MIDNIGHT REGULATIONS AND REGULATORY REVIEW

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INTRODUCTION

The term *midnight regulations* describes the dramatic spike of new regulations promulgated at the end of presidential terms, especially during

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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 newly proposed, 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. Our suggested solution to address the effects of midnight regulation on regulatory review is 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 the outgoing administration. Part II discusses the variety of concerns raised by midnight regulations with a special focus on the lack of proper 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 decreases "like a balloon with a slow leak" that is "ineluctably shrinking with each passing week" until it hits the ground.[1] Nonetheless, during his last days in office, President Bill Clinton managed to promulgate an unprecedented number of midnight regulations, including improved water quality rules, lead- and diesel-sulfur-reduction rules, an arsenic in drinking water standard, a significant ergonomics rule, and energy

1. JAMES P. PFIFFNER, THE STRATEGIC PRESIDENCY 5 (1996); *see also* Carl M. Cannon, *The Long Goodbye*, 33 NAT'L J. 274 (2001) (citation omitted) (recanting the final regulatory actions of the Clinton Administration).

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 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 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 26,542 pages in the *Federal Register*.[5] According to Susan E. Dudley, the regulatory activity in Clinton's postelection quarter represented a fifty-one percent increase over the average number of pages published during the same quarter of the previous three years of Clinton's second term.[6]

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 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]

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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, 43 (2001) (statement of Marshall E. Whitenton, Vice President, National Association of Manufacturers).

3. Jack Faris, *Small Business Focus: Watch Out for 'Midnight Regulation,'* NFIB, Aug. 21, 2000, http://www.nfib.com/object/1609860.html.

4. Susan E. Dudley, *Reversing Midnight Regulations*, 24 CATO REV. OF BUS. & GOV'T 9 (2001), *available at* http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf; Susan E. Dudley, *Midnight Regulations at All-Time High*, INTELL. AMMUNITION, Mar. 1, 2001, http://www.heartland.org/Article.cfm?artId=99.

5. Dudley, *Reversing Midnight Regulations*, *supra* note 4, at 9.

6. *Id.*

7. *See* GARY L. GALEMORE, CONG. RESEARCH SERV., FEDERAL REGULATORY REFORM 8 (2003), *available at* http://www.policyarchive.org/bitstream/handle/10207/1312/RL31207_20030129.pdf?sequence=1 (specifying that Bush's moratorium "exempted regulations issued by independent regulatory boards and commissions, as well as those regulations issued in response to emergency situations or statutory or judicial deadlines").

8. *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 890 (2008) (adding that the proposal was never finalized and was quickly scrapped by the Clinton Administration).

A. Evidence of the Phenomenon

In 2001, former Mercatus Center scholar Jay Cochran III 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 switched to the opposite party, the volume of regulation in the outgoing administration's final quarter-year averaged seventeen percent higher than during the same period in nonelection 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, "as the clock runs out 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 midnight regulation phenomenon.[14] It uses an extended data set—from 1948 to 2007—and examines data monthly instead of quarterly. 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 postelection months for a given administration relative to the administration's annual regulatory output.

9. Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Ctr. at George Mason Univ., Working Paper, 2001), http://www.mercatus.org/PublicationDetails.aspx?id=17546.

10. *See id.* at 11 (demonstrating at least some evidence of a tendency toward midnight regulations).

11. *Id.* at 15.

12. *Id.* at 4; *see also* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 955–60 (2003) (expanding on the Cinderella constraint).

13. Cochran, *supra* note 9, at 4.

14. Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update* (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-06, 2008), http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf.

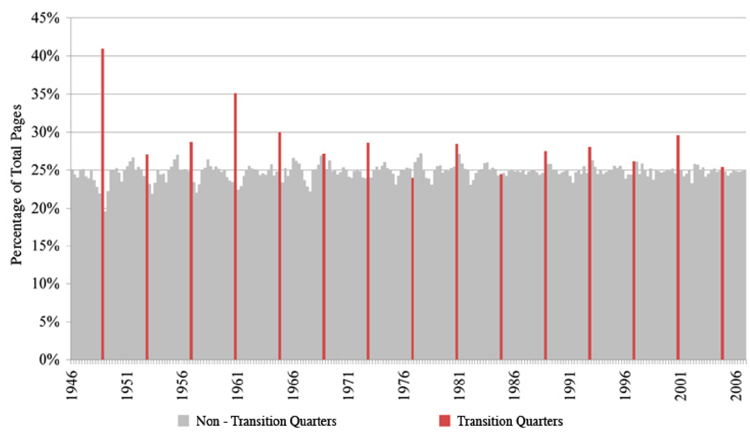

Figure 1: Pages Added to the *Federal Register* in Each Quarter as a Fraction of Pages Added for the Calendar Year.[15]

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 growth during nontransition quarters—the quarters in which no presidential election occurs—with the growth during the transition quarters.

The data show that, under normal circumstances, the number of pages added to the *Federal Register* during the course of a year is consistent—spread equally throughout the year. In other words, twenty-five percent of the pages added to the *Federal Register* during a calendar year are added each quarter. However, for quarters in which a presidential election occurs, the number of pages added exceeds the twenty-five-percent baseline thirteen out of fifteen times. The two exceptions correspond to the elections of 1976 (Ford succeeded by Carter) and 1984 (Reagan elected to a second term).

15. The authors based this calculation on the number of pages in the *Federal Register*. *Id.* at 4.

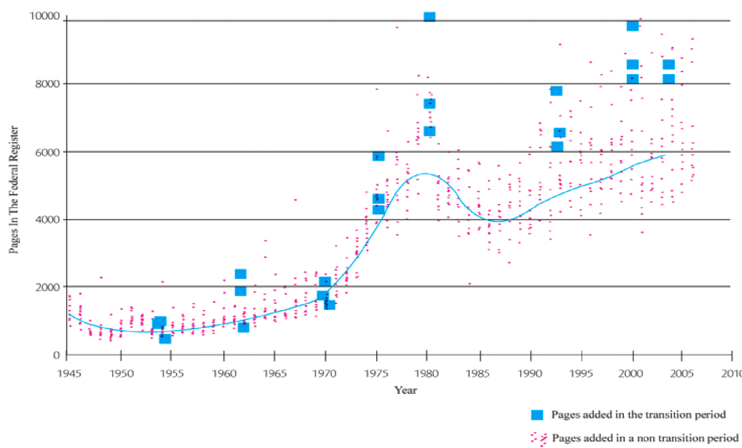

Figure 2: Number of Pages Added to the *Federal Register* from 1946 to 2006.[16]

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 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 1990s, it increased again but at a slower pace than in the 1970s.

