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MIDNIGHT REGULATIONS AND REGULATORY REVIEW

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MIDNIGHT REGULATIONS & REGULATORY REVIEW

Jerry Brito^{*} & *Veronique de Rugy*^{**}

INTRODUCTION

The term “midnight regulations” describes the dramatic spike of new regulations promulgated at the end of presidential terms, especially during transitions to an administration of the opposite party. As commentators have pointed out, this phenomenon is problematic because it is the result of a lack of presidential accountability during the midnight period—the time after the November election and before Inauguration Day. Midnight regulations, however, present another problem that receives little attention. It is the prospect that an increase in the number of regulations promulgated in a given time period could overwhelm the institutional review process that serves to ensure that new regulations have been carefully considered, are based on sound evidence, and can justify their cost.

The regulatory review process that every president since Richard Nixon has used to check his own administration’s regulations is now operated by the Office of Information and Regulatory Affairs (OIRA), which is charged with reviewing all proposed new significant regulations. The problem is that while the number of regulations proposed spikes during the midnight period, the resources available to OIRA remain constant.

Although the problem is perennially highlighted in the press, few satisfactory solutions to the phenomenon have been proposed. One possible solution to address the effects of midnight regulation on regulatory review might be to cap the number of regulations agencies may submit to OIRA for review during a given time period.

Part I of this Article presents updated evidence of the existence of the midnight-regulation phenomenon. It reviews the causes of the phenomenon and asks whether increased regulatory output is an effective strategy on the part of outgoing administration. Part II discusses the variety of concerns raised by midnight regulations with a special focus on the lack of proper

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OIRA oversight during the midnight period. Finally, Part III reviews several proposed solutions to the midnight-regulations problem and puts forth our own suggestion to address the effects of midnight regulations on regulatory review.

I. THE MIDNIGHT-REGULATIONS PHENOMENON

The ability of a lame-duck president to achieve anything in the last months of his presidency is “like 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,” ranging from tightened water-quality rules to 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.²

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.³ 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.⁴

Clinton’s unprecedented passage of midnight regulations in late 2000 sparked a renewed interest in the use of presidential power in the period between an election and a new administration. During its midnight period, the Clinton administration published more than 26,542 pages in the *Federal Register*.⁵ According to Susan Dudley, the regulatory activity in Clinton’s post-election quarter represented a 51 percent increase over the average number of pages published during the same quarter of the previous three years of Clinton’s second term.⁶

¹ Carl Cannon, *The Long Goodbye*, NATIONAL JOURNAL, Jan. 27, 2001, at 33.

² *A Rush to Regulate—The Congressional Review Act and Recent Federal Regulations: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 107th Cong. 38 (2001) (statement of Marshall Whinton, vice president, Resources, Environment and Regulation Department, National Association of Manufacturers).

³ 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>

⁴ Susan Dudley, *Reversing Midnight Regulations*, REGULATION MAGAZINE, Spring 2001, at 9, available at <http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf>.

⁵ *Id.* at 9.

⁶ *Id.*

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,⁷ but in its waning months it 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.⁸

A. 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.⁹ Cochran went as far back as 1948 and found that when control of the White House switches 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 non-election years.¹⁰ These pages of the *Federal Register* include executive orders, proclamations, administrative directives, and regulatory documents (from notices of proposed rulemaking to final rules). According to Cochran's analysis, the sudden outbursts are systemic and cross party lines.¹¹

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.¹² As Cochran 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."¹³

Recent Mercatus research takes a second look at the existence of the

⁷ 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

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

⁹ Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Center at George Mason University working paper, 2001), available at http://www.mercatus.org/Publications/pubID.4198,cfilter.0/pub_detail.asp.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 15.

¹² *Id.* at 15. and see also Jack M. Beermann, *Presidential Power in Transition*, 83 B.U. L. REV. 947, 955 (2002).

¹³ *Id.* at 4.

midnight-regulation phenomenon.¹⁴ 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: 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 the authors to capture the increase in regulatory activity during the post-election months for a given administration relative to the administration’s annual regulatory output.

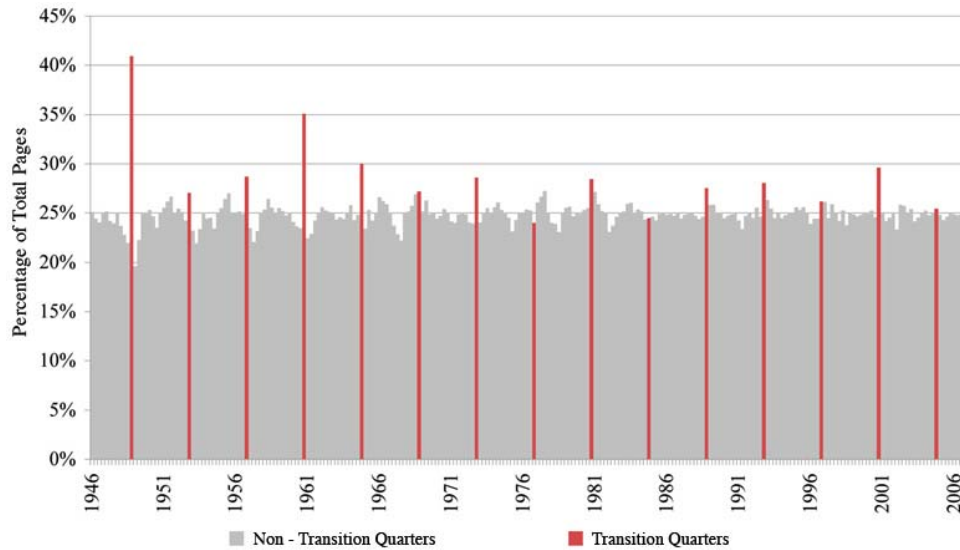


Figure 1 – Pages Added to the Federal Register in Each Quarter as a Fraction of Pages Added for the Calendar Year¹⁵

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

The data shows that, under normal circumstances, the number of pages added to the *Federal Register* during the course of a year is added at a

¹⁴ Antony Davies and Veronique de Rugy, *Midnight Regulations: An Update* (Mercatus Center at George Mason University Working Paper No. 08-06, 2008), available at http://www.mercatus.org/repository/docLib/20080403_midnightregulations_final.pdf.

¹⁵ Authors’ calculation based on number of pages in the Federal Register.

constant rate—it is 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. 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 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.

