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SPECIAL ISSUE ARTICLE

In the Midnight Hour: Participatory Opportunities in Regulatory Policymaking During Presidential Transitions

Steven J. Balla[1] | Christopher Carrigan[2] | Colin Emrich[3] | Sean Paul[2]

[1]Department of Political Science, George Washington University, Washington, District of Columbia, USA | [2]Trachtenberg School of Public Policy and Public Administration, George Washington University, Washington, District of Columbia, USA | [3]Holy Family University, Philadelphia, Pennsylvania, USA

Correspondence: Steven J. Balla (sballa@gwu.edu)

Received: 19 December 2024 | **Revised:** 10 October 2025 | **Accepted:** 26 November 2025

Keywords: bureaucratic politics | midnight rulemaking | notice and comment process | presidential transitions | regulation | stakeholder participation

ABSTRACT

We examine opportunities for stakeholder participation in regulatory policymaking in the U.S. during the midnight period, the 3 months between the presidential election in November and the inauguration of the winning candidate the following January. During partisan presidential transitions, do agencies—in a sprint to the regulatory finish line—limit stakeholder participation? We develop a novel typology of midnight regulations and construct an original data set of nearly 1000 rules developed during several presidential administrations. Our analysis demonstrates that, contrary to conventional wisdom, midnight regulations do not exhibit a deficiency in participatory opportunities. In fact, rules proposed early in presidential terms that are promulgated during midnight periods are characterized by relatively expansive opportunities for participation. Normatively, the robustness of opportunities for participation during presidential transitions suggests that midnight regulations do not suffer from a lack of democratic legitimacy, at least with respect to inviting stakeholder input.

Regulation is one of the primary ways in which policy is made throughout the world. Regulatory policymaking places power in the hands of bureaucratic specialists who are not directly accountable to the public through periodic elections. This exercise of power naturally raises questions of democratic legitimacy (Braun and Busuioc 2020).

One instrument for bolstering democratic legitimacy is stakeholder participation. In the U.S., it has long been required that agencies make proposed rules available to the public and solicit feedback from stakeholders. Similar consultative processes have more recently been implemented in political systems around the world. In 2016, the European Commission adopted a feedback mechanism allowing organizations and individuals to submit comments during a variety of stages of supranational policymaking (Bunea and Lipcean 2024). Two decades ago, as a condition of its accession to the World Trade Organization, China committed to soliciting stakeholder participation when developing commerce and trade regulations (Balla et al. 2024). In a similar vein, the Brazilian government in 2024 began requiring approximately 150 agencies and bureaus to consult with the public following the enactment of the U.S.-Brazil Protocol Relating to Trade Rules and Transparency (United States Trade Representative 2022).

Despite the durability and proliferation of consultative policymaking, it is unclear the extent to which stakeholder participation in practice facilitates the achievement of democratic legitimacy (Balla 2014). Agencies may not provide sufficient opportunities for participation. Feedback periods on proposed rules, for example, may be short in duration and therefore leave stakeholders with little time to "do the research needed to produce informed comments" (Lubbers 2006, 297).

In this article, we address opportunities for stakeholder participation in regulatory policymaking at the federal level in the U.S. We specifically examine this issue in the context of midnight rulemaking. The midnight period consists of the 3 months

between the presidential election in November and the inauguration of the winning candidate the following January (Miller and Pérez 2016). This period is particularly contentious when control of the White House switches from one political party to the other, as in 2024 when Republican challenger Donald Trump defeated Democratic Vice President Kamala Harris.

During such transitions, agencies endeavor to complete regulatory initiatives before the next president assumes office with contrasting priorities. The conventional wisdom is that, given the condensed calendar, agencies give short shrift to time- and resource-intensive procedures. For example, research highlights instances in which the benefit-cost analyses accompanying midnight rules are of lower quality than analyses conducted at other times in the electoral cycle (Ellig et al. 2013; Hahn and Sunstein 2001; Hahn and Tetlock 2008). In general, it is widely believed that midnight rules are deficient both in terms of processes and outcomes (Beermann 2013). As we detail below, midnight rules raise normative and practical concerns about the exercise of bureaucratic power during presidential transitions.

Despite such concerns, research has not yet examined whether deficiencies in adherence to administrative procedures during the midnight period extend to stakeholder participation. This article breaks new theoretical and empirical ground by analyzing the extent to which stakeholders are afforded opportunities to comment on proposed rules and participate in public forums during the midnight period, in comparison to times other than partisan presidential transitions.

Theoretically, we sharpen understanding of what constitutes a midnight regulation, explicitly incorporating into the concept various stages of the electoral cycle. The traditional definition focuses solely on the period during which rules are issued, in that midnight regulations are finalized between Election Day and Inauguration Day when the party occupying the White House changes. As we elaborate below, this definition does not adequately consider the conditions that agencies face when deciding whether to attend sufficiently to administrative procedures at various stages of presidential terms. Our theorizing points to two types of rules that have gone unrecognized in research on presidential transitions. One type is rules, which we call "potential" midnight regulations, that are begun by agencies toward the end of presidential administrations, yet are promulgated outside of the midnight period (Bull and Ellig 2018). The other type is rules, which we label "unconventional" midnight regulations, proposed early in presidencies that agencies work on over a period of years and ultimately issue during partisan transitions.

As detailed below, we theorize that opportunities for stakeholder participation vary systematically across these types of rules. For example, we expect potential midnight regulations—which agencies develop rapidly toward the end of presidential terms—to be characterized by deficiencies in participatory opportunities. By contrast, we expect unconventional midnight regulations—which agencies develop over the course of years—to not be subject to such deficits and, if anything, to be associated with relatively abundant opportunities for participation. In short, we expect—contrary to conventional wisdom—that midnight regulations vary substantially in the consultation opportunities provided, ranging from more limited opportunities relative to more typical rules for those initiated later in administrations to more expansive opportunities for those midnight rules initiated early on in the administration's tenure.