Pages added to the *Federal Register* during the transition periods are located well above the trendline, lending a first round of support to the theory that outgoing administrations will significantly increase their regulatory activity in the months following a presidential election—especially if parties are changing. As shown, 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 switch between political parties. There was a smaller increase when the ruling party stayed in power, such as in 1988.

With a few exceptions, these results are quantitatively and qualitatively consistent with Cochran's findings. They confirm a positive relationship

16. *Id.* at 5.

between postelection months and regulatory output.[17] They also show that Congress "is a significant contributor to the existence of midnight regulations."[18] That is, 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. The higher the rate of 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 will be issued.[19]

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 his way out.[20] However, according to political scientists William G. Howell and Kenneth R. Mayer, this is not necessarily the case.[21] The slowdown allows a 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] Howell and Mayer 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 plague the legislative process."[23]

Additionally, at the end of a term, a president has not only the ability but also 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 his administration, a president knows exactly who will

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17. *Id.* at 3.
18. *Id.* at 3–4.
19. *Id.* at 4.
20. *See* William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 534 (2005) (citing loss of public prestige and professional reputation as factors contributing to the diminished presidential power).
21. *See id.* (insisting that the President has "important policy options outside of the legislative process" and to ignore these options underestimates the influence and power the President wields during the final months in office).
22. *Id.*
23. *Id.*
24. *Id.* at 533.

succeed him as well as the president-elect's policy positions, legislative priorities, and level of partisan support he will enjoy with the new Congress.[25] An administration has every incentive to promulgate last-minute rules and regulations to deftly extend its influence beyond its last day.[26]

This is particularly true if the sitting president (or his party) lost the election. In that case, the outgoing president not only has an incentive to issue midnight regulations to extend his influence beyond the day he leaves office, but also might 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 unilateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must first 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 regulations issued by the previous administration.[29]

In fact, according to Professor Nina A. Mendelson, some last-minute rules may have such high change and deviation costs that they are close to irreversible.[30] Some changes made 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, 2001)[32] Clinton Administration rule setting acceptable levels of arsenic in drinking water at ten parts per billion imposed serious political costs.[33] Even though only one-third of the American public approved of the rule, the suspension led to severe public criticism.[34] The

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. 551, 557 (2003).

27. *See id.* (stating that the outgoing administration has incentive to finish its regulatory business before leaving office).

28. Dudley, *Reversing Midnight Regulations*, *supra* note 4, at 9.

29. *See id.* at 9 (noting that the "new administration's options for overturning midnight regulations are 'constrained'").

30. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 601 (2003).

31. *Id.* at 602.

32. Howell & Mayer, *supra* note 20, at 544.

33. *See* Mendelson, *supra* note 30, at 602 (citing the Bush suspension of the Clinton arsenic rule as an example of a "booby trap" laid by an outgoing president, leading to acute criticism of President Bush's attitude toward the environment).

34. Howell & Mayer, *supra* note 20, at 544.

Bush Administration's action on the arsenic standard became a symbol of the new administration's "callous attitude toward the environment."[35] Furthermore, as Andrew Morris and his coauthors explain, "by issuing regulations that complicate the life of the succeeding administration, outgoing regulators can earn political capital with their core constituencies, positioning 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 cost of taking action decreases. Because "an outgoing president is unlikely to seek elective office again[, he] may have little need for political support."[39] As a result, the administration is free to pursue actions that it could not have earlier in its term for fear of provoking opposition in Congress.[40]

Of course, another explanation for midnight regulations simply could be that some regulations are under review for years and only 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] Delay is a lag between the moment the regulation is proposed and the moment it is passed. One potential explanation for lag may simply be procrastination.[43] However, delay is more likely due to external forces. For instance, a "[s]tringent judicial review has made the rulemaking process more thorough and time consuming," extending the time it takes for a regulation to gain approval.[44] As a consequence, many new regulations are "naturally push[ed]" further into the President's term.[45] Also, Congress—knowingly or otherwise—

35. Mendelson, *supra* note 30, at 602.
36. Morriss et al., *supra* note 26, at 558.
37. Beermann, *supra* note 12, at 956.
38. *Id.*
39. *Id.* at 958.
40. *Id.*
41. *See* Dudley, *Reversing Midnight Regulations*, *supra* note 4, at 9 ("Some of these new regulations may have been developed carefully over many years, and only just now emerged from the procedural pipeline.").
42. Beermann, *supra* note 12, at 956.
43. *See id.* (arguing that while there are many reasons for delay, simple procrastination is "surely one explanation").
44. *Id.* at 956.
45. *Id.* at 956–57.

might cause the delay of a regulation's issuance. In one example, 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."[46]

C. Midnight Regulations: 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. As detailed in Part III, 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.

As Howell and Mayer explain, "Not only does this require time, but *changing* the status quo may well mean taking on interest groups who are reticent to give up ground that they have just won."[47] As mentioned earlier, President George W. Bush experienced difficulties altering Clinton's January 2001 arsenic regulation.[48] In spite of public outrage at the time the rule was issued,[49] Bush faced considerable opposition when he tried to scrap the rule three months later[50] and ultimately lost the battle.[51]

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.[52] The authors tracked the regulations passed in the midnight period of former

46. *Id.* at 957.

47. Howell & Mayer, *supra* note 20, at 544.

48. *Id.*

49. *Id.*

50. *See* Douglas Jehl, *E.P.A. Delays Its Decision on Arsenic*, N.Y. TIMES, Apr. 19, 2001, at A14 (describing the Bush Administration's efforts to suspend President Clinton's ten-parts-per-billion arsenic standard and postpone a decision on acceptable arsenic levels until February, effectively leaving the 1942 standard of fifty-parts-per-billion in place until at least early 2002).

51. *See Bush U-Turn on Arsenic Rule*, CBSNEWS.COM, Oct. 31, 2001, http://www.cbsnews.com/stories/2001/10/31/politics/main316574.shtml (reporting that the Bush Administration reversed course and would accept the Clinton Administration's ten-parts-per-billion arsenic rule).

52. 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).

