MERCATUS ON POLICY

Beware the Surge of Midnight Regulations

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At the end of every presidential administration, regulatory activity spikes during the "midnight" period between Election Day and Inauguration Day. This surge occurs even if the incumbent president is reelected. However, the surge is more pronounced if there is a change in administration. Unconstrained by the need to work with Congress, outgoing administrations often use this window to push through sweeping and controversial regulations. Once finalized, regulations often prove hard to repeal. During the surge, the agencies' regulatory analysis quality drops and regulatory oversight by the Office of Information and Regulatory Affairs (OIRA) weakens. As a result, federal agencies produce ineffective regulation and waste public resources.

WHAT ARE MIDNIGHT REGULATIONS?

The term "midnight regulation" refers to the last-minute regulatory activity at the end of a presidential term. Research by Mercatus Center scholars demonstrates a significant surge in regulatory activity in the months between Election Day and Inauguration Day (see figure 1).

Since all proposed and final regulations are published in the *Federal Register,* the Mercatus Center's Veronique de Rugy and Antony Davies used the number of pages in the *Federal Register* as a proxy for regulatory activity. To account for the differences between administrations, they looked at each month's regulation volume as a share of pages published within the calendar year. The proxy allowed de Rugy and Davies to compare a given month's regulatory activity with the administration's baseline annual output. Analyzing the data from 1975 to 2006, de Rugy and Davies found that regulatory activity is considerably higher during the midnight months (i.e., November and December) of the presidential election years.[1] Tellingly, in non-election years, November and December show no uptick in regulations, indicating the regulatory surge is not a year-end phenomenon. The magnitude of the midnight surge depends on the presidential election outcomes. The share of pages added during midnight months is 17 percentage points higher compared to non-midnight months regardless of election outcomes. It increases to 18 percentage points

FIGURE 1: NUMBER OF PAGES ADDED TO THE FEDERAL REGISTER FROM 1946 TO 2011

Source: Federal Register

when there is a change in administration, even if the incumbent party maintains control. It increases to 20 percentage points when the incumbent party loses the election.

Generally, the president's reelection ambitions and the agencies' need to work with Congress constrain the executive branch's regulatory activity. In the quarter following Election Day, an outgoing administration faces few constraints from either Congress or the voters. Lack of political accountability provides an opening for both the president and the president's political appointees in the executive agencies to push through sweeping, controversial regulations that would normally face considerable opposition. Jay Cochran called this a "Cinderella effect": At the stroke of midnight on Inauguration Day, the president and the president's appointees turn into ordinary citizens, so they try to rush through their favored regulations before their time runs out.[2] Since the turnover among political appointees is the highest during a change in administration, Cochran finds that this period produces the highest regulatory surge. Yet, even if the incumbent president is reelected, some agency heads typically depart the administration, producing a mini-surge. Research by de Rugy and Davies points to a similar conclusion.[3] They find evidence of a midnight surge regardless of election results, but the surge is higher for an outgoing incumbent administration and even higher for an outgoing incumbent party.

WHY THE MIDNIGHT REGULATORY SURGE?