To assess these expectations, we constructed an original data set of nearly 1000 rules developed in recent decades, including during partisan presidential transitions. We read the Federal Register documents for each of these rules as a means of thoroughly documenting opportunities for stakeholder participation. We then performed statistical analyses to juxtapose systematically the provision of these opportunities during midnight rulemaking with regulatory policymaking in other periods.

An important scope limitation is that the article focuses on a single procedural element—opportunities for stakeholder participation—in regulatory policymaking. The analysis does not, for example, consider the efficacy of stakeholder participation in midnight rulemaking relative to rules not associated with presidential transitions. In the closing section, we consider this scope limitation with an eye to future research as a way of building upon the findings of our research.

The analysis reveals two main patterns regarding opportunities for stakeholder participation. First, participatory opportunities are not—contrary to expectation—diminished for traditional and potential midnight regulations. Second, unconventional midnight regulations are—consistent with expectation—characterized by relatively expansive opportunities for participation. These expansive opportunities are unrelated to the politics of presidential transitions, given that agencies make decisions regarding participation in the making of unconventional midnight regulations years prior to the occurrence of elections. Collectively our findings are contrary to the conventional wisdom that midnight regulations are procedurally deficient in comparison to rules issued at other times in the electoral cycle. From a normative perspective, the robustness of opportunities for participation during presidential transitions suggests that midnight regulations do not suffer from a lack of democratic legitimacy with respect to inviting stakeholder input.

1 | Midnight Regulations and Opportunities for Participation

The midnight period begins on Election Day in early November and ends on Inauguration Day in late January the following year (Beermann 2013; Miller and Pérez 2016). Not every such period, however, is equivalent. On the one hand are periods in which the incumbent president wins reelection or when an outgoing president is succeeded by a fellow partisan (i.e., a Democrat follows a Democrat or a Republican replaces a Republican). On the other hand are periods in which the party occupying the White House changes from Democrat to Republican or from Republican to Democrat. The designation "midnight period" is ordinarily reserved for the latter circumstances. Underlying this concept is the notion that a period of continuity in policymaking priorities is coming to an end (i.e., the clock is striking twelve).

1.1 | Research on Midnight Rulemaking

Research has established the occurrence of significant increases in regulatory activity during midnight periods spanning the past several decades (Cochran 2001). Such increases have been hallmarks of administrations of both political parties (O'Connell 2011). In this regard, midnight regulations constitute a manifestation of the tendency of policymakers to issue bursts of actions of all sorts in the waning days of administrations (Howell and Mayer 2005).

There are reasons to be concerned about the proliferation of regulatory output during midnight periods. Normatively, midnight regulations may suffer from a lack of democratic legitimacy (Brito and de Rugy 2009). Outgoing administrations are not bound by the constraint of seeking voter approval. Furthermore, officials operating in the midst of switches in partisan control of government need not be concerned that unpopular actions threaten the electoral or governance prospects of co-partisan successors (McLaughlin and Ellig 2011).

As a practical matter, the quality of midnight regulations may be lower than rules issued outside of presidential transitions (Beermann 2013; Miller and Pérez 2016). Evidence demonstrates that midnight regulations are, as a general matter, deficient in the application of analytical approaches. For example, regulatory impact analyses prepared during the development of midnight regulations are lower in quality than analyses performed for rules issued in other periods (Bull and Ellig 2018; Ellig and Fike 2016). This pattern suggests that analysis of midnight regulations may be compromised in a rush to promulgate rules prior to impending partisan turnover in government.

1.2 | Conceptualizing Midnight Regulations

At first glance, the concept of a midnight regulation—a rule finalized during a partisan presidential transition—is straightforward. This traditional definition, it is important to note, focuses solely on the period during which rules are promulgated. As summarized in Table 1, our theoretical proposition is that the concept of a midnight regulation consists of two dimensions that do not necessarily occur together. One dimension is the period during which the rule is issued. The other dimension is the time during the course of a presidential term when the agency makes decisions about the implementation of administrative procedures. In our conceptualization, rules combine along these dimensions in two ways not recognized in extant research on midnight rulemaking.

The first combination is rules that are (a) begun by agencies toward the end of presidential terms and (b) finalized outside of partisan transitions between Election Day and Inauguration Day. According to the traditional definition, such rules are not midnight regulations. Given their close proximity to presidential elections, however, these rules are developed in the sprint to the regulatory finish line. As a result, agency implementation of administrative procedures—including opportunities for stakeholder participation—occurs in a period when time and other resources are in relatively limited supply. We conceive of these rules as "potential" midnight regulations, in that—although they are not promulgated in the midnight period—there are reasons for agencies to restrict participatory opportunities.

The second combination is rules that are (a) begun by agencies early in presidential terms and (b) finalized between Election Day and Inauguration Day during partisan transitions. Such rules meet the traditional definition of midnight regulations. In fact, these unconventional midnight regulations are a subset of traditional midnight regulations, in that unconventional midnight regulations are not only finalized during the midnight period but are proposed years prior to presidential elections as well. The key distinction is that agency decisions about opportunities for stakeholder participation are made far in advance of presidential elections. These decisions, in other words, are not necessarily made with the politics of impending partisan transitions in mind. We conceive of these as "unconventional" midnight regulations, as—although they are issued in the midnight period—agencies do not face pressures to limit participatory opportunities.

TABLE 1 | Characteristics of midnight rules.