Presidents Clinton and George H.W. Bush, as well as the incoming administrations' responses to those regulations. Based on a selected sample, the authors found that only 9% of George H.W. Bush's last-minute regulations were later repealed, and 43% were accepted without any amendment by the Clinton Administration.[53] By the same token, only 3% of President Clinton's midnight regulations were later repealed by the George W. Bush Administration, and a staggering 82% of them were accepted without any changes.[54]

II. THE MIDNIGHT REGULATIONS PHENOMENON IS PROBLEMATIC

Having established that the midnight regulations phenomenon is real and systemic, we now turn to the question of whether it is problematic and, if so, what can be done. This Part 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 OIRA 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.[55] However, unless you believe that regulation of any kind is always problematic, the fact that regulatory activity increases at the end of a presidential term should not by itself be a cause for concern. It is therefore not surprising to

53. *Id.* at 1456.

54. *Id.*

55. *See* Edward Cowan, *Administration to Kill or Put Off 36 Carter 'Midnight Regulations,'* N.Y. TIMES, Mar. 26, 1981, at A1 (noting that Vice President Bush announced the government was "killing or indefinitely postponing" numerous midnight regulations imposed by the Carter Administration that had substantial impacts in health care, the environment, and the economy); *Here Come Ronald Reagan's 'Midnight' Regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11 (characterizing the Reagan Administration's agenda with last-minute regulations as "too hot to handle" and controversial); Robert A. Rosenblatt & Elizabeth Shogren, *Clinton Readies an Avalanche of Regulations*, L.A. TIMES, Nov. 26, 2000, at A1 (suggesting that after a close and bitter election, outgoing President Clinton was determined to leave a lasting impression through midnight regulations on controversial topics that "left some Republican lawmakers fuming"); R. Jeffrey Smith, *A Last Push to Deregulate*, WASH. POST, Oct. 31, 2008, at A1 (noting the White House's efforts to enact a slew of last-minute regulatory activity); Editorial, *Last-Minute Mischief*, N.Y. TIMES, Oct. 18, 2008, at A22 (criticizing in the numerous last-minute environmental rules of the Bush Administration); Emma Schwartz, *The Bush Administration's Midnight Regulations*, ABCNEWS.COM, Oct. 30, 2008, http://www.abcnews.go.com/print?id=6146929 (surveying President Bush's last-minute rules on the environment, health care, occupation safety, and other areas).

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.[56] During the midnight period a lame-duck administration might be impervious to normal checks and balances.[57] 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]."[58] That is, an administration considering a regulation not only will take into account the political costs and benefits of the decision it is making now, but also will consider how that decision will affect future interactions with other players (Congress and the electorate).[59] 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.[60]

A president will not face another election if he has served two terms (e.g., Bill Clinton) or has been defeated at the polls (e.g., Jimmy Carter).[61] In either case, there will be an accountability deficit. Because such a president knows that he will not face voters again, that president and his agencies will be less hesitant to pursue a controversial regulatory course. The accountability provided by the threat of congressional retaliation is

56. *See* Loring & Roth, *supra* note 52, at 1446 (recognizing that during the midnight period, the outgoing administration no longer is subject to "traditional political constraints" such as voter satisfaction, and thus is unaccountable to the public, giving it "little incentive to avoid costly measures"); Morriss et al., *supra* note 26, at 558 (asserting that accountability is lost because of "political constraints on agency heads such as budgetary concerns, congressional oversight, political appointees' concern with their reputations, and personal performance measures absent in the period between the election and the new administration"); William S. Morrow, Jr., *Midnight Regulations: Natural Order or Disorderly Governance*, 26 ADMIN. & REG. L. NEWS 3 (2001) (expressing Judge Plager's view that one of the three major problems with midnight regulation is that it "undermines political accountability").

57. *See* Morriss et al., *supra* note 26, at 557–58 (explaining that "Congress is often out of session after the elections" with the exception of a "brief 'lame duck' session," and if political control of Congress "shift[s] with the election," many committee chairs will change, lessening the opportunity for oversight).

58. *Id.* at 556–57.

59. *See id.* (recognizing that long-term consequences of a decision may lessen the impact of its potential immediate benefit).

60. *See id.* at 557–58 (observing that a change in administration that includes a change in political party minimizes the possibility of future interactions, creating more "incentive to defect").

61. *But see id.* (explaining that when an administration changes but party control remains the same, agencies and employees can hope for future employment and thus have stronger incentive to cooperate). A two-term president might also be constrained until after the election because a controversial regulatory initiative might affect the campaign of his party's nominee to succeed him. However, once the election is decided, that constraint is removed.

also weakened once a president knows that there is no "next period" in which he will need Congress's cooperation on legislative, budgetary, and other matters.[62]

Some argue that this period of unaccountability is in fact salutary because it may be the only opportunity an administration has to take a principled stand on issues that would otherwise face swift retaliation by powerful special interests. On the other hand, the case could be made that this is also the perfect time for an administration 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.[63]

Related to the concern over accountability is the criticism that midnight regulations can be undemocratic. After an election, if the people have chosen a new president with policies opposite to the sitting president, actions by the sitting president aimed at exerting power beyond his term may be seen as undemocratic.[64] One way a lame-duck president can exert power beyond his term is by adopting a procedural rule that constrains the Executive's own power, but doing so only at the very end of his term so that the constraint affects only his successor.[65] Another way is to force an incoming president to expend political capital reversing his predecessor's last-minute decisions. During the midnight period, an "outgoing

62. According to Morriss and his coauthors, the incentive to defect is strongest when the incoming president is of the opposite party because "the outgoing administration has little incentive to leave unfinished business for the incoming administration" whose policies will likely be contrary. *Id.* at 557.

63. *See* 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 (identifying the pardons granted by President Clinton to Marc Rich, a wealthy donor to the Democratic Party and the Clinton campaign, and President Bush to Edwin Cox, Jr., whose family donated generously to the Republican Party and the Bush campaigns). *See generally* P.S. Ruckman, Jr., *"Last-Minute" Pardon Scandals: Fact and Fiction* (Paper presented at the Annual Meeting of the Midwest Political Science Association, Apr. 15, 2004), http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf (comparing the use of pardons by a variety of presidents throughout their administrations to the amount of pardons issued at the end of their administrations).

64. *See* Mendelson, *supra* note 30, at 599 (noting that the "worst case" scenario concerning midnight regulations is when the regulations by the outgoing administration hinder the president-elect's ability to implement a new and different policy, and that this abuse of power could be considered as "undermining our democratic regime").