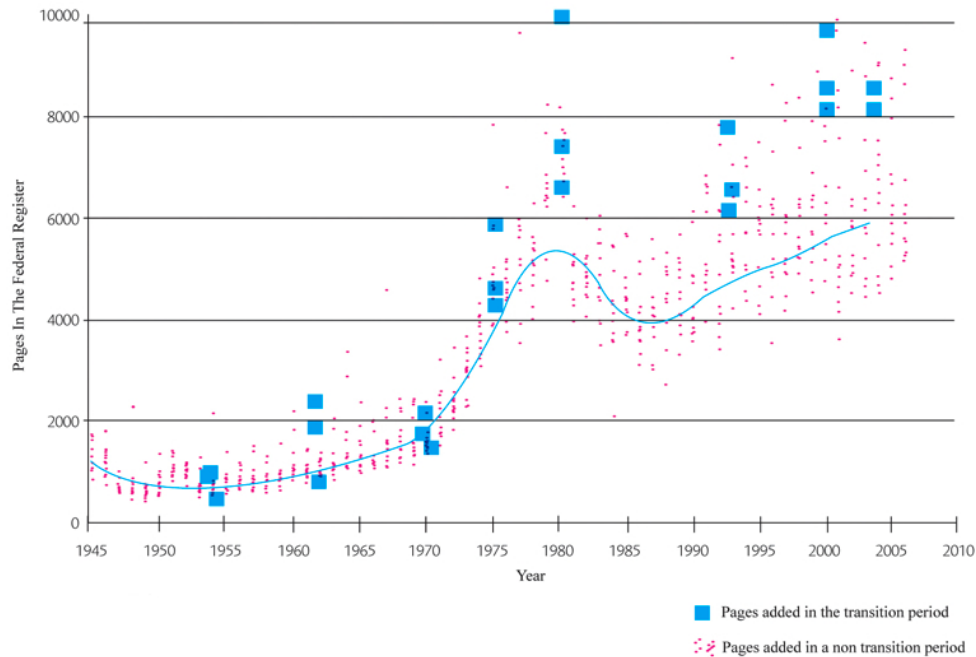


Figure 2 – Number of Pages Added to the Federal Register from 1946 to 2006¹⁶

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 will significantly increase their

¹⁶ Count of pages by authors of Federal Register pages.

regulatory activity in the months following a presidential election—especially if parties are changing. As we can see, 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 switch in party. 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.¹⁷ They also show that Congress is a significant contributor to the existence of midnight regulations.¹⁸ In other words, the more days Congress is in session the month before the start of the midnight period, the more regulations will be promulgated. In addition, the new data show a positive relationship between the rate of cabinet turnover and regulatory output.¹⁹ The higher the rate of the executive-branch turnover—for example, when the entire cabinet is 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. Explaining the Midnight-Regulations Phenomenon

So what is the cause of this 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 her way out.²⁰ However, according to political scientists William Howell and Kenneth Mayer, this is not necessarily the case.²¹ 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.²² The authors explain that with midnight regulations, executive orders, presidential 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.²³ In other words, it is easier to get things done when Congress is distracted.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 5.

²⁰ William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 *PRESIDENTIAL STUD. Q.* 533 (2005).

²¹ *Id.* at 534.

²² *Id.*

²³ *Id.*

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.”²⁴ During the last one-hundred days of her administration, a president knows exactly who will succeed her, 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.²⁵ The sitting president has every incentive to promulgate last-minute rules and regulations to deftly extend her influence beyond the day she leaves office.²⁶

This is particularly true if the sitting president (or her party) lost the election. In that case, the outgoing president not only has an incentive to issue midnight regulations to extend her influence beyond the day she leaves office, but she might also want to impose a cost on the incoming administration.²⁷ 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.”²⁸ This may make it extremely costly for a new administration to change last-minute regulation issued by a previous administration.²⁹

In fact, according to Professor Nina Mendelson, some last-minute rules may have such high change and deviation costs that it makes them close to irreversible.³⁰ 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.”³¹ In other words, an outgoing administration has the opportunity to seriously complicate matters for an incoming administration.

For instance, the Bush Administration’s decision to suspend the last-minute (January 22, 2000)³² Clinton Administration rule setting acceptable

²⁴ *Id.* at 533.

²⁵ *Id.*

²⁶ Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 557 (2003)

²⁷ *Id.* at 557.

²⁸ Susan Dudley, *Reversing Midnight Regulations*, REGULATION MAGAZINE, Spring 2001, at 9, available at <http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf>.

²⁹ *Id.* at 9.

³⁰ Nina Mendelson *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 41 (2003).

³¹ *Id.* at 42.

³² Howell & Mayer, *supra* note 21, at 545.

levels of arsenic in drinking water at ten parts per million imposed serious political costs on the new administration.³³ Even though only a third of the American public approved of the rule, the suspension led to severe public criticism.³⁴ The Bush Administration's actions on the arsenic standard became a symbol of for the new administration's "callous attitude toward the environment."³⁵

Furthermore, as Andrew Morris et al. 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."³⁶

Another explanation of the phenomenon is what Professor Jack M. Beermann calls waiting.³⁷ Waiting is the result of 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 avoid political consequences.³⁸ At the end of a term, the political costs of taking action decreases. This is because an outgoing president is unlikely to seek elective office again, she may have little need for political support, she may no longer worry about political opposition, and she may no longer need cooperation from Congress.³⁹ As a result, the administration is freer to take actions that it could not have earlier in its term for fear of provoking opposition.⁴⁰

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.⁴¹ 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.⁴² By delay he means a lag between the moment the regulation is proposed and the moment it is passed. One potential

³³ Mendelson, *supra* note, at 42.

³⁴ Howell & Mayer, *supra* note 21, at 544.

³⁵ Mendelson, *supra* note, at 42.

³⁶ Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 557 (2003).

³⁷ Jack M. Beermann, *Presidential Power in Transition*, 83 B.U. L. REV. 947, 957 (2002).

³⁸ *Id.* at 957.

³⁹ *Id.*

⁴⁰ *Id.* at 958

⁴¹ Dudley, *supra* note 4, at 9.

⁴² Beermann, *supra* note 37, at 956.

explanation for the lag may simply be procrastination.⁴³ 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.⁴⁴ Also, Congress might—knowingly or otherwise—cause the delay of 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.⁴⁵

C. *Midnight Regulations: An Effective Strategy?*

One would think that an incoming president could easily undo the midnight regulations of her predecessor. As it turns out, however, political and legal obstacles prevent extensive repeal. As we will see later in Part III of this paper, 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.”⁴⁶ As mentioned earlier, President George W. Bush experienced difficulties altering Clinton's January 2001 arsenic regulation.⁴⁷ In spite of public outrage at the time the rule was issued,⁴⁸ Bush faced considerable opposition when he tried to scrap the rule three months later,⁴⁹ and ultimately lost the battle.⁵⁰

⁴³ *Id.* at 956.