Extant conceptualization	When begun	When finalized	Notes
Traditional midnight rule		Between election day and inauguration day during a partisan presidential transition	In extant conceptualization, midnight rules are defined solely on the basis of when they are finalized
Our additional conceptualization	**When begun**	**When finalized**	**Notes**
Potential midnight rule	Toward the end of a presidential term	Prior to election day, after inauguration day, or not at all	In our conceptualization, potential midnight rules are proposed in close proximity to presidential elections but finalized outside of the traditional midnight period
Unconventional midnight rule	Early in a presidential term	Between election day and inauguration day during a partisan presidential transition	In our conceptualization, unconventional midnight rules are a subset of traditional midnight rules proposed early in presidential terms

An example of an unconventional midnight regulation is the Environmental Protection Agency's (EPA) 2021 rule on transparency in regulatory science. The rule, which was later vacated by a federal court, limited the use of—in the setting of pollution standards—research that does not make its underlying data available to the public (Frazin 2021). Proposed relatively early in the first Trump administration, the action was criticized as unnecessarily restricting the use of studies in which patient and participant records are bound by confidentiality agreements. Given this controversy, it is not surprising that the EPA provided robust opportunities for stakeholder participation. The comment period on the proposed rule was extended, a public hearing was held, and a revised proposal with a comment period was published in the Federal Register. A variety of procedural decisions, in other words, were made well in advance of the midnight period during which the regulation was finalized. In short, the rule was a highly salient action that had an expansive participatory history years before the transition to the Biden administration.

Existing research on midnight regulations focuses solely on rules promulgated between Election Day and Inauguration Day. In this article, we follow convention and contrast opportunities for stakeholder participation for rules published in the midnight period with regulatory policymaking at other times in the electoral cycle. In addition, we incorporate into the analysis the concepts of potential and unconventional midnight regulations. By considering the midnight period itself (i.e., traditional midnight rules), the surrounding race to the finish line (i.e., potential midnight rules), and the time in the electoral cycle during which decisions about participatory opportunities are made (i.e., unconventional midnight rules), our analysis extends existing conceptual and empirical understanding of regulatory policymaking during presidential transitions. Although we focus specifically on midnight rulemaking in the U.S., our research broadly concerns agency implementation of administrative procedures and, as such, contributes to comparative research on the politics of consultative policymaking (Bunea and Thomson 2015; Rimkutė 2020).

2 | Hypotheses

Little is known about stakeholder participation during the making of midnight regulations. As a means of developing expectations about opportunities for participation, we begin with the basic fact that regulatory activity significantly increases during the midnight period (Cochran 2001; O'Connell 2011). Given this heavy workload and accompanying short timeframe, it is straightforward to posit that procedures—including those governing participatory opportunities—are compromised in the rush to Inauguration Day.[1] Consistent with this presumption, there are anecdotes of midnight regulations being associated with comment periods of short duration (Beermann 2013; O'Connell 2011).

We expect that such anecdotes are indicative of an overarching pattern in the development of midnight regulations as they are traditionally conceived. In other words, rules promulgated between Election Day and Inauguration Day during partisan transitions are, as a general matter, characterized by limited opportunities for stakeholder participation relative to rules issued at other times in the electoral cycle.

Traditional Midnight Rule Hypothesis. *Opportunities for stakeholder participation are less robust for traditional midnight rules than for other rules.*

Our expectation is similar for rules we have labeled as potential midnight regulations. These rules share with traditional midnight regulations the political and administrative circumstances under which they are developed, in that regulatory activity is heavy and the presidential term is rapidly coming to an end. Potential midnight regulations, however, are not finalized during the midnight period. Our argument is that the policymaking environment within which the rule is made, as opposed to the date on which the regulation is issued, constitutes the key element regarding the nature of the participatory opportunities afforded to stakeholders.

There is an alternative possibility grounded in the notion that agencies suffer from deficiencies in information during the sprint to the regulatory finish line and, as a result, bolster opportunities for stakeholder participation. Although plausible, this possibility is contrary to research on regulatory impact analyses, which demonstrates that agencies give short shrift to procedural obligations when developing rules in the run-up to partisan turnover in government (Bull and Ellig 2018; Ellig and Fike 2016). On balance, therefore, we believe the case is stronger ex ante that participatory opportunities are relatively limited (rather than expansive) in the context of potential midnight rules.

Potential Midnight Rule Hypothesis. *Opportunities for stakeholder participation are less robust for potential midnight rules than for other rules.*

Unconventional midnight regulations are developed under political and administrative conditions that are distinct from the above categories of rules. Agencies begin working on unconventional midnight regulations early in presidential terms, when time and resources are relatively plentiful. Such rules—although promulgated during midnight periods—are not initiated during periods of heavy regulatory activity in the waning days of administrations. As a result, we have no reason to expect that opportunities for stakeholder participation are circumscribed in the context of unconventional midnight regulations.

To the contrary, we expect that participatory opportunities are—if anything—relatively abundant for unconventional midnight regulations. Rules initiated early in administrations often address presidential priorities (Light 1999). Given the importance of these issues, and with the luxury of time and resources, agencies have the motive and opportunity to implement administrative procedures in a thorough manner. Such thoroughness—including the provision of expansive opportunities for stakeholder participation—has the advantage of protecting rules from objections that agencies failed to carry out procedures in a manner consistent with the Administrative Procedure Act (APA) and other legal requirements (McGarity 1992). Furthermore, although unconventional midnight regulations are begun years prior to the sprint to the regulatory

finish line, these rules are not finalized until the waning days of outgoing administrations. This pattern suggests that rules in this category are difficult to develop for one reason or another (e.g., salience, complexity, etc.).

Thus, combining the fact that they are initiated early but finalized late in an administration suggests that these unconventional midnight rules are both important as well as potentially controversial and complex. These elements combine to suggest that unconventional midnight rules are likely associated with relatively expansive opportunities for stakeholder participation, underscoring the importance of our theoretical innovation that simply knowing that a rule fits the definition of a midnight rule is likely not enough to be able to predict how the agency will approach procedural requirements for that rule.