65. For example, Mendelson explains that the Clinton Department of Justice (DOJ) 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; *see also* Beermann, *supra* note 12, at 951–52 (concluding that when rules are imposed only at the end of a presidency, especially in the form of procedural constraints, it is evident that the administration had not found these rules necessary during its term and thus the only reasonable explanation for the promulgation was to "tie the hands of the successor").

administration may impose rules in a politically charged area" that it knows its successors will surely reverse.[66] That 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."[67]

Yet another criticism of midnight regulations is the inefficiency and wastefulness inherent in trying to exert influence beyond one's own administration. Putting aside concerns about democracy, enacting regulations contrary to the next president's policy agenda likely wastes the government's time and resources.[68]

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] Senior Federal Circuit Judge S. Jay Plager, debating Clinton Office of Management and Budget (OMB) Acting Deputy Director Sally Katzen on the question of whether midnight regulations should be curbed, has said that "he believes public virtue suffers from the rush to publish."[70] 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 A. Mendelson echoes Judge Plager, writing that "[s]omething about this activity strikes us as unseemly."[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—frequently cited as the main problems with midnight regulations. However, this Article will now focus on the less touted concern that an increase in the

66. *See* Beermann, *supra* note 12, at 951 (explaining that this often includes rules issued in areas such as abortion or the environment).

67. *Id.* at 951.

68. *See id.* at 951, 972 (arguing that waste occurs when "the new administration must dig itself out from under the remains of the outgoing administration, especially when the outgoing administration knows that this is inevitable" and that an outgoing president should recognize when the incoming president will have a new agenda and step aside to prevent waste of government funds on an "obviously futile endeavor"). Efficiency and waste are one of three concerns over midnight regulations identified by Judge Plager. *See* Morrow, *supra* note 56, at 3 ("[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.").

69. Beermann, *supra* note 12, at 951.

70. Morrow, *supra* note 56, at 3.

71. *Id.*

72. Mendelson, *supra* note 30, at 564.

number of regulations over a short time period could overwhelm the institutional review process that otherwise serves to ensure that new regulations have been carefully considered.

B. Regulatory Review

For over two decades, a series of executive orders has required executive agencies to perform economic analysis of the effects of proposed regulations.[73] OIRA, within OMB, oversees agencies' regulatory analysis and can delay, and even halt, some regulations if it believes that 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 both time and careful consideration. Therefore, the effectiveness of the process can be overpowered by a flood of rulemaking activity at the end of an administration.[75]

Below, we will look first at the history and purposes of the regulatory review process and then explore how the midnight regulations phenomenon affects this process.

C. 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

73. *See generally* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 28, 2002) *and* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (requiring agencies to perform a cost–benefit analysis, including both quantitative and qualitative measures of available regulatory alternatives and the option of no regulation); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003), http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf (providing guidance for regulatory analysis, including a standardization for measuring and reporting costs and benefits).

74. *See* 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. *See* Morrow, *supra* note 56, at 3 ("[Judge Plager] also believes presidential oversight tends to get lost in the process.").

76. *See* GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? 46 (1984) ("Many of the procedures and institutional arrangements that would later be employed by Presidents Ford, Carter, and Reagan trace their origins to decisions made in 1971 by the Nixon

Environmental Protection Agency (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 multimillion-dollar supplementary budget request by the EPA in December 1970, the OMB concluded that the effects of EPA's regulation on the budget and the private sector were going unchecked.[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 previously done. OMB Director George Schultz sent a letter to EPA Administrator William Ruckleshaus in 1971 "assert[ing] 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, 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 agencies to submit significant proposed rules to OMB at least thirty days before their

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administration."); Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REG., Winter 1997, at 20 (noting that Nixon's reforms, which required agencies to consider regulatory alternatives and their costs, were the "precursor of all modern reform efforts").

77. *See* EADS & FIX, *supra* note 76, at 46–47 (explaining that when the EPA was created, it began to "spew forth" new regulations so quickly and in such large numbers that implementing the regulations led to serious budgetary and policy consequences).

78. *Id.* at 47.

79. *Id.* at 48.

80. *Id.*

81. *See id.* (noting the development of the Quality of Life Review process).

82. *See* Memorandum from George P. Schultz, Director, Office of Mgmt. and Budget, to Heads of Departments and Agencies (Oct. 5, 1971) [hereinafter Schultz Memo], http://www.thecre.com/ombpapers/QualityofLife1.htm (ordering agencies to submit proposed regulations to the Office of Management and Budget (OMB) for review before the regulations are formally announced).

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.

publication, 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 nonfederal) associated with the alternatives considered; and the reasons for selecting the alternative that is proposed."[85] OMB then began to circulate proposed rules and its explanations to other agencies for comment, forwarding the feedback to the issuing agency.[86]

For political reasons, a mechanism by which conflicts among agencies would be resolved was intentionally left out of this interagency review process.[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, taking into account the cost of the rules they were proposing.

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 or Council) in August 1974.[91] Among other things, the Council was charged with reviewing regulations to ascertain their impact on the economy.[92] Three months after establishing the CWPS, President Ford issued Executive Order 11,821 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, which were prepared by executive branch agencies, and then filed comments on the public record with those agencies.[94]

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85. *Id.*

86. *See id.* (establishing a process for circulating proposed regulations for agency comment); *see also* EADS & FIX, *supra* note 76, at 48 (describing OMB's role in soliciting comments on proposed regulations).

87. *See* EADS & FIX, *supra* note 76, at 49 (discussing the interaction between agencies during the Quality of Life Review process).

88. *See id.* (noting the White House's involvement in the regulatory review process).

89. *See generally id.* at 54 (discussing the Carter Administration's approach to regulatory review).

90. *See* Weidenbaum, *supra* note 76, at 20 (noting that concerns about inflation affected President Ford's regulatory reforms).

91. EADS & FIX, *supra* note 76, at 51; *see also* Weidenbaum, *supra* note 76, at 20 (describing the founding of the Council on Wage and Price Stability (CWPS) and its role in the regulatory review process).

92. *See* Weidenbaum, *supra* note 76, at 20.