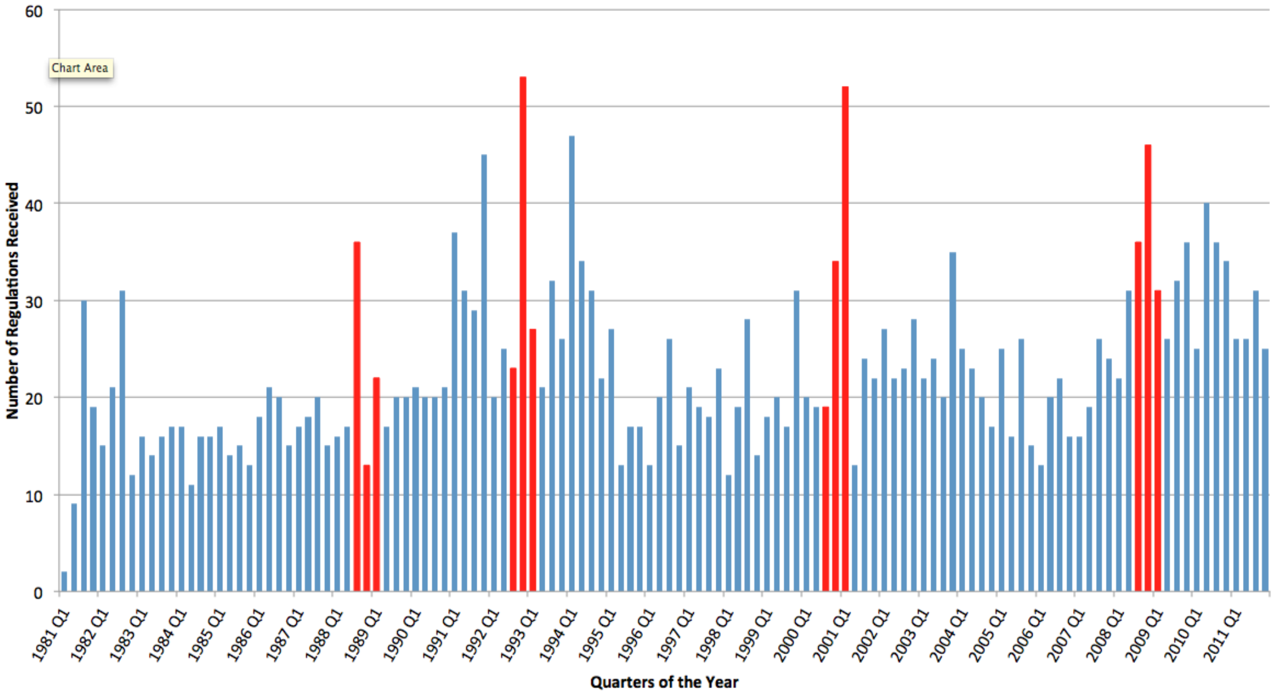
There are a number of plausible explanations for the midnight regulatory surge. A benign one is that agencies procrastinate till the last months of the presidential term and then rush through the regulations that would have been promulgated anyway. However, a number of scholars have argued that at least some midnight regulations are politically motivated.[4] An outgoing administration may seek to impose its political preferences and bind the incoming administration to a particular course of action. Alternatively, it may seek to embarrass the next administration by forcing the latter to publically repeal a controversial regulation. In addition, the regulatory surge itself may make it difficult for the incoming administration to sift through the flurry of midnight regulations and to ensure that the regulations conform to its political preferences.

WHY IS THE SURGE A PROBLEM?

Research by Mercatus Center scholars indicates that the quality of the agencies' regulatory analysis drops during the midnight period. In addition, the surge weakens OIRA's oversight of regulatory analysis quality.

To ensure effective use of federal resources, executive agencies complete regulatory impact analyses for economically

FIGURE 2—ECONOMICALLY SIGNIFICANT REGULATIONS REVIEWED BY OIRA*



Source: General Services Administration, OIRA Review Counts Database
**By quarter; presidential transitions highlighted*

significant regulations (i.e., when the impact on the economy exceeds $100 million). The Mercatus Center's Regulatory Report Card scores the analytical quality of proposed economically significant regulations, evaluating the need for regulation, thoroughness of economic analysis, and the use of analysis in selecting a regulatory alternative. Using the Regulatory Report Card data, Patrick McLaughlin and Jerry Ellig examined the quality of the regulatory impact analyses for economically significant regulations passed in 2008, the last year of the Bush administration.[5] The administration established a June 1 deadline to propose regulations it intended to finalize before Inauguration Day. Six of the 30 prescriptive regulations proposed that year were proposed after the June 1 deadline and finalized during the midnight period.[6] Non-midnight regulations received an average score of 34 out of 60 maximum points, whereas midnight regulations scored on average only 26.2 points—a significant drop in analytical quality.[7] Regulations finalized during the midnight period but proposed before June 1 had scores similar to non-midnight regulations proposed in 2008. Thus, it was the "rushed" midnight regulations proposed after June 1 that had lower quality analysis. The outcome of poor quality analysis is inefficient use of public resources to deal with society's problems.

OIRA reviews the agencies' regulatory analysis to ensure quality. However, OIRA's ability to provide effective oversight during the midnight period is limited. In one study, the Mercatus Center's Jerry Brito and Veronique de Rugy found that the regulatory surge is rarely accompanied by a commensurate increase in OIRA's budget or staff. In real terms, OIRA's budget has decreased substantially since its inception in 1981.[8] Its staff reduced by half—from 90 in 1981 to 45 in 2011.[9] At the same time, the number of economically significant regulations that OIRA has been asked to review has not diminished. Moreover, compared to preceding quarters, the number of economically significant regulations submitted for OIRA review more than doubles during midnight periods when control of the White House transfers to the other party (see figure 2).