Unconventional Midnight Rule Hypothesis. *Opportunities for stakeholder participation are more robust for unconventional midnight rules than for other rules.*

In assessing these hypotheses, we consider three manifestations of the provision of opportunities for stakeholder participation. The first measure is the duration of comment periods. As a general matter, comment periods of longer duration facilitate participation by providing stakeholders with sufficient time to comprehend and respond to proposed rules (Lubbers 2006). The second measure is the extension of comment periods. It is not uncommon for stakeholders to request such extensions. Are agencies less likely to grant requests for extensions in the context of traditional and potential midnight rules and more likely in the context of unconventional midnight rules? The third measure is the holding of public hearings and meetings. Although the submission of written comments operates as a baseline form of participation, agencies convene in-person forums as well (Dudley 2021). Together these measures provide broad consideration of the opportunities, or lack thereof, offered by agencies to stakeholders vis-à-vis participation in the development of regulations.

3 | Data Collection

As a means of assessing the hypotheses, we assembled data from the Office of Information and Regulatory Affairs (OIRA). OIRA is the White House organization charged with reviewing regulations prior to publication in the Federal Register (Dudley 2022). OIRA operates a portal (reginfo.gov/public/) that serves as a clearinghouse for information about regulatory policymaking. This portal contains information about a variety of rule characteristics, such as whether the agency faces a deadline by which it must legally promulgate the regulation. The website also provides links to Federal Register notices associated with the rulemaking.

We focus our investigation on rules reviewed by OIRA for a number of reasons. OIRA review is limited to rules that are significant in some respect, either because of their economic effects or political ramifications. This criterion is consistent with our theoretical notion that agency decisions regarding opportunities for stakeholder participation are a function of the politics of presidential transitions. In other words, we have no reason to expect that our hypotheses hold in the context of routine rules not deemed salient enough for White House review. Our reasoning is consistent with the approach taken in previous research on midnight rulemaking (Bull and Ellig 2018; Ellig and Fike 2016; Ellig et al. 2013). In our view, this scope condition is not a serious limitation, in that concern surrounding the midnight period centers on rules for which economic and political consequences are particularly pronounced (Beermann 2013).

We extracted from OIRA's website information about a sample of 962 rules.[2] We sampled according to the date on which OIRA completed its rule review, focusing on the years during which four partisan presidential transitions occurred: Clinton-Bush (2000–2001), Bush-Obama (2008–2009), Obama-Trump (2016–2017), and Trump-Biden (2020–2021).[3] This sampling strategy has the advantage of ensuring that the analysis includes rules promulgated both between Election Day and Inauguration Day as well as at other times in the electoral cycle. For example, the 2016–2017 period comprises the closing months of the Obama administration, the transition from President Obama to President Trump, and the opening year of the first Trump administration. In sum, the data set makes it possible to assess opportunities for stakeholder participation in traditional, potential, and unconventional midnight rulemaking.[4]

Measuring opportunities for stakeholder participation was the most labor-intensive element of the data collection process. We examined all Federal Register documents associated with each rule in the data set. We specifically inspected each document for information about stakeholder participation. When we identified such information, we recorded three attributes—the number of days of the comment period, whether the comment period was extended, and whether at least one public hearing or meeting was held.[5]

4 | Variables

Table 2 provides descriptions and summary statistics for the variables in the analysis.

4.1 | Dependent Variables

The outcomes of interest are measures of opportunities for stakeholder participation. The first dependent variable is the number of days that stakeholders were provided with the opportunity to comment prior to the rule being finalized. The second dependent variable is a dichotomous indictor of whether the comment period was extended. The third dependent variable is also dichotomous, an indicator of whether at least one public hearing or meeting was held during the rulemaking.

4.2 | Main Independent Variables

The independent variables utilized to assess the hypotheses distinguish midnight regulations from rules issued outside of

TABLE 2 | Variable descriptions and summary statistics.

Variable name	Variable description	N	Mean	SD	Min	Max
Dependent variables (opportunities for stakeholder participation)						
Comment duration	Number of days of comment period(s)	924	81.32	69.29	0	676
Comment extended	1 if there was a comment period extension, 0 otherwise	924	0.19	0.39	0	1
Public forum	1 if at least one public forum was held, 0 otherwise	924	0.18	0.39	0	1
Main independent variables (midnight regulations)						
Traditional midnight rule	1 if rule published between election day and inauguration day, 0 otherwise	924	0.31	0.46	0	1
Potential midnight rule	1 if rule (a) proposed on or after June 1 of election year and (b) published in month preceding election day, month following inauguration day, or not at all, 0 otherwise	924	0.05	0.21	0	1
Unconventional midnight rule	1 if rule (a) proposed before last 2 years of presidential term and (b) published between election day and inauguration day, 0 otherwise	924	0.05	0.21	0	1
Control variables						
Economically significant	1 if rule is economically significant, 0 otherwise	924	0.27	0.45	0	1
Legal deadline	1 if rule is subject to deadline, 0 otherwise	924	0.23	0.42	0	1
Negotiated rulemaking	1 if negotiated rulemaking was utilized, 0 otherwise	924	0.01	0.11	0	1
Ideological match	1 if there a match between presidential party and agency ideology, 0 otherwise	906	0.55	0.50	0	1

Note: N denotes the number of rulemakings for which the variable is measured. SD, Min, and Max denote the standard deviation, minimum value, and maximum value, respectively. Ideological match is missing for 18 observations either because there is no ideology score for the agency or the rule was issued by multiple agencies.

presidential transitions and the sprint to the finish line. It is straightforward to measure traditional midnight regulations as rules promulgated between Election Day and Inauguration Day when the party occupying the White House changes.[6]

As specified earlier, potential midnight regulations are (a) begun by agencies toward the end of presidential terms and (b) finalized outside of partisan transitions between Election Day and Inauguration Day. What is meant by rules "begun toward the end" of presidential terms? We operationalize this notion as rules proposed on or after June 1 of presidential election years, for the following reason. Previous research on midnight regulations uses June 1 as a reasonable tipping point after which agencies have particularly strong reasons to sidestep administrative procedures (Bull and Ellig 2018). Consistent with this reasoning, policymakers have viewed rules proposed in June or later as indicators of the "historical tendency of administrations to increase regulatory activity in their final months" (J. B. Bolton 2008).[7]

Similarly, what is meant by rules "finalized outside of partisan transitions?" We operationalize this element as rules finalized in the month preceding Election Day, the month following Inauguration Day, or not finalized at all. Our rationale is that rules issued within a month of the midnight period can plausibly be considered part of the policymaking rush at the end of presidential administrations. We include rules not finalized at all to reflect the fact that on Inauguration Day newly sworn in presidents invariably order a pause in ongoing regulatory activities begun during the preceding administration.[8] The end result of these orders is that some eleventh-hour rules (i.e., regulations developed in the dash to the finish line) are never published in the Federal Register. In sum, we denote rules meeting both of these operational criteria as potential midnight regulations.