93. *Id.*

94. *See* EADS & FIX, *supra* note 76, at 51–52 (discussing the development of formal analysis of the economic effects of proposed regulations); Weidenbaum, *supra* note 76, at

President Jimmy Carter continued to formalize the regulatory review process begun in the Ford Administration. In 1978, Carter established the Cabinet-level Regulatory Analysis Review Group (RARG), which had the authority to review major proposed rules.[95] He also issued Executive Order 12,044 in March 1978, which replaced Ford's Inflation Impact Statements with the "Regulatory Analysis."[96] The Executive Order was remarkably similar to the Nixon and Ford efforts.[97] 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.[98]

Also, much like the 1971 Schultz memo, Executive Order 12,044 required agencies to prepare and publish a semiannual agenda "of significant regulations under development or review."[99] This obligation was later codified into law during the last year of the Carter Administration by the Regulatory Flexibility Act.[100]

It was under the Administration of President Ronald Reagan, however, that we saw the crystallization of the regulatory review process as we know it today. The stage was set during the last year of the Carter Administration with the passage of the Paperwork Reduction Act.[101] That Act created OIRA within OMB.[102] Its primary purpose was to enforce the Act's limits on the amount of reporting that agencies could require from the private sector.[103] President Reagan, however, expanded the role of OIRA.

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20 (noting that CPWS reviewed proposed regulations to determine their effect on competition and productivity).

95. EADS & FIX, *supra* note 76, at 55–56; Weidenbaum, *supra* note 76, at 20.

96. *See* Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979) (directing that regulations be as simple and clear as possible and not impose unnecessary burdens on the economy or individuals).

97. *Compare* Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *with* Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974), *and* Schultz Memo, *supra* note 82.

98. Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979).

99. *Id.*

100. *See* 5 U.S.C. § 602 (2006) (requiring agencies to publish a semiannual regulatory flexibility agenda); Weidenbaum, *supra* note 76, at 21 (describing the role of the Regulatory Council in preparing semiannual reviews).

101. *See* 44 U.S.C. § 3501 (2000) (minimizing the paperwork burden on groups that are required to submit information to the federal government).

102. 44 U.S.C. § 3503 (2000).

103. *See* 44 U.S.C. § 3504 (2000) (outlining the authority of the Director of OMB to take steps to improve the efficiency of the collection of information from and the dissemination of information to the public).

One month into his presidency, Reagan signed Executive Order 12,291, titled "Federal Regulation," mandating that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[104] The Executive Order required agencies to prepare regulatory impact analyses for proposed "major rules."[105] What constituted a major rule was left largely to the discretion of OMB.[106] Although the Executive Order did not mention OIRA specifically (and only OMB generally), the review of regulatory impact analyses fell on OIRA.[107] As a result, "[a] federal agency could not publish a notice of proposed rulemaking until an OIRA review was complete and its concerns had been addressed."[108]

At the same time, President Reagan established the Presidential Task Force on Regulatory Relief, headed by Vice President George H.W. Bush, which gave direction to OIRA.[109] Unlike the Nixon, Ford, and Carter programs of regulatory review, none of which addressed how an impasse between an agency and its reviewing authority would be settled,[110] 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 [] OIRA and the regulatory agencies could not agree."[111]

The regulatory review process established in Executive Order 12,291 and carried out by OIRA went largely unchanged through the presidency of George H.W. Bush.[112] The only major break was that the Task Force on

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104. Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982).

105. *See id.* at 128–30 (outlining the Regulatory Impact Analysis requirements).

106. Although "major rule" was defined in § 1(b) as a rule having an annual impact on the economy of $100 million or more, in § 3(b) the Director is given authority, subject to the direction of the taskforce, to treat other rules as major rules as well. *Id.* at 127–28.

107. *See id.* at 128 (giving the Director of OMB the authority to develop standards for preparing a Regulatory Impact Analysis, develop procedures for evaluating agency estimates, and monitor agency compliance); CURTIS W. COPELAND, CONG. RESEARCH SERV., FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 4 (2004) (describing how OIRA became involved in the regulatory review process).

108. Weidenbaum, *supra* note 76, at 22.

109. *See* COPELAND, *supra* note 107, at 3 (listing responsibilities of the newly created taskforce including "(1) monitoring the establishment of OMB's responsibility to coordinate and review new rules, (2) the development of legislative changes to regulatory statutes, and (3) the revision of existing regulations").

110. EADS & FIX, *supra* note 76, at 48–50. The White House staff and the President were often the mediators. On at least one occasion, administration officials who took different sides of a proposed regulation lobbied President Carter himself. The initial result was confusion because after their respective meetings each side thought they had persuaded the President. *Id.* at 58–59.

111. Weidenbaum, *supra* note 76, at 22.

112. *See generally* COPELAND, *supra* note 107, at 9–10 (discussing OIRA and the George H.W. Bush Administration); Weidenbaum, *supra* note 76, at 23.

Regulatory Relief was replaced by the Council on Competitiveness, also headed by the Vice President (in this case Dan Quayle) and supported by OIRA.[113] 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 12,291.[114]

President Clinton issued Executive Order 12,866 in September 1993, articulating a new regulatory review process that was less of a radical departure and more an evolution consistent with past programs.[115] 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.[116] The focus of OIRA review was shifted to those proposed regulations that might "[h]ave an annual effect on the economy of $100 million or more."[117] Predictably, this caused the number of rules reviewed by OIRA to drop markedly.[118]

Although it changed the process of regulatory review, the Clinton Executive Order kept the substance of regulatory analysis that had developed since the Nixon Quality of Life Reviews. The framework 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 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.[119]

113. COPELAND, *supra* note 107, at 10; Weidenbaum, *supra* note 76, at 23.
114. Weidenbaum, *supra* note 76, at 24.
115. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).
116. *See id.* at 51,742 (mandating that "OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions").
117. *Id.* at 51,738.
118. *See* COPELAND, *supra* note 107, at 12 (charting the significant drop in rules reviewed under Executive Order 12,866 and noting that the number of rules that OIRA examined fell from about 2,000–3,000 per year under Executive Order 12,291 to about 500–700 rules per year under Executive Order 12,866).
119. Exec. Order No. 12,866, 58 Fed. Reg. 51,736 (Oct. 4, 1993).

Additionally, Executive Order 12,866 embodied the evolution of modern regulatory analysis by adding a new first step to the regulatory analysis framework. It ordered the following: "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."[120]

In 2003, President George W. Bush issued Executive Order 13,422, amending Executive Order 12,866 and underlining the importance of identifying a problem to be addressed by regulation.[121] The new Executive 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)."[122] This requirement highlights the insight, first expressed in Clinton Executive Order 12,866, 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.

D. Regulatory Review and Midnight Regulations

Every administration since President Nixon has come to view regulatory analysis as a useful tool to ensure the effectiveness of regulation. To the extent we believe that regulatory review is beneficial, midnight regulations are problematic because they undercut the benefits of the review process.

