

Court Decision Extends the Period for Issuing Midnight Rules

In brief...

The DC Circuit Court decided that agencies cannot withdraw a final rule that has appeared in the Federal Register for public inspection without notice and comment, functionally extending the midnight period that occurs at the end of a presidential administration. The decision will make it more difficult for newly inaugurated presidents to rescind midnight rules.

By: Mark Febrizio | August 10, 2022

A recent ruling by the [US Court of Appeals for the DC Circuit](#) has important implications for rules finalized at the tail end of the midnight period that occurs during a presidential transition. The court decided that an agency cannot withdraw a final rule that has appeared in the Federal Register for public inspection without notice and comment, even if the document has not been officially published. Because the end of a presidential administration is ripe for wrapping up as many policy priorities as possible, this decision is particularly relevant for [midnight rules](#)—those rules finalized during an outgoing president’s lame duck or “midnight” period. The court’s ruling has broad implications for the rulemaking process by making it more difficult to rescind poorly justified midnight rules.

What's Public Inspection?

The Federal Register is the daily journal of the federal government that publishes official documents such as proposed rules, final rules, agency notices, and executive orders. Before a document is published in a Federal Register issue, it is [filed](#) by the Office of the Federal Register (OFR) for “public inspection.” A [public inspection document](#) is essentially a preview of the document’s contents and its estimated effective or comment dates, which are typically available the day before it will be published officially.

Brief Summary of the Case

The DC Circuit Court decided [Humane Society of the United States v. Department of Agriculture](#) (USDA) on July 22, finding that the agency could not withdraw a final rule that was made available for public inspection, but not published, without first going through the [notice-and-comment process](#). The final rule in question was developed by USDA during the Obama administration and would have amended horse protection regulations for training and licensing inspectors at horse shows, exhibitions, sales, and auctions.

USDA [proposed](#) the rule in July 2016, [extended](#) the comment period in September 2016, [posted](#) a signed final rule on its website on January 11, 2017, and then filed the final rule with OFR. The document appeared for [public inspection](#) on January 19, 2017, but it was subsequently withdrawn [at the direction](#) of the newly inaugurated President Trump.

In a 2-1 vote, the majority found that USDA erred in rescinding the final rule without notice and comment, even though it had not been officially published in a Federal Register issue. In other words, a rule posted for public inspection is a final rule, so the issuing agency must comply with the notice-and-comment provisions established in the [Administrative Procedure Act](#) when modifying or repealing it. Circuit Judge Neomi Rao—who was formerly Administrator of the Office of Information and Regulatory Affairs during the Trump administration—dissented from the court’s opinion, [arguing](#) that treating public inspection documents as final was problematic.

Others have [summarized](#) the legal details of the case more thoroughly. Below, I focus on the policy implications of establishing public inspection, rather than publication, as a “[point of no return](#)” for final rules.

Implications for the Rulemaking Process

While the difference between a public inspection document and a published document in the Federal Register may seem insignificant, the decision has important consequences for the notice-and-comment rulemaking process. Most notably, the court ruling functionally extends the midnight period that occurs at the end of an outgoing president’s term by moving the baseline for when their rules are “safe.” In doing so, it makes it [harder](#) for newly inaugurated presidents to rescind or undo the regulatory priorities of the prior administration.

Extending the midnight period to include public inspection documents is consequential for several reasons. First, a newly inaugurated president has less control over rules published during their administration. A rule that appears for public inspection on January 19 generally will not be published for a few days (and made effective 30 days after that). In this case, USDA’s rule was slated for publication on January 24, 2017. Elections still have consequences, but now less so.

Although *Humane Society v. USDA* deals with a rule issued by Democrat and repealed by a Republican, the broader implications apply to presidents of any political party. Notice how USDA was defending the withdrawal made by Trump officials, even under the Biden administration (in contrast to other [strategic responses to litigation](#) from agency officials under Biden).

Second, extending the midnight period—even by just a few days—invites more poorly justified rules. [Evidence suggests that](#) midnight rules are generally accompanied by lower-quality regulatory analysis. There are at least two possible, related reasons for this: a) unfinished rules may be [rushed](#) to get out the door; b) a president leaving office is [less accountable](#) and may be more willing to push through questionable actions.

Third, the court decision may apply retroactively for a number of previously withdrawn rules, creating unresolved legal and policy problems. What happens to other midnight rules that appeared for public inspection but were withdrawn before publication? As Judge Rao [articulates](#), given that such withdrawals date back to at least the Clinton administration, can countless withdrawn documents “rise from the regulatory graveyard as soon as an aggrieved party brings suit?” And if so, how should agencies respond when the regulatory landscape has drastically changed since the withdrawal?

The discussion surrounding the court case has largely revolved around a single USDA rule, but the extent of its effects on other documents withdrawn before publication remain speculative. In a future article, I plan on conducting an empirical assessment of the potential impacts, by analyzing data on midnight rules that were withdrawn from public inspection before being published. Then, policymakers can have a better sense of the scope and nature of the affected documents.