As discussed above, unconventional midnight regulations are (a) begun by agencies early in presidential terms and (b) finalized between Election Day and Inauguration Day during partisan transitions. What is meant by "early in presidential terms?" We operationalize this period as prior to the last 2 years of presidential administrations. Our logic is that contemporary presidential campaigns unfold over the course of 2 years, with candidates declaring in the year prior to the election and the election year itself dominated by primaries, conventions, and debates (Astor 2023). Prior to the campaign season, rulemaking is not immediately connected to a prospective partisan transition. Agencies, for example, make decisions regarding opportunities for stakeholder participation in an environment in which the politics of the next presidential election have not yet begun to crystallize in a meaningful way. In short, the operational definition of unconventional midnight regulations is rules finalized during the midnight period that were proposed prior to the last 2 years of presidential terms.

4.3 | Control Variables

Opportunities for stakeholder participation are plausibly associated with attributes of rules and agencies. We therefore control for four attributes that are commonly included in analyses of regulatory policymaking.[9]

First, we include a dichotomous indicator of whether the regulation is economically significant. In the period under analysis, OIRA designated as economically significant the subset of reviewed rules that were "likely to have an annual effect on the economy of $100 million or more or adversely affect in a material

way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[10] It is reasonable to expect that agencies afford stakeholders with expansive opportunities for participation in the context of economically significant rules, relative to rules not meeting this threshold.

Second, it is not uncommon for Congress and the courts to place deadlines upon agencies for the promulgation of regulations. As just one example, Congress instructed the Centers for Medicare and Medicaid Services to revise its Medicare physician fee schedule by November 1, 2017.[11] For such rules, we anticipate that opportunities for stakeholder participation are circumscribed, as agencies strive to adhere to deadlines.

Third, agencies on occasion utilize negotiated rulemaking as a means of regulatory policymaking. In negotiated rulemaking, agencies and stakeholders collaborate in committees formed for the express purpose of drafting proposed rules (Harter 1982). Agencies announce in the Federal Register their intention to conduct a negotiated rulemaking and solicit applications for committee membership. Negotiated rulemaking committees are charged with achieving unanimous concurrence on the content of proposed rules. Agencies then publish the committee's proposal in the Federal Register. In theory, the duration of comment periods and the need for alternative forms of stakeholder participation are reduced under negotiated rulemaking. The expectation is that since "most of the parties likely to comment have already agreed upon the notice of proposed rulemaking, the review period should be uneventful" (Susskind and McMahon 1985, 137).

Fourth, we include as a control the overarching policy perspective of the agency issuing the regulation. Agencies with relatively liberal orientations have an incentive to quickly finalize the regulatory initiatives of Democratic administrations and to delay promulgation of the rules of Republican presidents (Potter 2019). The reverse set of incentives holds for agencies with relatively conservative orientations.

To account for agency policy preferences, we turn to a measure of organizational ideology (Clinton and Lewis 2008) that has been widely used by researchers (e.g., A. Bolton et al. 2016; Potter and Shipan 2019). This measure locates agencies on a liberal-conservative dimension, ranging from −2.07 (the most liberal agency) to 2.4 (the most conservative agency). Examples of liberal agencies are the Department of Labor and the EPA, while conservative agencies include the Department of Defense and the Small Business Administration.

We do not have an unconditional expectation regarding whether liberal or conservative agencies are relatively likely to provide robust opportunities for stakeholder participation. Rather, we expect that liberal agencies are more inclined to incorporate time-consuming participation procedures for rules favored by Republican presidents, and vice versa for conservative agencies. As a result, we include in the analysis a dichotomous indicator of whether there is an ideological match between the agency and the administration that proposed the regulation. This variable is coded as one under two circumstances (1) if the agency is relatively liberal (i.e., in the negative range of the scale) and the rule was proposed during a Democratic presidency, and (2) if the agency is relatively conservative (i.e., in the positive range of the scale) and the rule was proposed during a Republican administration. The variable is coded as zero for regulations without such ideological matches. We expect a negative association between the variable and opportunities for stakeholder participation. Our expectation, in other words, is that matched regulations experience less expansive opportunities than rules for which agency ideology and presidential party are at odds.[12]

5 | Methods and Descriptive Results

To assess the association between midnight regulations and opportunities for stakeholder participation, we conduct both descriptive and regression analyses. The descriptive analysis consists of difference of means and difference of proportions tests. For the dependent variables that are dichotomous (i.e., whether the comment period was extended and whether at least one public hearing or meeting was held during the rulemaking), we estimate logistic regressions. We estimate Poisson regressions for the dependent variable measuring the number of days that stakeholders were provided with the opportunity to comment on proposed rules.[13] In all regressions, we incorporate fixed effects for agencies.[14]

It is important to note that the analysis is not causal in orientation. Both the descriptive and regression analyses aim to illuminate the association (or lack thereof) between midnight regulations and opportunities for stakeholder participation. We juxtapose, in other words, participatory opportunities for rules begun and finalized at different points in the electoral cycle. Causal analysis of midnight rulemaking remains a direction for future research.