The logic is simple. As we have seen, at the end of each administration, especially between administrations of opposing parties, there is a dramatic spike in regulatory activity. However, there is no corresponding increase in the resources available to OIRA during those times of increased activity. If the number of regulations OIRA must review goes up significantly and the man-hours and resources available to it remain constant, we can expect the quality of review to suffer.[123]

Since it 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.[124] The high mark was $8 million in 2004 and 2006.[125] However, in

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120. *Id.* at 51,735.

121. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007); *see also* COPELAND, *supra* note 107, at 3–4 (outlining changes made by Executive Order 13,422).

122. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (emphasis added).

123. To conclusively prove this would require judging every OIRA-produced regulatory review issued during each period from November 8th to January 20th of the last twenty-seven years against objective criteria—a massive undertaking. We instead opt to make the case through circumstantial evidence and deductive reasoning.

124. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983, at I-C7 (1982) (listing OIRA's actual 1981 budget as $4,332,000); OFFICE OF MGMT. & BUDGET, EXEC.

real terms, OIRA's budget has decreased since its inception.[126] Staffing at OIRA has also decreased consistently and dramatically—from ninety full-time equivalent employees in 1981 to just fifty today.[127]

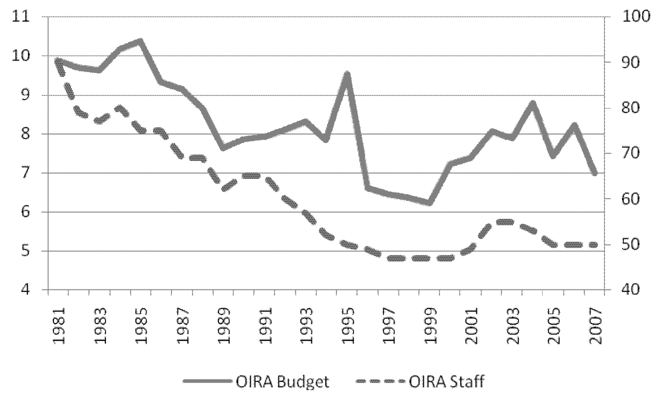

Figure 3: OIRA Annual Budget (in Millions of 2007 Dollars—Left Axis) and Staff (in Number of FTEs—Right Axis).[128]

OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 1058 (2008) (listing OIRA's actual 2007 budget as $7 million).

125. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 982 (2005) (listing OIRA's actual 2004 budget as $8 million); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, at 966 (2007) (listing OIRA's actual 2006 budget as $8 million)

126. Adjusted for inflation, $7 million is equivalent to $2.9 million in 1981 dollars. Bureau of Labor Statistics Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 17, 2008).

127. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 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 (2002), http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (reporting staffing figures for OIRA from 1981 through 2003); E-mail from John F. Morrall III, Branch Chief for Health, Transp., and Gen. Gov't in the Office of Info. and Regulatory Affairs of the Office of Mgmt. and Budget (July 3, 2008, 12:23:21 EDT) (providing OIRA staffing data for the 2004–2008 period).

128. This graph was compiled using the Appendices to the Budgets of the United States Government. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983 (1982); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009 (2008) (providing OIRA's actual budget from 1981 to 2007).

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

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 George H.W. Bush and Clinton presidencies, when the transition was to a president of the opposing party, we see the number of economically significant regulations that OIRA was 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.

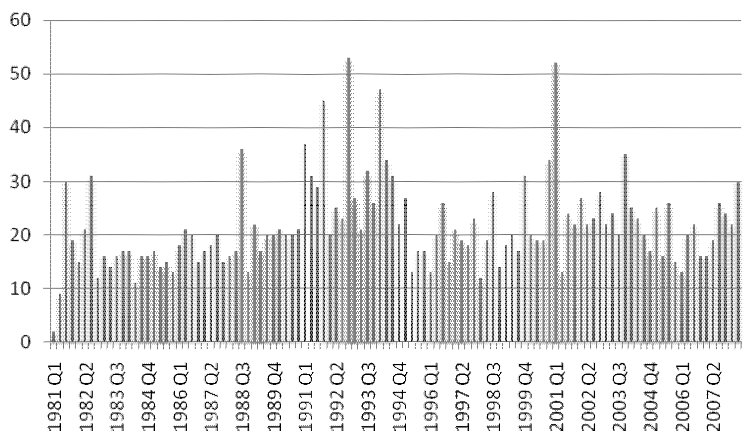

Figure 4: Economically Significant Regulations Reviewed by OIRA (by Quarter; Presidential Transitions Highlighted).[129]

129. Quarterly figures generated using OIRA's online "review counts" database. *See* RegInfo.gov, Review Counts, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init (last visited Jan. 21, 2009).

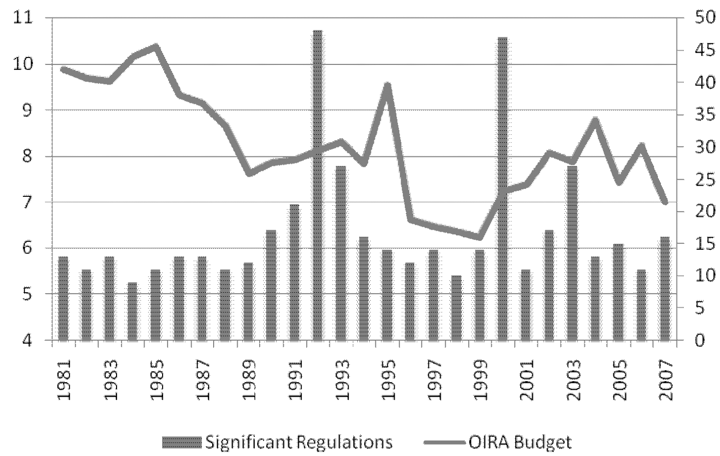

Figure 5: OIRA Budget (in Millions of 2007 Dollars—Left Axis) Superimposed over Number of Economically Significant Regulations Reviewed by OIRA Nov. 8–Jan. 20 of Each Fiscal Year (Right Axis).[130]

As a consequence, we can expect the amount of time and attention OIRA 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.[131] New Mercatus Center research by Patrick A. McLaughlin examines whether increases in regulatory activity, such as those that occur during midnight periods, cause average review time to decrease.[132] 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

130. Number of yearly significant regulations derived from OIRA's online "review counts" database. *Id.* The OIRA budget derived from Appendices to the Budgets of the United States for Fiscal Years 1983 through 2009. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983 (1982); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009 (2008).

