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A SOLUTION TO THE MIDNIGHT REGULATION OUTBURST

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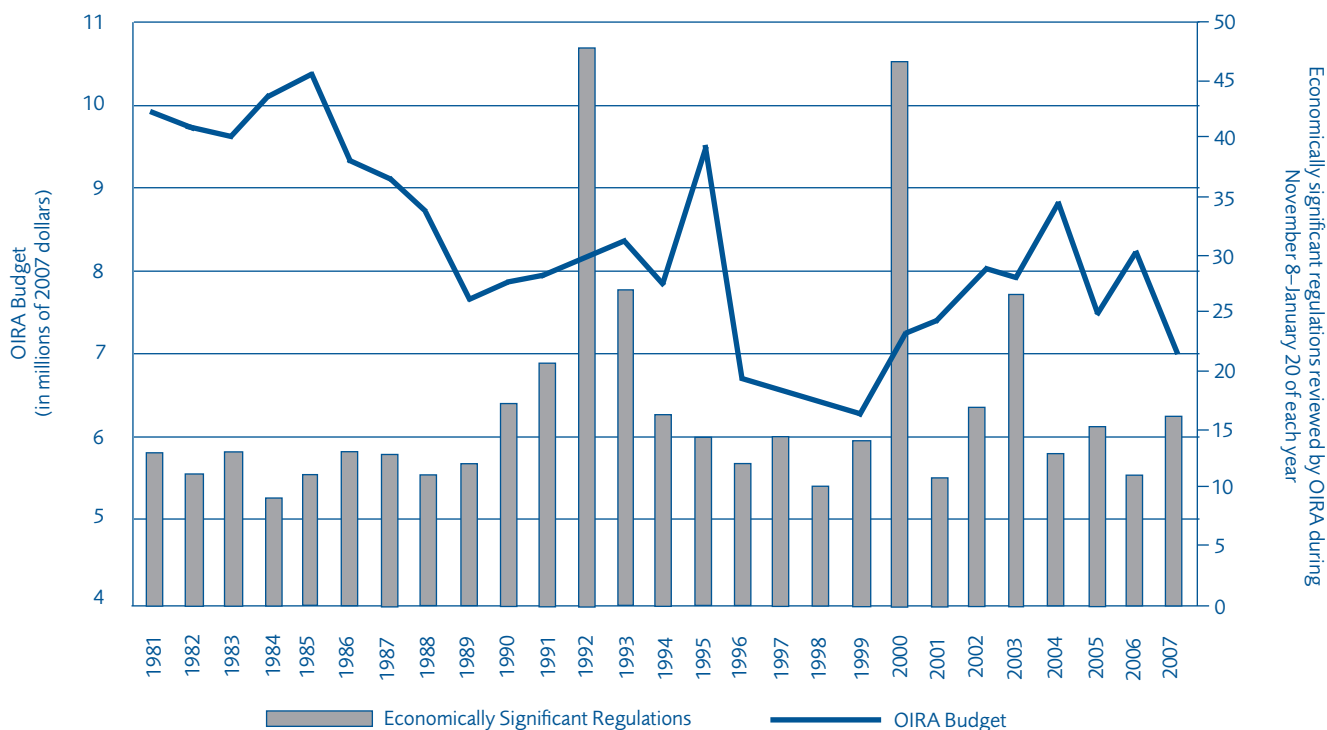
AT THE END of each administration—and especially between administrations of opposite parties—there is a dramatic spike in regulatory activity. This “midnight regulation” phenomenon is well documented.¹ Its causes include the desire of the outgoing administration to extend its influence into the future as well as the opportunity to impose costs on the incoming administration. In fact, the high political costs a new administration faces in order to overturn last-minute rules makes it an effective strategy for the outgoing administration to project its influence beyond its term. In order to ensure that such regulations are beneficial, we suggest modifications in the review process that would benefit the public.

MIDNIGHT REGULATIONS ARE PROBLEMATIC

The most common criticism of last-minute rulemaking relates to accountability.² During the midnight period—after the November election, but before a new president is sworn in—a lame-duck administration might be impervious to checks and balances normally provided by Congress and the electorate. Also, midnight regulations can be seen as undemocratic. After the election, the people have spoken, and if they have chosen a new president whose policies differ significantly from the sitting president’s, then actions by the sitting president aimed at exerting power beyond his term may be seen as undemocratic.³

In addition, inefficiency and wastefulness are 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 wastes the government’s time and resources. The outgoing administration wastes effort by enacting regulations that will no doubt be reversed, and the incoming administration then wastes time undoing them.

FIGURE 1: OIRA BUDGET VS. ECONOMICALLY SIGNIFICANT MIDNIGHT REGULATIONS



Source: Number of yearly significant regulations derived from OIRA's online "review counts" database. OIRA budget derived from Appendix to the Budget of the United States for Fiscal Years 1983 to 2009.

Our focus here is the less-touted problem that an increase in the number regulations in a given period leads to insufficient consideration of new rules. This can overwhelm the review process intended to ensure that new regulations are based on sound evidence and that their costs are justified.

DURING THE MIDNIGHT REGULATION PERIOD OVERSIGHT IS WEAKENED

The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget, plays an important role in the regulatory process. OIRA oversees agencies' regulatory analysis and can delay some regulations if it believes the agencies' analysis is inadequate.