⁴⁴ *Id.* at 957.

⁴⁵ *Id.* at 957.

⁴⁶ Howell & Mayer, *supra* note 21, at 544.

⁴⁷ *Id.* at 544.

⁴⁸ *Id.* at 544.

⁴⁹ Douglas Jehl, E.P.A Delays its Decision on Arsenic, Apr. 19, A1 (2001). Available at <http://query.nytimes.com/gst/fullpage.html?res=9E03E1D61430F93AA25757C0A9679C8B63&sec=&spon=&pagewanted=print>

⁵⁰ CBS News, *Bush U-Turn on Arsenic Rule: Administration oks Clinton Era Standard it Had Once Rejected*, CBSNews.com, October 31, (2001). Available at

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 her influence into the future.⁵¹ The authors track the regulations passed in the midnight period 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 find that only 9 percent of George H. W. Bush's last-minute regulations were later repealed, and 43 percent were accepted without any amendment by the Clinton administration.⁵² By the same token, only 3 percent on President Clinton's midnight regulations were later repealed by the George W. Bush administration, and a staggering 82 percent of them were accepted without any changes.⁵³

II. THE MIDNIGHT-REGULATIONS 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 and, if so, what can be done about it. Part II surveys some of the criticisms of midnight regulations and highlights one particular concern: diminished regulatory review. Part III surveys and critiques proposals to curb the effect of midnight regulations and suggests a way to address the particular problem of diminished regulatory review, namely a cap on the number of economically significant regulations the Office of Information and Regulatory Affairs can be expected to review during a given time period.

A. Often-Cited Concerns Over Midnight Regulations

Midnight regulations are the target of perennial criticism.⁵⁴ However, unless you believe that regulation of any kind is always problematic, the

http://www.cbsnews.com/stories/2001/10/31/politics/main316574.shtml?source=search_story

⁵¹ Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed By The Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005).

⁵² *Id.* at 1456.

⁵³ *Id.* at 1456.

⁵⁴ See Edward Cowen, *Administration to Kill or Put Off 36 Carter 'Midnight Regulations'*, N.Y. TIMES, Mar. 26, 1981, at A1; *Here come Ronald Reagan's 'midnight' regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11; Elizabeth Shogren, *Clinton Readies an Avalanche of Regulations*, L.A. TIMES, Nov. 26, 2000, at 1; [We predict there will be news articles about the G.W. Bush midnight regulations, which we can insert here.].

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.

The most common criticism relates to accountability.⁵⁵ 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.⁵⁶ In large part, Congress and the electorate provide these checks. The electorate holds the president accountable at the ballot box, while Congress has extensive oversight over agency activity.

In the lingo of game theory, political checks depend on ‘repeated game-play.’⁵⁷ That is, an administration considering a regulation will not only take into account the political costs and benefits of the decision they are making now, but also how that decision will affect future interactions with other players (Congress and the electorate).⁵⁸ If there are no such future interactions, an administration will be more likely to “defect” and pursue a regulatory course that might have otherwise invited retaliation.⁵⁹

A president will not face another election if she has served two terms (Bill Clinton) or if she has been defeated at the polls (Jimmy Carter).⁶⁰ In either case, there will be an accountability deficit. Because the president knows that she will not face voters again, the president and her 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 she will need Congress’s cooperation on legislative, budgetary, and other matters.⁶¹

Some argue that this period of unaccountability is in fact salutary because it may be the only opportunity an administration has to take a

⁵⁵ See William S. Morrow, Jr., *Midnight Regulations: Natural Order or Disorderly Governance*, ADMIN. & REG. L. NEWS, Spring 2001, at 3, 18; Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551 (2003); and Loring & Roth, *supra* note 51, at 1446.

⁵⁶ Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 557-8 (2003).

⁵⁷ *Id.* at 556-557.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ A two-term president might also be constrained until after the election because a controversial regulatory initiative might affect the campaign of her party’s nominee to succeed her. However, once the election is decided, that constraint is removed.

⁶¹ According to Morriss et al., the incentive to defect is strongest when the incoming president is of the opposite party. Morriss et al., *supra* note 56, at 557. This is because “the outgoing administration has little incentive to leave unfinished business for the incoming administration” whose policies will likely be opposite. *Id.*

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 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.⁶²

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 her term may be seen as undemocratic.⁶³ One way a lame-duck president can exert power beyond her term is by adopting a procedural rule that constrains the executive's own power, but doing so only at the very end of her term so that the constraint effectively affects only her successor.⁶⁴ Another way is to force an incoming president to expend political capital reversing her 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.⁶⁵ 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."⁶⁶

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.⁶⁷ 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.⁶⁸

⁶² Kelly Wallace, *Former President Bush granted last-minute pardon to contributor's son*, CNN.COM, Mar. 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), available at <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf>.

⁶³ Mendelson, *supra* note 29, at 6.

⁶⁴ Beerman, *supra* note 37, at 951-952. For example, Beerman 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, *supra* note 30, at 600.

⁶⁵ *Id.*

⁶⁶ *Id.* at 951.

⁶⁷ *Id.* at 951 & 972.

⁶⁸ Efficiency and waste is one of three concerns over midnight regulations identified by Judge Plager. William S. Morrow, Jr., *Midnight Regulations: Natural Order or*

Finally, there are criticisms based on principle. “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.”⁶⁹ Federal Circuit Judge S. Jay Plager, debating Clinton OIRA Administrator Sally Katzen on the question of midnight regulations, has said he believes “public virtue suffers from the rush to publish.”⁷⁰ 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.’”⁷¹ Professor Nina Mendelson echoes Judge Plager, writing that “[s]omething strikes us as unseemly about this activity.”⁷²

The concerns over 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 very serious concerns indeed. It is no doubt for that reason that they are frequently cited as the main problems with midnight regulations. However, in the balance of this Article we would like to focus on a less-touted problem of midnight regulations. That is the concern that an increase in the number regulations in a given time period could overwhelm the institutional review process that serves to ensure that new regulations have been carefully considered, are based on sound evidence, and can justify their cost.

