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THE MIDNIGHT REGULATION PHENOMENON

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THE ABILITY OF a lame-duck president to achieve anything in the last months of his presidency has been compared to “a balloon with a slow leak that shrinks with each passing week until it hits the ground.”¹ Nonetheless, in his last days in office, President Bill Clinton managed to promulgate an unprecedented number of “midnight regulations,” such as lead and diesel sulfur reduction rules; an arsenic in drinking water standard; a significant ergonomics rule; and energy-efficiency standards for air conditioning, heat pumps, and washing machines.

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.² 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.³

However, this type of 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, but in its waning months issued a large number of regulations, including a significant proposal loosening the rules on how long truck drivers could stay on the road between breaks.⁴

EVIDENCE OF THE PHENOMENON

IN 2001, FORMER Mercatus Center scholar Jay Cochran examined the number of pages in the *Federal Register* as a proxy for regulatory activity.⁵ Cochran found that when control of the White House switched to the opposing 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 non-election years.

These *Federal Register* pages include executive orders, proclamations, administrative directives, and regulatory documents (from notices of proposed rulemaking to final rules). According to Cochran’s analysis, sudden regulatory outbursts are systemic and cross party lines.

Cochran’s explanation for this phenomenon is what he calls the Cinderella constraint: At the end of an administration, officials hurry to issue last-minute rules before they have to leave their positions. He explains, “Simply put, as the clock runs out of 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.”

Recently, Duquesne University’s Anthony Davis and I took a second look at the midnight regulation phenomenon.⁶ Our work 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: the number of *Federal Register* pages in the current month is represented as a percentage of total pages during the calendar year as opposed to the number of pages published. This change allows us to capture the increase in regulatory activity during the post-election months for a given administration relative to the administration’s annual regulatory output.

Our data shows that transition periods 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 the non-transition quarters—during which

no presidential election occurs—and the growth in the transition quarters—during which a presidential election does occur.

Under normal circumstances, throughout the course of a year pages are added to the *Federal Register* at a constant rate—additions are spread equally through 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 thirteen out of fifteen times. The two exceptions followed the elections of 1976 (Ford succeeded by Carter) and 1984 (Reagan elected to a second term).

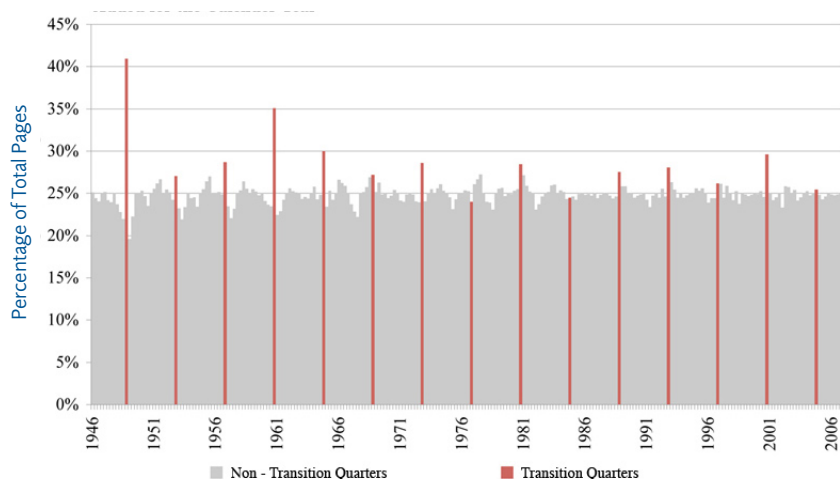
Figure 2 also illustrates the midnight regulation phenomenon. The dots represent the number of pages added in a given month and the squares highlight the number of pages added during transition periods. The solid line reveals underlying trends in the data. Figure 2 shows that the number of pages grew slowly between 1945 and 1970. After 1970, the number of pages started to grow rapidly before it decreased slightly in the 1980s. In the ’90s, it increased again, but at a slower pace than in the ’70s.