131. *See* RegInfo.gov, Review Counts, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init (last visited Jan. 21, 2009) (allowing users to enter specific dates and determine OIRA reviewing statistics).

132. *See generally* Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time* (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-40, 2008), *available at* http://www.mercatus.org/PublicationDetails.aspx?id=22854.

tests whether the number of regulations submitted to OIRA each month for review affects review time.[133]

While controlling for differences in administrations, McLaughlin finds that during the midnight period of the Clinton Administration, review time decreased significantly.[134] 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 twenty-five days—a drop of fifty percent.[135] Because there is only one midnight period in the time frame 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"—regulations 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 OIRA reviewed spikes dramatically during midnight periods in general.[136] He further finds that an increase in this proportion negatively affects the review time for all regulations, in and out of the midnight period.[137] 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.[138] This suggests a diminished level of scrutiny that undermines the benefits of regulatory review.

III. SOLUTIONS

Several solutions to the midnight regulations problem have been proposed and tried. They 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 predecessors' last-minute regulatory activity has been to delay the effects of new rules

133. *Id.* at 25–26.
134. *Id.* at 25.
135. *Id.* at 21–22, 25.
136. *Id.* at 31–32.
137. *Id.* at 14.
138. *Id.* at 21, 25.

and to rescind unpublished rules.

A new regulation cannot gain the force of law until it is published in the *Federal Register*.[139] Even then, once a regulation is published it will not become effective until a later date, allowing regulated parties to come into compliance.[140] The minimum time in which a new rule can become effective after publication is thirty days, although agencies often set effective dates sixty days or more in the future.[141] At any point before a regulation is published in the *Federal Register*, the agency may rescind the rule at will.[142] Once a regulation is published, however, an agency must engage in the same type of lengthy notice-and-comment rulemaking process it undertook to create the regulation in order to repeal it.[143]

With these constraints in mind, we see that the most direct course for a new president to address his predecessor's midnight activity is to "stop the presses" at the *Federal Register* until the new administration can review unpublished rules and decide which to keep and which to rescind. As for regulations that have recently been published but have not yet become effective, the president can direct agencies to delay their effective dates but the regulations cannot be postponed indefinitely.[144]

This is what President Reagan did in Executive Order 12,291 less than a month after he took office.[145] As explained in Part II.B.1, Reagan's Executive 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"[146] and directed agencies to refrain from publishing any new major rules until they had

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139. 5 U.S.C. § 552(a)(1)(D) (2006).

140. *Id.* § 553(d).

141. *Id.*

142. *See generally* 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 Card Memorandum*, 54 ADMIN. L. REV. 1479, 1488–97 (2002) (using as an example Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191 (D.C. Cir. 1996)).

143. Beermann, *supra* note 12, at 982–83.

144. *See* Jack, *supra* note 142, 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 likely be skeptical of a simultaneous across-the-board claim of good cause by a large number of agencies). *See generally* Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645 (1987) (outlining the history of suspension of agency regulations). Whether delay of effective dates is legally problematic or not, the fact remains that Presidents Reagan and George W. Bush (each one a president who took over from the opposite party) have ordered the preceding administration's rules delayed as a first order of business. Jack, *supra* note 142, at 1482–83 & n.11.

145. *See* Exec. Order No. 12,291, 3 C.F.R. 127, 131–32 (1982) ("[A]gencies shall . . . suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective . . . .").

146. *Id.* at 131.

undergone regulatory review.[147]

Since Reagan, every president taking over from a president of the opposing political party has ordered a similar regulatory moratorium. For example, 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*."[148] 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 the [published] regulations for 60 days."[149] President Barack Obama's Chief of Staff Rahm Emanuel also issued a memo withdrawing rules not yet published in the *Federal Register*.[150]

B. Congressional Review Act

The Congressional Review Act of 1996 (CRA) presents another tool to address the problem of midnight regulations.[151] It creates an expedited process for Congress to repeal any regulation by a simple majority vote in each house.[152]

The CRA requires agencies to submit to Congress all rules before they become effective.[153] In order for the CRA's expedited repeal procedures to control, a joint resolution of disapproval must be introduced in Congress within sixty days of continuous session after a rule has been submitted to Congress or published in the *Federal Register*, whichever is later.[154] 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."[155] Additionally, the agency may not issue another rule that is "substantially the same" unless later "specifically authorized" by

147. *Id.* at 132.

148. Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993).

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

150. Memorandum from Rahm Emanuel, White House Chief of Staff, to Heads of Executive Departments and Agencies (Jan. 20, 2009), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf.

151. *See* 5 U.S.C. § 801 (2006) (outlining a process by which federal agencies must submit copies of proposed rules to each chamber of Congress, as well as cost–benefit analyses to the Comptroller General, before rules become effective).

152. *See* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 100–01 (1997) (explaining the expediting nature of the Act).

153. 5 U.S.C. § 801(a)(1)(A) (2006).

154. *Id.* § 802(a).

155. Cohen & Strauss, *supra* note 152, at 102; *see also* 5 U.S.C. § 801(f) ("Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.").

subsequent legislation.[156]

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.[157] If not, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules.

It should therefore not be surprising that the CRA has only been used once to successfully repeal a regulation. The target was a controversial Occupational Safety and Health Administration (OSHA) ergonomics regulation promulgated in the last few months of the Clinton Administration.[158] It was disapproved by joint resolution of a Republican-controlled Congress and signed by President Bush.[159]

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.[160] With this in mind, one approach a new president could take is to conduct a review of rules promulgated during his predecessor's midnight period, identify any rules that are worthy candidates for repeal, and submit them to Congress as a package. 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.[161]

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156. 5 U.S.C. § 801(b)(2).

157. *See* Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 199 (2003) (arguing that the repeal of the Clinton Occupational Safety and Health Administration (OSHA) ergonomics standard—the only time the Congressional Review Act (CRA) has been used—could only have occurred because the new President and Congress were of the same party).

158. *See id.* at 192–94 (detailing the action taken by Congress regarding the contentious OSHA ergonomics regulation).

159. *See id.* at 197–99 (outlining the strategy for using CRA to fight the ergonomics standard).

160. *See* Cohen & Strauss, *supra* note 151, at 99 (describing procedures established under 5 U.S.C. § 802).