B. Regulatory Review

For over two decades, a series of executive orders have required executive agencies to perform economic analysis of the effects of proposed regulations.⁷³ The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget, oversees agencies’ regulatory

Disorderly Governance, ADMIN. & REG. L. NEWS, Spring 2001, at 3, 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.” *Id.* at 3.

⁶⁹ Beerman, *supra* note 37, at 951.

⁷⁰ Morrow, *supra* note 68, at 3.

⁷¹ *Id.*

⁷² Mendelson, *supra* note 29, at 564.

⁷³ See *Executive Order 12866 of September 30, 1993, as amended by E.O. 13258 of February 26, 2002 and E.O. 13422 of January 18, 2007, available at http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866_amended_01-2007.pdf, and Circular A-4, *Regulatory Analysis* (Sept. 17, 2003), available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.*

analysis and can delay some regulations if it believes the agencies' analysis is inadequate.⁷⁴

Regulatory review is not a partisan policy tool. Every president since Gerald Ford has relied on a formal system to review new regulations before they are issued. The recurring themes evident in these programs are an insistence that regulatory agencies consider possible alternatives to achieving the outcome that is their target, and that they estimate the cost of these alternatives in order to find the most efficient course of action. By its nature, this type of reasoned economic oversight of proposed regulations requires time and careful consideration. Unfortunately, the effectiveness of the process can be overpowered by a flood of rulemaking activity at the end of an administration.⁷⁵

Below we will first look at the history and purposes of the regulatory review process, and then we will explore how the effects of the midnight-regulations phenomenon on that process.

1. The Regulatory-Review Process

Regulatory review has its origins in President Nixon's so-called "Quality of Life" review process.⁷⁶ Soon after the establishment of the EPA in 1970, the White House took notice of the cost—both to society and the treasury—of the new regulation spawned by the Clean Water Act and other newly minted environmental laws.⁷⁷ Alarmed by a multi-million dollar supplementary budget request by the EPA in December 1970, the OMB concluded that the effects of EPA's regulation on the budget and on the private sector were going unchecked and that it should take on this mission.⁷⁸

If agencies' regulations were to be checked (at least for budgetary reasons), they had to be reviewed before they were promulgated, something the White House had not theretofore done. OMB Director George Schultz

⁷⁴ Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 *FORDHAM URB. L.J.* 1257, 1273-74 (2006) ("At the end of the review period, OIRA either returns the draft rule to the agency 'for reconsideration' or OIRA concludes that the rule is consistent with the executive order.").

⁷⁵ Morrow, *supra* note 68, at 3 ("[Judge Plager] also believes presidential oversight tends to get lost in the process.").

⁷⁶ Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REGULATION, Spring 1997, available at <http://www.cato.org/pubs/regulation/reg20n1a.html>; GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 46 (1984).

⁷⁷ GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 46-47 (1984).

⁷⁸ *Id.* at 47.

sent a letter to EPA Administrator William Ruckelshaus in 1971 “asserting authority to review *and clear* EPA’s regulations.”⁷⁹ At the same time, the White House established a “Quality of Life Committee” composed of Cabinet members, including the EPA administrator, and senior White House staff.⁸⁰ Its purpose was to formulate a regulatory-review process for significant regulations in order to ensure that the costs of alternatives had been considered.⁸¹

The resulting review process was established in a memorandum from OMB Director George Schultz dated October 5, 1971.⁸² First it required the covered agencies to submit to OMB “a schedule . . . covering the ensuing year showing estimated dates of future announcements of all proposed and final regulations, standards, guidelines or similar matters”⁸³ that were “significant”⁸⁴ in nature. More notably, it also required the agencies to submit significant proposed rules to OMB at least thirty days before their publication and accompanied by “the principal objectives of the regulations, standard, guidelines, etc.; alternatives to the proposed actions, that have been considered; a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered; and the reasons for selecting the alternative that is proposed.”⁸⁵ OMB then began to circulate the proposed rules and their explanations to other agencies for comment and forwarded the feedback to the issuing agency, something it does with most policy statements and proposals.⁸⁶

Intentionally left out of this interagency review process for political reasons was a mechanism by which conflicts among agencies would be resolved.⁸⁷ In practice, the White House often played arbiter.⁸⁸ If nothing else, the Quality of Life Review process, by forcing agencies such as the EPA to answer certain questions, curbed reflexive rulemaking and made regulators consider alternatives and take into account the cost of the rules they were proposing.

⁷⁹ *Id.* at 48.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Memorandum from George P. Schultz to Heads of Department and Agencies (Oct. 5, 1971) *available at* <http://www.thecre.com/ombpapers/QualityofLife1.htm>.

⁸³ *Id.*

⁸⁴ A “significant” rule was defined as a rule that would “have a significant impact on the policies, programs, and procedures of other agencies; or impose significant costs on, or negative benefits to, non-Federal sectors; or increase the demand for Federal funds for programs of Federal agencies which are beyond the funding levels provided for in the most recent budget requests submitted to the Congress.” *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*; Eads & Fix, *supra* note 77, at 48.

⁸⁷ *Id.* at 48-50

⁸⁸ *Id.* at 49.

While the Quality of Life review process continued through 1977,⁸⁹ President Gerald Ford expanded regulatory review to address concerns about the effect of regulation on inflation, then a major national concern.⁹⁰ Ford sought and received legislation establishing the Council on Wage and Price Stability (CWPS) in August 1974.⁹¹ Among other things, the council was charged with reviewing regulation to ascertain its impact on the economy.⁹² Three months after establishing the CWPS, President Ford issued Executive Order 11821 establishing procedures for preparing Inflation Impact Statements, which addressed the economic effect of proposed rules on productivity and competition.⁹³ The CWPS reviewed the statements prepared by executive-branch agencies and then filed comments on the public record with those agencies.⁹⁴

President Jimmy Carter continued the formalization of the regulatory-review process begun in the Ford administration. In 1978 Carter established the cabinet-level Regulatory Analysis Review Group (RARG) with authority to review major proposed rules.⁹⁵ He also issued Executive Order 12044 in March 1978, which replaced Ford's Economic Impact Statement with the "Regulatory Analysis."⁹⁶ The order was remarkably similar to the Nixon and Ford efforts. It 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*, and required the agencies' analysis to "contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others."⁹⁷ Also, much like the 1971 Schultz memo, Executive Order 12044 required agencies to prepare and publish a semiannual agenda "of significant regulations under development or review."⁹⁸ This obligation was later codified into law during the last year of the Carter Administration in the Regulatory Flexibility Act.⁹⁹

It was under the administration of Ronald Reagan, however, that we saw

⁸⁹ *Id.* at 52.