As we can see, after 1970 the number of pages added to the *Federal Register* increased 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.

WHY IT HAPPENS

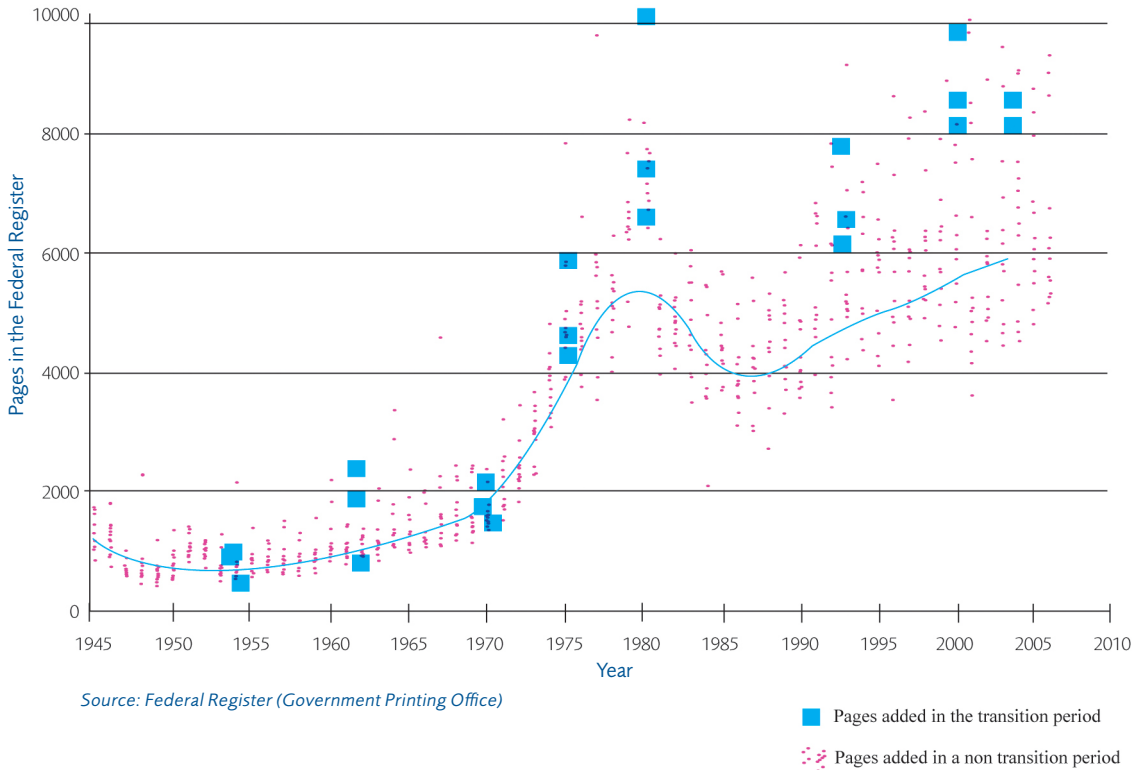
According to political scientists William Howell and Kenneth Mayer, midnight regulation occurs when “political uncertainty

FIGURE 1 – PAGES ADDED TO THE *FEDERAL REGISTER* IN EACH QUARTER AS A FRACTION OF PAGES ADDED FOR THE CALENDAR YEAR



Source: Authors’ calculations based on *Federal Register* (Government Printing Office)

FIGURE 2 – NUMBER OF PAGES ADDED TO THE *FEDERAL REGISTER* FROM 1946 TO 2006



shifts to political certitude.” They explain that during the last hundred days of his administration, a president knows exactly who will succeed him and what to expect in terms of policy decisions, legislative priorities, and the level of partisan support the new president will enjoy within the new Congress. If the sitting president (or his party) lost the election, he has every reason to promulgate last-minute regulations to tie his successor’s hands. 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 Administration Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must develop a factual record that supports the change in policy.”⁷ This may make it extremely costly for a new administration to change last-minute regulation issued by a previous administration.