However, a flood of rulemaking activity at the end of an administration can overpower OIRA's review process. The calculus is simple. The dramatic increase in regulatory activity at the end of each administration is not accompanied by a corresponding increase in the resources available to OIRA. 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.

As figure 1 shows, OIRA's budget is not related to the number of regulations it must review. During the midnight periods of the Bush I and Clinton presidencies, when the transition was

to a president of the opposite party, the number of economically significant regulations (regulations that are expected to have an annual effect on the economy of \$100 million or more) that OIRA was asked to review more than doubled from the same period in the immediately preceding years. However, there is no concurrent increase in the resources available to OIRA.

One proxy for time and attention is the number of days OIRA takes to review a proposed regulation. OIRA publishes both the date it receives a regulation for review and the date it completes its review. New Mercatus Center research by Patrick McLaughlin examines whether increases in regulatory activity cause average review time to decrease.⁴ 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.

McLaughlin finds that during the midnight period at the end of the Clinton administration, review time decreased significantly. Relative to the mean review time between 1994 and 2007 (all full years of data available since the passage of Executive Order 12866, which allows OIRA to focus its resources on economically significant regulations), the Clinton midnight period witnessed a decrease in mean review time of about twenty-seven days—a drop of over 50 percent from an average of fifty-three days per regulation.

He further finds that an increase in this proportion negatively affects the review time for all regulations, in and out of the midnight period. 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. This suggests a diminished level of scrutiny that undermines the benefits of regulatory review.

ADDRESSING THE PROBLEM

The most common way presidents have dealt with their predecessor's last-minute regulatory activity has been to delay the effects of new rules and to rescind unpublished rules. In fact, since Reagan, every president taking over from a president of the opposite party has ordered a regulatory moratorium. Two days after taking office, Clinton issued a directive to all agencies ordering them to "withdraw . . . all regulations that have not yet been published in the *Federal Register*."⁵ Bush II issued a similar directive the day he took office, ordering agencies to halt rules from being published in the *Federal Register* and "temporarily postpone the effective date of [published] regulations for sixty days."⁶

The 1996 Congressional Review Act offers another way to deal with midnight regulations.⁷ Under the act, agency rules may be nullified by introducing a resolution that is adopted by both houses of Congress and signed by the new president. However, the resolution has to be introduced within sixty days of the rule's publication. This significantly limits the ability of Congress to deal with most regulations from the midnight period. Besides, if Congress and the new president are of opposite parties, Congress is unlikely to support the president's attempt to take the midnight rules off the books.

OUR SOLUTION: PREVENT OR MITIGATE

A BETTER APPROACH to regulatory outbursts is to try to prevent them, or at least mitigate their negative effects. One way to do this is to change the incentives of regulators by increasing the costs of regulating during the midnight period. For instance, 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, would change the regulators' incentive structure.⁸ However, a limit on the size or number of regulations during the midnight period does nothing to prevent spikes in regulation, it just changes when such spikes occur.

Also, in theory, an agency should be allowed to regulate as much as it needs as long as there is sufficient economic justification for the regulation. Because the OIRA review process helps to ensure sound economic analysis of significant regulations, a less restrictive and more politically feasible solution

is to cap the number of regulations an agency is allowed to submit to OIRA during a given period.

Because OIRA has up to ninety days to review economically significant regulations, a rolling ninety-day window is an appropriate period for assessing regulatory activity. The number

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of significant regulations permitted for review in any ninety-day period would be based on the budget and staff resources 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 when there are dramatic spikes in rulemaking.

This is a practical approach because it allows the OIRA regulatory review process to work as it presently does to ensure that benefits justify costs and that alternative approaches to regulation have been considered. An agency, therefore, would be able to regulate as it sees fit with the only limitation that it cannot exceed OIRA's capacity to check its work adequately. In practice this simply means that an agency will not be able to promulgate an abnormally large number of significant regulations in a short period.

Finally, because the regulation 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, especially the desk officers and other regulatory review staff available. This means that the ceiling on the number of regulations that can be submitted in a given period can be raised by increasing the resources available to OIRA. In this way, Congress and the president can choose to allow for regulatory spikes while preserving review quality.

CONCLUSION

Midnight regulations are problematic. In particular, if we accept that regulatory review is beneficial, then midnight regulations raise serious concerns because they limit the quality of review that OIRA is able to perform for proposed rules.

Our solution tries to mitigate the negative effects of midnight regulations by changing the incentives of the outgoing administration. We suggest limiting the number of economically significant rules OIRA can be expected to review during a given period, dependent on the resources available to OIRA. This preserves the quality of OIRA's review while allowing for greater numbers of rules to be considered when OIRA is granted sufficient resources to review them.

ENDNOTES

1. Anthony Davies and Veronique de Rugy, "Midnight Regulations: An Update" (working paper 08-06, Mercatus Center at George Mason University, March 2008).
2. William S. Morrow, Jr., "Midnight Regulations: Natural Order or Disorderly Governance," *Administrative and Regulatory Law News*, Spring 2001.
3. Nina Mendelson, "Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives," *New York University Law Review* 78, no. 557 (2003): 41.
4. Patrick A. McLaughlin, "Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time" (working paper 0840, Mercatus Center at George Mason University, September 2008).
5. "Notice, Regulatory Review" *Federal Register* 58, no. 6074 (January 24, 1993).
6. "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies" *Federal Register* 66, no. 7702 (January 24, 2001).
7. 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. 551 (2003).
8. *Ibid.*

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