⁹⁰ Weidenbaum, *supra* note 76.

⁹¹ Eads & Fix, *supra* note 77, at 50; Weidenbaum, *supra* note 76.

⁹² *Id.*

⁹³ Weidenbaum, *supra* note 76.

⁹⁴ Weidenbaum, *supra* note 76, Eads & Fix, *supra* note 77, at 51-52.

⁹⁵ Eads & Fix, *supra* note 77, at 55-56; Weidenbaum, *supra* note 76.

⁹⁶ Exec. Order No. 12,044, available at

<http://www.presidency.ucsb.edu/ws/print.php?pid=30539>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Weidenbaum, *supra* note 76; 5 U.S.C. § 602 (2007).

the crystallization of the regulatory review process as we know it today. The stage for this was set during the last year of the Carter administration with the passage of the Paperwork Reduction Act.¹⁰⁰ That Act created the Office of Information and Regulatory Affairs within OMB.¹⁰¹ Its primary purpose was to enforce the Act's limits on the amount of reporting agencies could require from the private sector.¹⁰² President Reagan, however, expanded the role of OIRA.

One month into his presidency, Reagan signed Executive Order 12291 titled "Federal Regulation" and mandating that "Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society."¹⁰³ The order required agencies to prepare regulatory impact analyses for proposed "major rules."¹⁰⁴ What constituted a "major rule" was left largely to the discretion of OMB.¹⁰⁵ Although the order did not mention OIRA specifically, but only OMB generally, the review of regulatory impact analyses fell to OIRA.¹⁰⁶ As a result, federal agencies could not publish notices of proposed rulemaking until an OIRA had completed a regulatory review and its concerns had been addressed.¹⁰⁷

At the same time, President Reagan had established a "Task Force on Regulatory Relief," headed by Vice President George H.W. Bush, which gave direction to OIRA.¹⁰⁸ Unlike the Nixon, Ford, and Carter programs of regulatory review, which did not address how an impasse between the agency and the reviewing authority would be settled,¹⁰⁹ the Reagan system placed the power to hold back regulations in the hands of OIRA. As a result, "[t]he Task Force on Regulatory Relief often acted as a court of appeals for issues on which the OIRA and the regulatory agencies could not agree."¹¹⁰

The regulatory review process established in Executive Order 12291

¹⁰⁰ 44 U.S.C. § 3501 *et seq.*

¹⁰¹ 44 U.S.C. § 3503.

¹⁰² 44 U.S.C. § 3504.

¹⁰³ Exec. Order No. 12,291, *available at* <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Although "major rule" was defined as \$100m or more in §1(b), in §3(b) the director/taskforce is given authority to treat other rules as major rules. *Id.*

¹⁰⁶ *Id.*; Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, CRS Report, May 28, 2004, at 4.

¹⁰⁷ Weidenbaum, *supra* note 76.

¹⁰⁸ Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, CRS Report, May 28, 2004, at 3.

¹⁰⁹ Eads & Fix, *supra* note 77, at 48-50. The White House staff and the president were often the mediators. Include Carter intervention on cotton dust standards here. *Id.*

¹¹⁰ Weidenbaum, *supra* note 76.

and carried out by OIRA went largely unchanged through the presidency of George H.W. Bush.¹¹¹ The only major change was that the Task Force on Regulatory Relief was replaced by the “Council on Competitiveness,” also headed by the Vice President (in this case Dan Quayle), and supported by OIRA.¹¹² It was President Bill Clinton who made significant changes to the regulatory-review process by abolishing the Council on Competitiveness and rescinding President Reagan’s Executive Order 12291.¹¹³

President Clinton issued Executive Order 12866 in September 1993 articulating a new regulatory review process that was less a radical departure and more an evolution consistent with past programs.¹¹⁴ The most significant change was the removal of OMB’s authority to treat any rule it deemed appropriate as if it were a “major rule.”¹¹⁵ Only those proposed regulations that might “have an annual effect on the economy of \$100 million or more” were now subject to OIRA review.¹¹⁶ Predictably, this caused the number of rules reviewed by OIRA to drop markedly.¹¹⁷

Although it changed the *process* of regulatory review, the Clinton Executive Order kept the substance of regulatory analysis that had been developing since the Nixon Quality of Life reviews. The framework it announced maintained the emphasis on identifying all practical alternatives to regulation and selecting the most cost-effective option:

Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. . . . When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. . . . Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. . . . Each agency shall identify and assess

¹¹¹ Copeland, *supra* note 108, at 9-10; Weidenbaum, *supra* note 76.

¹¹² Weidenbaum, *supra* note 76; Copeland, *supra* note 108, at 10.

¹¹³ Weidenbaum, *supra* note 76.

¹¹⁴ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ From an average of about 2,500 rules reviewed annually before 1993, to an average of about 600 rules reviewed annually after 1993. Copeland, *supra* note 108, at 12.

alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.¹¹⁸

Additionally, Executive Order 12866 embodied the evolution of modern regulatory analysis by adding a new first step to the regulatory analysis framework. It ordered, “Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.”¹¹⁹ As we will see below, this first step, to identify the market failure or other problem, is a critical and often dispositive step.

President George W. Bush recently issued Executive Order 13422 amending Executive Order 12866 that, among other procedural changes, underlines the importance of identifying a problem to be addressed by regulation.¹²⁰ The new order requires agencies to “identify *in writing* 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)[.]”¹²¹ This requirement highlights the insight first expressed in the Clinton Executive Order 12866 that cost-benefit analysis is not the only criterion used to assess whether a regulation is necessary; a market failure or some other systemic problem must also be identified.

2. Regulatory Review and Midnight Regulations

Every administration since Richard Nixon 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, then midnight regulations are problematic because they undercut the benefits of the review process.

The calculus is simple. 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

¹¹⁸ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

¹¹⁹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

¹²⁰ Exec. Order No. 13,422; Curtis W. Copeland, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, CRS Report, Feb. 5, 2007, at 3-4.