Table 3 reports the results of a series of difference of means and difference of proportions tests. The tests provide no evidence in support of the hypothesis that participatory opportunities are limited for traditional midnight rules. The differences in means and proportions are not statistically significant, with one exception. Comment periods are, contrary to expectation, more likely to be extended in the context of traditional midnight regulations. Also contrary to expectation, there are no negative and statistically significant associations for potential midnight regulations with respect to opportunities for stakeholder participation.

By contrast, opportunities for stakeholder participation are—as expected—robust for unconventional midnight regulations. Table 3 demonstrates that the average duration of comment periods is 50 days longer for unconventional midnight regulations. Unconventional midnight regulations are more than twice as likely to be characterized by comment period extensions. Public hearings and meetings are more likely to occur in the context of unconventional midnight regulations as well.

6 | Regression Results

The regressions confirm the results of the descriptive analysis. In this section, we first discuss the results for traditional

TABLE 3 | Descriptive analysis.

	Traditional midnight rules	Other rules	Statistical significance	Consistent with hypothesis?
Comment duration	85.48	79.49	n.s.	No
Comment extended	0.25	0.16	***	No
Public forum	0.18	0.18	n.s.	No
	Potential midnight rules	**Other rules**	**Statistical significance**	**Consistent with hypothesis?**
Comment duration	72.43	81.76	n.s.	No
Comment extended	0.11	0.19	n.s.	No
Public forum	0.23	0.18	n.s.	No
	Unconventional midnight rules	**Other rules**	**Statistical significance**	**Consistent with hypothesis?**
Comment duration	138.77	78.44	***	Yes
Comment extended	0.43	0.18	***	Yes
Public forum	0.27	0.18	*	Yes

Note: The numbers in the cells are means for the continuous dependent variable (comment duration) and proportions for the dichotomous indicators (comment extended and public forum). For example, the average comment duration was 85.48 days for traditional midnight regulations and 79.49 days for other rules. *** = statistically significant at $p < 0.01$; ** = statistically significant at $p < 0.05$; * = statistically significant at $p < 0.10$; n.s. = not statistically significant. The p-values are two tailed.

midnight regulations. We then compare and contrast these findings with the results for potential midnight regulations and unconventional midnight regulations. Finally, we consider the results for the control variables.[15]

6.1 | Traditional Midnight Regulations

Table 4 demonstrates that opportunities for stakeholder participation are not limited for traditional midnight regulations. There are no negative and statistically significant coefficients associated with the traditional midnight rule variable.[16] This result contradicts the Traditional Midnight Rule Hypothesis, which is grounded in the conventional wisdom regarding participatory opportunities for rules promulgated in the midnight period. Expanding upon this analysis, the results below introduce a more nuanced understanding of participatory opportunities by considering the timing of both the start and finish of rulemaking processes.

6.2 | Potential and Unconventional Midnight Regulations

The results presented in Table 5 are consistent with the above findings, in that—contrary to expectation—opportunities for stakeholder participation are not circumscribed for potential midnight regulations. There are no negative and statistically significant coefficients associated with the potential midnight rule variable. By contrast, as shown in Table 6, the coefficients for the unconventional midnight rule variable are—as expected—positive and statistically significant in all three equations. Unconventional midnight rules are characterized by the relative prevalence of lengthy comment durations, extensions of comment periods, and public hearings and meetings.

The associations between participatory opportunities and unconventional midnight rules are not only statistically significant but are substantively sizeable as well. For the first column in Table 6, the comment period for unconventional midnight rules is on average 1.78 times longer in duration than for other rules. For the second column, the likelihood of a comment period extension is 3.91 times greater for unconventional midnight rules. For the third column, the likelihood of a public hearing or meeting is 2.26 times higher for unconventional midnight rules.

6.3 | Control Variables

The results for the control variables reveal a variety of interesting patterns in opportunities for stakeholder participation across types of rules and agencies. First, participatory opportunities are, as expected, more robust for economically significant rules than for regulations not meeting this threshold. As demonstrated by the uniformly positive and statistically significant coefficients in Table 4 through 6, this association holds across dependent variables and types of midnight regulations. Second, the first columns of the three tables indicate that the implementation of negotiated rulemaking is associated with comment periods of relatively short duration. This pattern is consistent with the theory of negotiated rulemaking, particularly the notion of "uneventful" comment periods in the aftermath of stakeholder participation in the drafting of proposed rules (Susskind and McMahon 1985, 137). Finally, the third columns of the tables provide evidence in support of the expected negative association between the occurrence of public forums and the existence of an ideological match between the agency and the administration during which the regulation was proposed. Agency incentives to convene time- and resource-intensive forums are diminished in the context of rules supported by presidents with whom they are ideologically aligned.

7 | Discussion of Results

Collectively, the regressions demonstrate the importance of our innovation in conceptualizing and operationalizing midnight

TABLE 4 | Regressions for traditional midnight regulations.

Dependent variable	Comment duration (Poisson)	Comment extended (Logit)	Public forum (Logit)
Traditional midnight rule	1.06	1.71***	1.01
	(0.05)	(0.32)	(0.21)
Economically significant	1.20**	1.60**	1.51*
	(0.10)	(0.34)	(0.33)
Legal deadline	1.02	0.96	1.45*
	(0.07)	(0.21)	(0.31)
Negotiated rulemaking	0.64*	0.54	0.68
	(0.15)	(0.64)	(0.80)
Ideological match	1.04	1.21	0.49***
	(0.12)	(0.22)	(0.10)
χ^2	12.91**	14.49**	22.48***
Observations	906	906	808

Note: In Table 4 through 6, each column reports the results of a regression model. The numbers in the cells are incidence-rate ratios for the Poisson regressions and odds ratios for the logistic regressions. Regressions with standard coefficients are reported in the online appendix. Standard errors, in parentheses, are clustered by agency for the Poisson models specifically. All models include agency fixed effects. The number of observations in the public forum models is reduced because four agencies accounting for 98 of the rules in the data set did not hold hearings or meetings for any of those rules. *** = statistically significant at $p < 0.01$; ** = statistically significant at $p < 0.05$; * = statistically significant at $p < 0.10$. The p-values are two tailed.

