation in federal agencies, and would enable OIRA to ask penetrating technical questions about agency proposals.

Copeland, *Federal Rulemaking*, 1257, 1293.

<sup>131</sup> In fact, some have argued that OIRA's resources at present are inadequate and should be increased. Robert Hahn and Robert E. Litan, "Why Congress Should Increase Funding for OMB Review of Regulation" Brookings Institution (October 2003) [http://www.brookings.edu/opinions/2003/10\\_ombregulation\\_litan.aspx](http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx).

<sup>132</sup> According to Copeland (2004), "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," CRS RL32397 p. 29 "OIRA does not have a specific line item in the budget, so its funding is part of OMB's appropriation. Similarly, OIRA's staffing levels are allocated from OMB's totals." This means that either Congress could increase OIRA's budget by creating a line item, or the president could increase the budget by prioritizing the distribution of OMB's budget differently.

<sup>133</sup> *Ibid.*, "Although some observers continue to hold that view."

<sup>134</sup> Copeland, *Federal Rulemaking*, 1306-07.

given time period.

Doing so would help prevent OIRA oversight of new regulations from being diluted. A flexible cap would afford OIRA time and resources to carefully consider new rules while preserving Congress and the President's prerogative to increase the cap by allocating more resources to OIRA. To the extent more resources are not allocated and end-of-term regulatory spikes are eliminated, a cap would also have the effect of addressing some of the other concerns raised by midnight regulations, including a lack of accountability and democratic legitimacy.

Table 1. History of executive oversight

President	Agency	Cabinet Group	Process
<b>Nixon</b>	OMB	None	The Quality of Life Committee is established to formulate a regulatory review process for significant regulations.
<b>Ford</b>	Council on Wage & Price Stability (CWPS)	Review Group on Regulatory Reform	Regulatory review is expanded to address concerns about the effect of regulation on inflation. Legislation establishing the Council on Wage and Price Stability is passed to review regulatory impact on the economy. Executive Order 11821 established procedures for Inflation Impact Statements.
<b>Carter</b>	OMB & CWPS	Regulatory Analysis Review Group & Regulatory Council	Regulatory Analysis Review Group is created to review major proposed rules. Executive Order 12044 required proposed rules with an effect on the economy of \$100 million or more to be reviewed before they were published in the Federal Register. The Paperwork Reduction Act is passed and the Office of Information and Regulatory Affairs (OIRA) within OMB is created.
<b>Reagan</b>	OMB (OIRA)	Task Force on Regulatory Relief	Executive Order 12291 mandates that “Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.” The review of regulatory impact analyses falls to OIRA. The Task Force on Regulatory Relief is created to give direction to OIRA. The Task Force often acts as a court of appeals for issues on which the OIRA and the regulatory agencies can not agree.
<b>Bush 41</b>	OMB (OIRA)	Council on Competitiveness	The Task Force on Regulatory Relief is replaced by the Council on Competitiveness.
<b>Clinton</b>	OMB (OIRA)	Reinventing Government Initiative	Executive Order 12291 is rescinded and Council on Competitiveness is abolished. Executive Order 12866 articulates a new regulatory review process; it removes OMB’s authority to treat any rule it deems appropriate as if it were a “major rule.” Only those proposed regulations that might “have an annual effect on the economy of \$100 million or more” are now subject to OIRA review.
<b>Bush 43</b>	OMB (OIRA)	OMB & Council of Economic Advisors	Executive Order 13422 amended Executive Order 12866. The new order requires agencies to “identify <i>in writing</i> the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions).”



Abbreviated flow chart of the regulatory review process