¹²¹ Exec. Order No. 13,422. Emphasis added.

goes up significantly, and the man-hours and resources available to it remain constant, we can expect the quality of review to suffer.¹²²

Since its was invested with regulatory review authority in 1981, OIRA's budget has grown only modestly from \$4.3 million in 1981 to \$7 million in 2007.¹²³ The high mark was \$8 million in 2004 and 2006.¹²⁴ However, in real terms OIRA's budget has decreased since its inception.¹²⁵ Staffing at OIRA has also decreased consistently and dramatically—from ninety full-time equivalent employees in 1981, to just fifty today.¹²⁶

¹²² 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 of the last 27 years—a massive undertaking. We instead opt to make the case through circumstantial evidence and deductive reasoning.

¹²³ Appendix to the Budget of the United States for Fiscal Year 1983, I-C7 (OIRA's actual 1981 budget listed as \$4,332,000); Appendix to the Budget of the United States for Fiscal Year 2009, 1058 (OIRA's actual 2007 budget listed as \$7,000,000).

¹²⁴ Appendix to the Budget of the United States for Fiscal Year 2006, 982 (OIRA's actual 2004 budget listed as \$8,000,000); Appendix to the Budget of the United States for Fiscal Year 2008, 966 (OIRA's actual 2006 budget listed as \$8,000,000)

¹²⁵ Adjusted for inflation, \$7 million is equivalent to 2.9 million 1981 dollars. Calculated using the Bureau of Labor Statistics inflation calculator available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

¹²⁶ 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 (Dec. 2002) (reports staffing figures for OIRA from 1981 through 2003), available at http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf; 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).

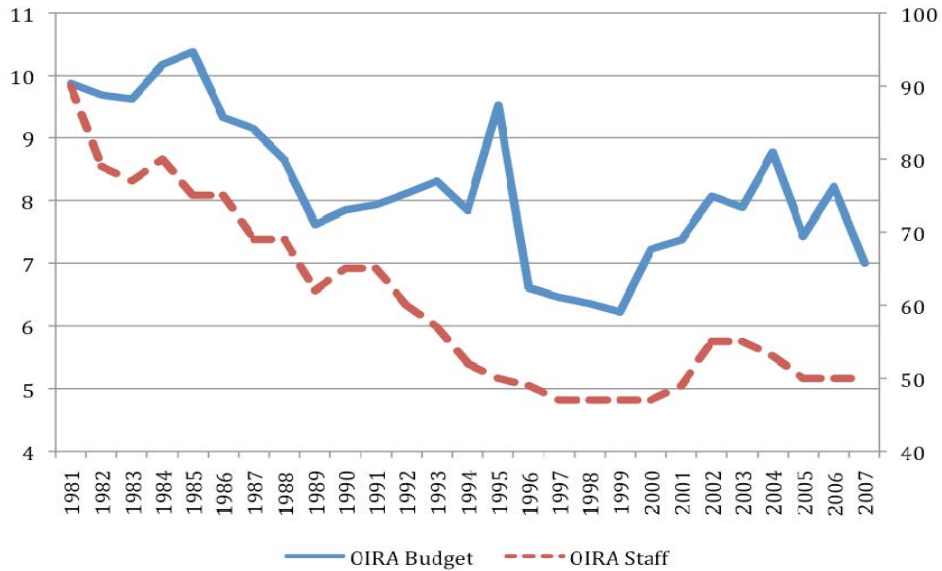


Figure 3 – OIRA Annual Budget (in millions 2007 dollars – left axis) and Staff (in number of FTEs – right axis)¹²⁷

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

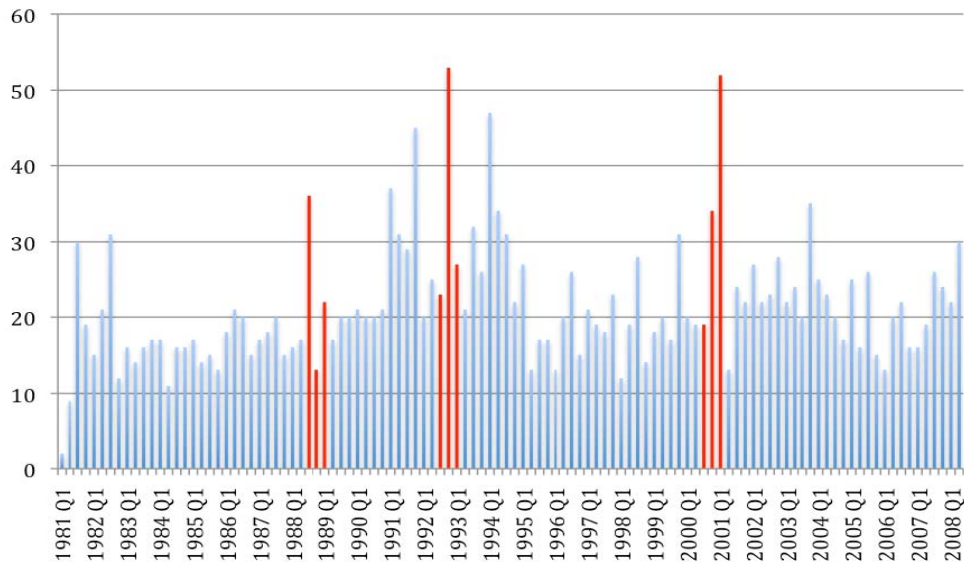


Figure 4 – Economically Significant Regulations Reviewed by OIRA (by quarter; presidential transitions highlighted)¹²⁸

¹²⁷ Appendix to the Budget of the United States for Fiscal Years 1983 to 2009.

As Figure 3 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 Bush I 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.

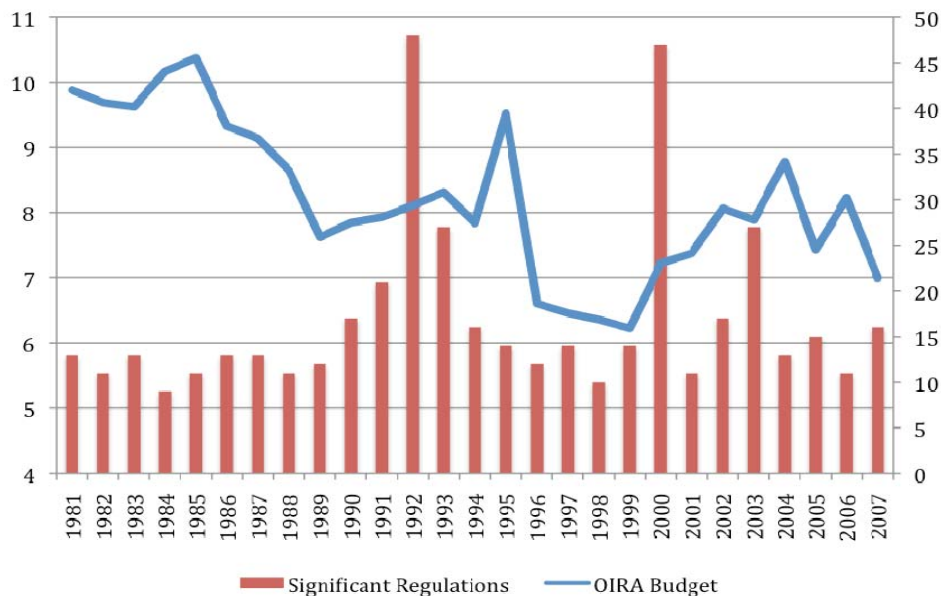


Figure 5 – OIRA Budget (in millions 2007 dollars – left axis) superimposed over number of economically significant regulations reviewed by OIRA during Nov. 8 – Jan. 20 of each year (right axis)¹²⁹