TABLE 5 | Regressions for potential midnight regulations.

Dependent variable	Comment duration (Poisson)	Comment extended (Logit)	Public forum (Logit)
Potential midnight rule	1.01	0.71	1.90
	(0.11)	(0.37)	(0.82)
Economically significant	1.21**	1.62**	1.52*
	(0.10)	(0.34)	(0.34)
Legal deadline	1.01	0.92	1.42
	(0.07)	(0.20)	(0.31)
Negotiated rulemaking	0.64*	0.66	0.60
	(0.15)	(0.77)	(0.69)
Ideological match	1.04	1.21	0.49***
	(0.12)	(0.22)	(0.10)
χ^2	12.00**	6.97	24.56***
Observations	906	906	808

regulations. According to the traditional approach, in which midnight regulations are defined solely on the basis of the period during which rules are issued, there is generally no association with opportunities for stakeholder participation. Still, by going further and explicitly incorporating agency implementation of administrative procedures at various stages of presidential terms, our approach provides novel evidence of a conditional association between midnight rulemaking and participatory opportunities. On the one hand, potential midnight regulations—begun by agencies toward the end of presidential administrations and promulgated outside of the Election Day to Inauguration Day period—are not characterized by either limitations or expansions in comment periods and public forums. On the other hand, unconventional midnight regulations—proposed early in presidential terms and finalized years later during partisan transitions—experience abundant opportunities for stakeholder participation.

These differences suggest that if there are normative and practical concerns about midnight rules (Beermann 2013; Miller and Pérez 2016), such concerns ought to be separated into two distinct categories. The first category pertains to midnight regulations not proposed well in advance of elections. Are agencies—in a sprint to the regulatory finish line—giving such rules short shrift with respect to time- and resource-intensive participatory opportunities? The second consideration is relevant for midnight regulations proposed early in presidential terms. Why does the development of such rules (e.g., the

TABLE 6 | Regressions for unconventional midnight regulations.

Dependent variable	Comment duration (Poisson)	Comment extended (Logit)	Public forum (Logit)
Unconventional midnight rule	1.78***	3.91***	2.26**
	(0.23)	(1.38)	(0.90)
Economically significant	1.23***	1.69**	1.53*
	(0.10)	(0.36)	(0.34)
Legal deadline	1.01	0.92	1.46*
	(0.07)	(0.20)	(0.31)
Negotiated rulemaking	0.60*	0.45	0.59
	(0.18)	(0.57)	(0.69)
Ideological match	1.03	1.17	0.48***
	(0.11)	(0.22)	(0.09)
χ^2	33.82***	20.71***	26.35***
Observations	906	906	808

transparency in science regulation) consume years of agency time and resources? These important distinctions regarding the implications of midnight rulemaking have not been previously identified in research on regulatory policymaking during presidential transitions.

8 | Conclusions and Implications

Contemporary governments confront fundamental challenges with respect to the legitimacy of their decisions. Across political systems, the failure of processes and outputs to address adequately pressing economic, environmental, and public health issues is associated with diminished levels of public trust (Bishop 2022). In advanced industrialized democracies, such concerns are magnified by the exercise of policymaking authority by bureaucratic agencies.

Stakeholder participation has long been viewed as a promising means of remedying such deficits in democratic legitimacy (Davis 1971). Consistent with this view, governments around the world provide stakeholders with opportunities to participate in bureaucratic policymaking (Balla et al. 2024; Bunea and Lipcean 2024; United States Trade Representative 2022). In the U.S., for example, agencies have long been required to publicize proposed regulations and solicit feedback from interested parties.

Under this backdrop, a crucial question is the degree to which stakeholder participation in practice facilitates the achievement of democratic legitimacy. In our view, a promising way of addressing this question is to build a body of empirical knowledge regarding the manner in which administrative procedures are implemented over time and across political systems. Under what conditions does agency policymaking raise—and not raise—normative and practical concerns? In this article, we contribute to this effort by examining agency provision of opportunities for stakeholder participation in regulatory policymaking at the federal level in the U.S. We focus in particular on the midnight period, a politically fraught time between Election Day and Inauguration Day when the party occupying the White House changes.

Although the article is limited to a specific political and administrative context, our approach is broadly applicable in that it emphasizes the importance of agency behavior. It is plausible that such behavior—and by extension the normative and practical implications of bureaucratic policymaking—is conditioned upon political circumstances and administrative resources. In midnight rulemaking, for example, we hypothesize and empirically confirm that participatory opportunities are a function not only of the period during which regulations are issued (as posited in extant research) but also of the time in the electoral cycle in which agencies make decisions about the expansiveness—or lack thereof—of opportunities for stakeholder participation. It strikes us that similar theorizing about agency behavior across the life cycle of elections in political systems other than the U.S. has the potential to illuminate the conditions under which stakeholder participation makes good on its promise to remedy deficits in democratic legitimacy.

In this regard, our analysis demonstrates that midnight regulations do not exhibit a deficiency in opportunities for stakeholder participation. In fact, midnight regulations proposed early in presidential terms are characterized by abundant participatory opportunities. These results are contrary to prior research demonstrating that the quality of benefit-cost analysis is lower for midnight regulations than for rules issued at other times in the electoral cycle (Ellig and Fike 2016; McLaughlin and Ellig 2011). One explanation for the robustness of opportunities for stakeholder participation is the ever-present possibility of legal challenges to agency regulations. Agencies that do not comply with APA requirements place the durability of their rules in jeopardy. The first Trump administration, for example, was sued on a number of occasions for limiting participatory opportunities in violation of the APA (Gross 2020). Going forward, interviews with agency officials and stakeholders as well as in-depth case studies of rulemakings strike us as promising approaches for exploring this explanation in depth.