Patrick McLaughlin found further evidence that workforce shortage leads to shorter OIRA review times. By examining OIRA reviews between 1981 and 2007, McLaughlin found that during midnight periods the number of economically significant rules submitted for OIRA review increased by approximately 7 percentage points.[10] This increase resulted in shorter reviews. Although the average review time between 1994 and 2007 was around 50 days, for midnight regulations it dropped to 25 days.[11]

Interestingly, this drastic reduction in review time did not occur for midnight regulations in 2008.[12] Apparently, the outgoing administration's efforts to constrain midnight regulations gave OIRA the normal amount of review time.[13] Despite this, the rushed midnight regulations still had lower-quality analysis.

HOW CAN WE PREVENT THE MIDNIGHT SURGE?

There are no silver bullets when it comes to stopping the midnight surge. A comprehensive solution would require a set of reforms addressing the political appointees' incentives as well OIRA's ability to provide effective oversight. Experts have proposed caps on total costs for regulations issued during the midnight period to prevent the regulatory surge.[14] To address OIRA's ability to effectively oversee the quality of regulatory analysis, the Mercatus Center's Brito and de Rugy suggest capping the number of major regulations an agency can submit for OIRA review within any given 90-day period.[15] The rolling cap would prevent a regulatory surge and ensure that OIRA has a sufficient workforce to oversee the quality of regulatory analysis.

CONCLUSION

The midnight period registers a significant increase in regulatory activity. The highest surges are for outgoing administrations, but even the reelection of an incumbent president prompts a mini-surge. Administrations face fewer political constraints during the midnight period and, thus, take the opportunity to impose their policy preferences. These rushed, politically motivated regulations have poor quality analysis and face less stringent oversight from OIRA. Stemming the surge of midnight regulations requires comprehensive reform to constrain agencies' ability to issue too many regulations and improve OIRA's ability to oversee regulatory quality during the midnight period.

ENDNOTES

1. Veronique de Rugy and Antony Davies, "Midnight Regulations and the Cinderella Effect," *Journal of Socio-Economics* 38, no. 6 (December 2009): 886–90.
2. Jay Cochran, "The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters" (Working paper, Mercatus Center at George Mason University, Arlington, VA, 2001), http://mercatus.org/sites/default/files/publication/The_Cinderella_Constraint%281%29.pdf.
3. de Rugy and Davies, "Midnight Regulations and the Cinderella Effect."
4. See Jerry Brito and Veronique de Rugy, "Midnight Regulations and Regulatory Review," *Administrative Law Review* 61, no. 1 (2009): 163–96.
5. Patrick McLaughlin and Jerry Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration," special edition, *Administrative Law Review* 63 (2011): 179–202.
6. Prescriptive regulations are the traditional regulations that prescribe specific actions, as opposed to transfer regulations that implement federal spending and revenue collection laws. The transfer regulations were excluded from the analysis since they generally have considerably lower quality analysis and skew the results.
7. The difference is statistically significant at the 5 percent level, which means there is a 95 percent chance that the difference reflects a real difference between the two kinds of regulations rather than just a random variation.
8. Brito and de Rugy, "Midnight Regulations and Regulatory Review," 184.
9. Ibid.; Collin Drat, *Who's Regulating the Regulators?*, Regulatory Policy Commentary, George Washington University Regulatory Studies Center, June 30, 2011,http://www.regulatorystudies.gwu.edu/images/commentary/20110630_drat_reg_staffing1.pdf.
10. Patrick McLaughlin, "Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time," (Working paper, Mercatus Center, George Mason University, Arlington, VA, September 2008), http://mercatus.org/sites/default/files/publication/WPPDF_Empirical_Tests_for_Midnight_Regulations.pdf.
11. The analysis is limited to 1994–2007 to account for effects of the Executive Order 12866, which clearly defined OIRA's review obligations.
12. McLaughlin and Ellig, 196.
13. See Susan Dudley, "Regulatory Activity in the Bush Administration at the Stroke of Midnight," *Engage* 10 (2009): 27. Dudley describes the memorandum issued by President Bush's Chief of Staff instructing agencies to finalize regulations by November 1, 2008.
14. William S. Morrow, Jr., "Midnight Regulations: Natural Order or Disorderly Governance," *Administrative & Regulatory Law News*, 2001; Andrew P. Morriss, Roger E. Meiners, and Andrew Dorchak, "Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining," *Administrative Law Review* 55, no. 3 (2003): 551–606.
15. Brito and de Rugy, "Midnight Regulations and Regulatory Review," 194–5.

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