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 proxy for time and attention is the number of days OIRA takes to review a proposed regulation. OIRA publishes both when it receives a regulation for review and when it completes its review.¹³⁰ New

¹²⁸ Quarterly figures generated using OIRA's online "review counts" database. OIRA Review Counts Database, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Aug. 22, 2008).

¹²⁹ Number of yearly significant regulations derived from OIRA's online "review counts" database, *supra* note 128. OIRA budget derived from Appendix to the Budget of the United States for Fiscal Years 1983 to 2009.

¹³⁰ See OFFICE OF INFORMATION AND REGULATORY AFFAIRS, Review Counts,

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.¹³¹ 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.¹³²

While controlling for differences in administrations, McLaughlin finds that during the midnight period of the end of the Clinton administration, review time decreased significantly.¹³³ Relative to the mean review time between 1994 and 2007 (all full years of data available since the passage of Executive Order 12,866), the Clinton midnight period witnessed a decrease in mean review time of about twenty-seven days—a drop of over 50 percent.¹³⁴ 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.¹³⁵ He further finds that an increase in this proportion negatively affects the review time for all regulations, in and out of the midnight period.¹³⁶ 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.¹³⁷ This suggests a diminished level of scrutiny that undermines the benefits of regulatory review.

III. SOLUTIONS

<http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Aug. 15, 2008).

¹³¹ Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time*, July 29, 2008. (On file with author. Will be published imminently as a Mercatus Center working paper.)

¹³² *Id.*

¹³³ *Id.* at XXX.

¹³⁴ *Id.*

¹³⁵ *Id.* at XXX.

¹³⁶ *Id.*

¹³⁷ *Id.*

Several solutions to the midnight-regulations problem have been proposed and tried. These have largely addressed the democracy deficit caused by midnight regulations. In this part 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 activity 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*.¹³⁸ Even then, once a regulation is published in the *Federal Register*, it will not become effective until a later time in order to allow regulated parties to come into compliance.¹³⁹ The minimum time in which a new rule can become effective after publication is thirty days, although agencies often set effective dates of sixty days or more.¹⁴⁰ At any point before a proposed regulation is published in the *Federal Register*, the agency may rescind the rule at will.¹⁴¹ Once a 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.¹⁴²

With these constraints in mind, we see that the most direct course for a new president to address her 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 delay their effective dates, but not postpone them indefinitely.¹⁴³

¹³⁸ 5 U.S.C. § 552(a)(1)(D).

¹³⁹ 5 U.S.C. § 553(d).

¹⁴⁰ *Id.*

¹⁴¹ 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*, 54 ADMIN. L. REV. 1479, 1488-97 (2002).

¹⁴² Beermann, *supra* note 37, at 982-984.

¹⁴³ Jack, *supra* note 141, at 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*, 56 N.C. L. REV. 645 (1987). Whether delay of effective dates is legally problematic or not, the fact remains that Presidents Reagan, Clinton, and 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 at n.11 and accompanying

This is precisely what Ronald Reagan did in Executive Order 12291 less than a month after he took office.¹⁴⁴ As explained in Part II.B.1, *supra*, 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,”¹⁴⁵ and directed agencies to refrain from publishing any new major rules until they had undergone regulatory review.¹⁴⁶

Since Reagan, every president taking over from a president of the opposite party has ordered a similar regulatory moratorium. Two days after taking office, President Clinton issued a directive to all agencies ordering them to “withdraw . . . all regulations that have not yet been published in the *Federal Register*[.]”¹⁴⁷ George W. Bush 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[.]”¹⁴⁸

B. Congressional Review Act

The Congressional Review Act of 1996 (“CRA”) presents another tool to address the problem of midnight regulations.¹⁴⁹ It creates an expedited process for Congress to repeal any regulation by a simple majority vote in each house.¹⁵⁰

The CRA requires agencies to submit to Congress all rules before they can take effect.¹⁵¹ In order for the CRA’s expedited repeal procedures to control, a joint resolution of disapproval must be introduced in the Senate within sixty days of an agency submission.¹⁵² 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.”¹⁵³ Additionally, the agency may not issue another rule that is “substantially the same” unless later “specifically authorized” by

text.

¹⁴⁴ Exec. Order No. 12,291, *available at* <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

¹⁴⁵ *Id.* § 7(a).

¹⁴⁶ *Id.* § 7(d).

¹⁴⁷ Notice, Regulatory Review, 58 Fed. Reg. 6074 (Jan. 24, 1993).

¹⁴⁸ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

¹⁴⁹ 5 U.S.C. § 801 et seq. (2008).

¹⁵⁰ Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 97, 100-101 (1997) (explaining the expediting nature of the Act.).

¹⁵¹ 5 U.S.C. § 801(2008).

¹⁵² 5 U.S.C. § 802(a); Cohen & Strauss, *supra* note 150, at 99.

¹⁵³ *Id.* at 102; 5 U.S.C. § 801(a)(4)(b)(1).

subsequent legislation.¹⁵⁴

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.¹⁵⁵ If the party of the outgoing president controls the Congress, and the incoming president is of the opposite party, then there's 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 her predecessor, and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn her 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.¹⁵⁶ It was disapproved by joint resolution of a Republican-controlled Congress and signed by President Bush.¹⁵⁷

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.¹⁵⁸ With this in mind, one approach a new president could take is to conduct a review of rules promulgated during her predecessor's midnight period, identify any rules that are worthy candidates for repeal, and submit them to Congress as a package. 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.¹⁵⁹

¹⁵⁴ 5 U.S.C. § 801(b)(2)

¹⁵⁵ Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 199 (2003) (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).