161. *See* Morriss et al., *supra* note 26, 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

C. Our Solution

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

Professor Andrew P. Morriss and his coauthors have argued that the root cause of the midnight regulations problem is bad incentives: "Regulators in the lame duck period are not only freed from political fallout from their actions but have positive incentives to cause problems for the incoming administration."[162] They suggest changing those incentives by giving presidents the authority to easily repeal any regulations promulgated during their predecessor's midnight period "simply by issuing a notice in the *Federal Register*."[163] (Judge Plager has even suggested a moratorium during the midnight period that would prohibit new regulations altogether.)[164] 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 political accountability still exists. However, to the extent regulatory activity continues to spike at the end of an administration—albeit sooner than has previously been the case—the strain placed on the regulatory review process will remain.

The Bush Administration made such an attempt to "resist the historical tendency of administrations to increase regulatory activity in their final months."[165] On May 9, 2008, White House Chief of Staff Joshua B. Bolten

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employed by Congress to shut down military bases. While Congress can recognize a glut of bases (and the need to close some), individual state delegations will oppose closing the military base in their area. To address this collective action problem, Congress enacted the Base Closure and Realignment Act:

> Under this act, a federal advisory committee, known as the Base Closure Commission, was required to develop a recommended list of bases to be closed or realigned. This list would then be submitted as a package to Congress for review. The act required Congress to consider the Commission's list as a single package; Congress could not alter or delete specific recommendations, but could only enact a joint resolution disapproving the Commission's entire list within forty-five days. If Congress failed to disapprove the entire list, the Secretary had to implement the recommended closures and realignments within six years.

Benjamin L. Ginsberg et al., *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L.J. 169, 172 (1994) (citation omitted).

162. Morriss et al., *supra* note 26, at 597.

163. *Id.*

164. *See* Morrow, *supra* note 56, 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.").

165. *See* Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008), *available at* http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf.

sent a memo to all executive agency heads instructing them to abstain from regulation in the last months of the administration except in extraordinary circumstances.[166] According to the memo, new regulations were to be proposed no later than June 1 and issued as final no later than November 1.[167] If the memo had had its intended effect, we would not have seen a spike during the midnight period. Unfortunately, the memo was not successful.

In the first seven years of the Bush Administration, the average number of significant regulations reviewed by OIRA was 7 per month.[168] Over the last three months of the term, however, that number doubled to 14.[169] Despite the Bolten memo, OIRA reviewed 42 significant regulations in the period between Election Day and Inauguration Day.[170] This is little different from the 48 significant regulations Clinton's OIRA reviewed during its midnight period.[171]

While one could argue that there might have been a greater spike but for the Bolten memo, the data suggest the memo's June 1 deadline for agencies to wrap up their regulations merely pushed back the beginning of the midnight period. During the period of June 1 to November 1 at the end of their respective terms, Bill Clinton's OIRA reviewed 36 significant regulations, while George H.W. Bush's OIRA reviewed 43.[172] During the June–November 2008 period covered by the Bolten memo, however, that number grew to 58 significant regulations reviewed.[173]

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

Another way of changing the incentives of regulators touched on by Morriss and his coauthors 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.[174] They argue, "If agencies faced a 'budget' of regulations, they

166. *Id.*
167. *Id.*
168. Monthly figures generated using OIRA's online "review counts" database. *See* RegInfo.gov, Review Counts, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init (last visited Aug. 15, 2008).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. Morriss et al., *supra* note 26, at 597.

would have to make choices on which subjects to 'spend' their budget."[175] This approach certainly would help to make regulators more accountable—especially if promulgating significant regulations could be banned altogether during the midnight period. However, a limit on the size or number of regulations during the midnight period does nothing to prevent spikes in regulation. As we have seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.

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

One way to cap regulations mentioned by Morriss and his coauthors is to limit the size of regulations.[176] 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.[177] Senator Lloyd Bentsen, who twice introduced legislation to create a regulatory budget, 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.[178]

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175. *Id.*

176. Morriss et al., *supra* note 26, at 597.

177. *See generally* CLYDE WAYNE CREWS, JR., COMPETITIVE ENTERPRISE INSTITUTE, PROMISE AND PERIL: IMPLEMENTING A REGULATORY BUDGET (1996), http://cei.org/pdf/1549.pdf; Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. CHI. LEGAL F. 143, 152–53 (advocating use of a regulatory budget).

178. 125 CONG. REC. 3817 (Mar. 5, 1979) (quoting Sen. Lloyd Bentsen), *as quoted by* Julius W. Allen, CONG. RESEARCH SERV., THE PROPOSAL FOR A FEDERAL REGULATORY BUDGET—AN OVERVIEW 8–9 (1979); CREWS, *supra* note 177, at 3.

A regulatory budget is an idea that could 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 to so long as there is good economic analysis to justify that need. The OIRA review process is the check that helps ensure sound economic analysis of significant regulations. Therefore, a less restrictive and more politically feasible solution to the midnight regulations problem is to cap the *number* of 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,[179] 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 above the "normal" levels of regulatory activity we see during non-midnight periods; the cap should only be approached during the periods of dramatic spikes seen at the end of presidential terms.

A flexible number cap is also a practical approach. Unlike a regulatory budget, 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 being 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

179. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993).

agencies conducts the review.[180] 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 by total.

Finally, because the number cap would exist only to ensure quality review, not to limit the amount of regulation, it should be based on the resources available to OIRA—especially the desk officers and other regulatory review staff.[181] Therefore, 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.[182] In this way, Congress and the President can always choose to allow for regulatory spikes while preserving quality review.[183]

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.[184] If the President has

180. *See* Copeland, *supra* note 74, at 1273–74, 1277 (outlining OIRA's formal review process and elaborating on the specific function of the desk officer).

181. 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.

Id. at 1293 (citation omitted).

182. In fact, some have argued that OIRA's resources at present are inadequate and should be increased. *See* Robert Hahn & Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, BROOKINGS INSTITUTION, Oct. 2003, http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx (observing that OIRA's lean staff of fifty-four professionals reviews over three-hundred regulations with "an annual economic impact that typically exceeds $100 million").

183. 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 74, at 1307. 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.

184. *See id.* at 1304 ("Although some argued early in OIRA's history that the office's regulatory review role was unconstitutional, few observers continue to hold that view.").

the authority to devise and enforce a system that checks his administration's regulatory decisionmaking, it follows that he should be able to outline procedural rules to ensure that system's quality. Congress has also previously flirted with the idea of codifying the OIRA regulatory review process into law,[185] and if it ever did, it would be able to include our proposed safeguards.

CONCLUSION

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

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

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

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

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185. *See, e.g.*, *id.* at 1306–07 (explaining that the 106th Congress considered legislation that would have required the president to establish a review process for agency regulatory actions).