More importantly, Howell and Mayer explain, whether or not the president and his party lose the election, midnight regulations attempt to extend the outgoing president’s influence beyond the day he leaves office.

In addition, at the end of a term, an administration not only has an incentive to promulgate new regulations, but it has the opportunity as well. The slowdown allows the president to use tools at the executive’s disposal to take action that during any other period the legislature would likely check or halt. With midnight regulations, executive orders, presiden-

tial proclamations, executive agreements, and national security initiatives, presidents have ample resources to effectuate policy changes that stand little chance of overcoming the collective action problems and multiple veto points that characterize the legislative process. In other words, it is easier to get things done when Congress is distracted.

IS IT AN EFFECTIVE STRATEGY?

One would think that an incoming president could easily undo the midnight regulations of his predecessor. As it turns out, however, political and legal obstacles prevent extensive repeal. Presidents can issue executive orders, proclamations, and rules to overturn actions taken by their predecessors. They can also block the implementation of the outgoing president’s orders. However, more often than not, incoming presidents cannot alter orders set by their predecessors without paying a considerable political price or confronting serious legal obstacles.

Also, as Howell and Mayer explain, “not only does it take time, but changing the status quo probably means taking on interest groups who are reticent to give up ground that they have just won.”⁸ For example, President George W. Bush experienced difficulties altering Clinton’s January 2001 arsenic regulation. Despite public outrage at the time the rule was issued, Bush faced considerable opposition when he tried to scrap the rule three months later and ultimately lost the battle.

In fact, a recent empirical study by Jason M. Loring and Liam R. Roth confirms that passing midnight regulations is a winning strategy for an outgoing president who wishes to project his influence into the future.⁹ The authors tracked the regulations passed in the midnight periods of former presidents Clinton and George H. W. Bush, as well as the incoming administrations' responses to those regulations. Based on a selected sample of midnight regulations passed by those presidents, the authors found that only 9 percent of George H. W. Bush's last-minute regulations were later repealed and that the Clinton Administration accepted 43 percent with no amendment. By the same token, only 3 percent of President Clinton's midnight regulations were later repealed by the George W. Bush administration, and a staggering 82 percent of them were accepted with no changes.

SHOULD WE CARE?

We should absolutely care about midnight regulations. While some midnight regulations may provide real benefits that exceed costs, most result in more harm than good and cater to special interests rather than the public interest. That is why they are hurried into effect without the usual checks and balances.

There is little doubt that the current Bush administration is already preparing its regulatory legacy by actively writing rules that will secure some of its priorities about mine-worker protections, airline security, financial crisis, and fuel efficiency. We can only hope that the inevitable increase in regulatory activity will be based on the best science and be subjected to public scrutiny and cost-benefit analysis.

ENDNOTES

1. Carl Cannon, "The Long Goodbye," *National Journal* (Jan 27, 2001): 33.
2. J. Jack Faris, "Small Business Focus: Watch Out for 'Midnight Regulation,'" *NFIB Commentary*, August 21, 2000, <http://www.nfib.com/object/1609860.html>.
3. Susan Dudley, "Reversing Midnight Regulations," *Regulation Magazine*, Spring 2001, 9, <http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf>.
4. Anne Joseph O'Connell, "Political Cycles of Rulemaking: An Empirical Portrait of Modern Administrative State," *Virginia Law Review* 94 (2008): 889–890.
5. 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/Publications/pubID.4198.filter.0/pub_detail.asp.
6. 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/repository/docLib_20080403_midnightregulations_final.pdf.
7. Susan Dudley, "Reversing Midnight Regulations."
8. William G. Howell and Kenneth R. Mayer, "The Last One Hundred Days," *Presidential Studies Quarterly* 35 (2005): 533.
9. Jason M. Loring and Liam R. Roth, "After Midnight: The Durability of the 'Midnight' Regulations Passed by the Two Previous Outgoing Administrations," *Wake Forest Law Review* 40 (2005): 1441.

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