¹⁵⁶ *Id.* at 193-94.

¹⁵⁷ *Id.* at 197-99.

¹⁵⁸ Cohen & Strauss, *supra* note 150, at 99.

¹⁵⁹ Morriss et al., *supra* note 56, at 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

Although the CRA would not control the package approach, it nevertheless would help facilitate it. Under the CRA, rules submitted to Congress less than sixty legislative days before a Congress adjourns are treated as if submitted on the fifteenth legislative day of the next Congress.¹⁶⁰ This means that all rules submitted to Congress during an outgoing administration's midnight period would be treated as if submitted in January.¹⁶¹ The CRA further provides that the effective date of "major" rules—those designated as economically significant by OIRA¹⁶²—are delayed by at least sixty days from the time they are submitted to Congress.¹⁶³ Therefore, the new president and Congress will have until at least March before a major rule submitted during the midnight period becomes effective. As a result, if the president and Congress act swiftly, they can ensure that major rules are repealed before they ever take effect.

C. Our Solution

The most common solutions to the midnight regulations problem suggest steps that an incoming president can take to undo her 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 co-authors have argued that the root cause of the midnight regulations problem are 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

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*, 23 PUB. CONT. L.J. 169, 172 (1994).

¹⁶⁰ 5 U.S.C. § 801(d); Cohen & Strauss, *supra* note 150, at 101.

¹⁶¹ 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. 5 U.S.C. § 801(d). The earliest this can be is January 18th.

¹⁶² 5 U.S.C. § 804(2).

¹⁶³ 5 U.S.C. § 801(a)(3); Cohen & Staruss, *supra* note 150, at 98.

administration.”¹⁶⁴ They suggest changing those incentives by giving presidents the authority to easily repeal any regulations promulgated during their predecessor’s midnight period by simply publishing a notice in the *Federal Register*.¹⁶⁵ (Judge Plager has even suggested a moratorium during the midnight period that would prohibit new regulations altogether.¹⁶⁶) This would certainly address the concern over accountability. 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.

[Discussion on whether the Bolten memo worked forthcoming after January 20, 2009. We already have indications that, as we expect, it will not work.]

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.¹⁶⁷ “If agencies faced a ‘budget’ of regulations,” they argue, “they would have to make choices on which subjects to ‘spend’ their budget.”¹⁶⁸ This approach certainly would help 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’ve seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.¹⁶⁹

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

¹⁶⁴ Morriss et al., *supra* note 56, at 597.

¹⁶⁵ *Id.*

¹⁶⁶ Morrow, *supra* note 68, at 18 (“[Judge Plager] suggested a more effective measure would be to have Congress pass a law prohibiting submission of final regulations during the interregnum.”).

¹⁶⁷ Morriss et al., *supra* note 56, at 597.

¹⁶⁸ *Id.*

¹⁶⁹ Cite to Bolten memo above depending on outcome we find on Jan. 20.

activity outstrip the resources available to OIRA.

One way to cap regulations mentioned by Morriss et al is to limit the size of regulations.¹⁷⁰ 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 proposed 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 its 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.¹⁷¹ Sen. 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.¹⁷²

A regulatory budget is a fine idea that would work to keep in check the costs imposed on society by regulation. 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 *per se*, but that regulations receive the 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 as long as there is good economic analysis to justify that need. The OIRA

¹⁷⁰ Morriss et al., *supra* note 56, at 597.

¹⁷¹ See CLYDE WAYNE CREWS JR., PROMISE AND PERIL: IMPLEMENTING A REGULATORY BUDGET (Competitive Enterprise Institute 1996), available at <http://www.heartland.org/pdf/72004o.pdf>; Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. CHI. LEGAL F. 143, 152-53 (advocating use of a regulatory budget).

¹⁷² Crews, *supra* note 171, at 3 (quoting Sen. Lloyd Bentsen).

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 regulations an agency is allowed to submit to OIRA during a given time period.

Because OIRA has up to ninety days to review significant regulations,¹⁷³ a rolling ninety-day window might be an appropriate time period. That is, an agency would be allowed to submit no more than *X* number of significant regulations for review in any ninety-day period. The number *X* would be based on the resources—budget and staff—available to OIRA. The number should be well below 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 previously proven politically unfeasible, there would be no limit to the total cost of an agency’s regulations. The OIRA regulatory-review process will simply work as it presently does to check 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 adequately check its work. 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 of time. Unlike a regulatory budget, when an agency approaches the cap, it must not decide which regulations to forgo completely, but must merely prioritize its proposed regulations.

Capping the *number* of regulations an agency can submit in a given time 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.¹⁷⁴ A spike in the number of reviews a particular desk officer must complete would seem to affect the quality of her 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

¹⁷³ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), at § 6(b)(2)(B).

¹⁷⁴ Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1273-74 & 1277 (2006).

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.¹⁷⁵ What this means is that the ceiling on the number of regulations that can be processed by OIRA in a given time period can be raised by increasing the resources available to it.¹⁷⁶ In this way, Congress and the president can always choose to allow for regulatory spikes while preserving quality review.¹⁷⁷

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.¹⁷⁸ If the president has the authority to devise and enforce a system that checks her administration's regulatory decision-making, it follows that she 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,¹⁷⁹ and if it ever did it would be able to include our proposed safeguards.

¹⁷⁵ 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 ninety staff members. By 1997, OIRA's FTE allocation had declined to forty-seven—a nearly fifty 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.

Starting in 2001, OIRA's staffing authorization began to increase somewhat, and by 2003 it stood at fifty-five 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.

Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 *FORDHAM URB. L.J.* 1257, 1293 (2006).

¹⁷⁶ In fact, some have argued that OIRA's resources at present are inadequate and should be increased. ROBERT HAHN & ROBERT E. LITAN, *WHY CONGRESS SHOULD INCREASE FUNDING FOR OMB REVIEW OF REGULATION* (Brookings Institution, Oct. 2003), available at http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx.

¹⁷⁷ According to Copeland, "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." Copeland, *supra* note 174. 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.

¹⁷⁸ See Copeland *supra* note 176, at 1304-05 ("Although some argued early in OIRA's history that the office's regulatory review role was unconstitutional, few observers continue to hold that view.")

¹⁷⁹ *Id.* at 1306-07.

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 those 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, a sudden increase in regulations going through the review process 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 her 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 that one way to address this particular problem is to place a cap on the number of economically significant regulations OIRA can be expected to review during a given time period.