Normatively, the robustness of opportunities for participation during presidential transitions suggests that—at least with respect to the potential for stakeholder input—midnight regulations do not suffer from a lack of democratic legitimacy. This general possibility does not imply an absence of troubling instances of midnight rulemakings characterized by comment periods of short duration and other participatory limitations (Beermann 2013; O'Connell 2011). It is a task of future research to investigate such cases as a means of scoping out the specific conditions under which midnight regulations are problematic from the viewpoint of democratic legitimacy.

Finally, as highlighted at the outset, we do not examine the efficacy of stakeholder participation that occurs during midnight rulemaking. It remains possible that while agencies do not limit opportunities for participation, the influence of public input on the content of rules is diminished during the midnight period. Such a pattern would indicate that although agencies hew to the letter of the procedural law by soliciting participation, stakeholder involvement in the making of midnight regulations is a heightened form of "Kabuki theater" in comparison to other times in the electoral cycle (Elliott 1992). In general, despite the salience of the midnight period for questions of democratic legitimacy, much remains unknown about the practice and normative consequences of rulemaking during presidential transitions.

Acknowledgments

We gratefully acknowledge feedback received on previous drafts from Adriana Bunea, Christel Koop, Susan Moffitt, Rachel Potter, Dovilė Rimkutė, Adam Sheingate, Natalie Smith, Susan Yackee, and anonymous reviewers, as well as from participants at the Midwest Political Science Association Annual Conference, Chicago, IL, April 7–10, 2022, DC Public Management Consortium, Washington, DC, October 7, 2022, European Consortium for Political Research Joint Session of Workshops, Toulouse, France, April 25–28, 2023, and International Association on Regulation and Governance Inaugural Conference, Philadelphia, PA, June 17–18, 2024.

Conflicts of Interest

All authors declare that they have no conflicts of interest.

Data Availability Statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.

Endnotes

[1] Such compromise is potentially a byproduct of internal agency conditions (e.g., capacity, workload, etc.) and/or external pressures. We are agnostic regarding the mechanisms behind the compromise of administrative procedures. Interviews strike us as a plausible future approach for illuminating these mechanisms.

[2] OIRA organizes rules by RIN (Regulation Identifier Number). Occasionally, a RIN is associated with multiple rules. We eliminate such RINs from the analysis, as it is often unclear how to distinguish participatory opportunities across multiple rules contained in a single RIN. We also drop a handful of RINs with empty or ambiguous records. After this data cleaning process, the sample for analysis consists of 924 rules.

[3] Our data collection occurred during 2021. The sample therefore does not include rules for which OIRA review was completed in that year.

[4] Two frequency distributions of rules are provided in the online appendix. One frequency distribution breaks rules down by agency. The other frequency distribution divides rules by presidential administration.

[5] We do not incorporate interim final rules into the data set and analysis. Interim final rules take effect without public comment periods and, as such, limit opportunities for stakeholder participation. The prevalence of interim final rules during midnight periods relative to other times in the electoral cycle is a salient direction for future research.

[6] In alternative analysis, we account for the fact that the outcomes of two presidential elections were not declared until after Election Day. In 2000, the election was decided by the Supreme Court's *Bush v. Gore* decision on December 12. In 2020, the election was not declared until November 7, the Saturday after the election. The alternative analysis counts these dates (rather than Election Day) as the start of these two midnight periods. The results reported in the main analysis are robust to this alternative approach, which is described in the online appendix.

[7] An alternative operationalization of rules begun toward the end of presidential terms is the date of the opening of the lookback window under the Congressional Review Act (CRA). The CRA provides Congress and the president with expedited procedures for eliminating rules promulgated at the end of the preceding administration. As documented in the online appendix, the results reported in the main analysis are robust to using the opening date of the CRA lookback window to denote rules begun toward the end of presidential terms. These dates—which vary from year-to-year according to the details of the congressional calendar—were July 13, 2000, May 16, 2008, June 13, 2016, and August 21, 2020. We also use these dates, rather than Election Day, to identify the beginning of the midnight period to categorize rules as traditional and unconventional midnight rules. As shown in the online appendix, using CRA lookback window start dates to identify the onset of the midnight periods or potential midnight rules similarly does not affect the results reported.

[8] On January 20, 2025, for example, President Trump mandated a regulatory freeze and review of pending rules (see https://www.whitehouse.gov/presidential-actions/2025/01/regulatory-freeze-pending-review/).

[9] The analysis in which the dependent variable is whether the comment period was extended is also estimated with a fifth control variable. This additional variable is the duration of the initial comment period, on the assumption that shorter/longer initial comment periods are more/less likely to be extended. The results of these alternative specifications, which are reported in the online appendix, are consistent with the main results.

[10] This definition is accessible at https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

[11] OIRA documents this deadline at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=0938-AT02.

[12] The online appendix includes a correlation matrix for the variables discussed in this section. None of the correlations are greater than 0.25 and most are below 0.10.

[13] The analysis for the duration of comment periods was also estimated using negative binomial regression. The negative binomial results—which are reported in the online appendix—are consistent with the main Poisson findings.

[14] In the online appendix, we report alternative analyses in which the standard errors are clustered by agency and by presidential administration with and without agency fixed effects. The main results are robust across approaches to calculating standard errors as well as with respect to whether fixed effects are included.

[15] The regressions in Tables 4 through 6 include rules finalized during five presidential administrations (Clinton, Bush, Obama, Trump, and Biden). As a robustness check, we re-estimated all reported regressions excluding each presidential administration, one-by-one, from the analysis. The main results are consistent across these exclusions, which are reported in the online appendix.

[16] Table 4 through 6 report the coefficients as incidence-rate ratios for the Poisson regressions and odds ratios for the logistic regressions. As a result, coefficients greater than one indicate positive associations while coefficients less than one indicate negative associations.

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Supporting Information

Additional supporting information can be found online in the Supporting Information section.

Supporting Information S1: gove70095-sup-0001-suppl-data.docx.