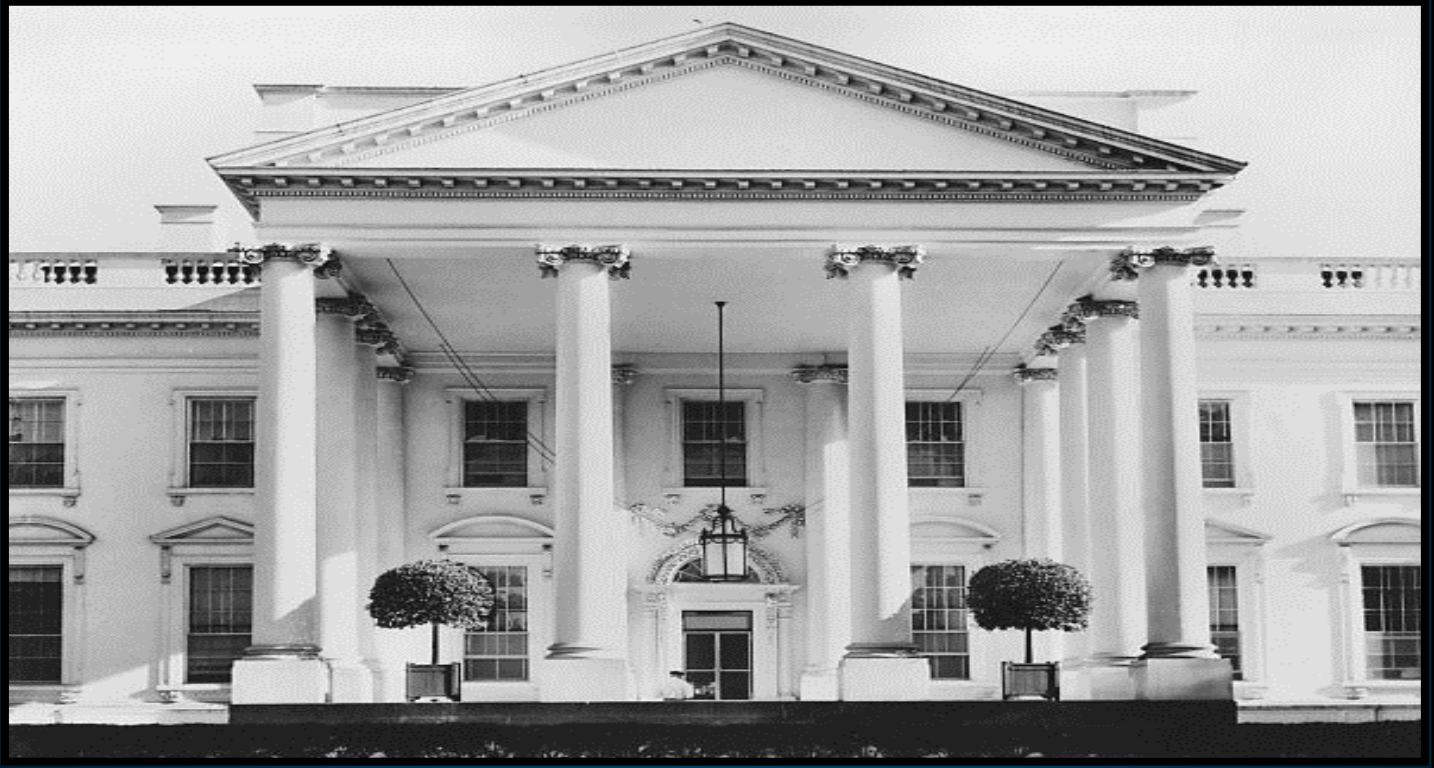


The Final Countdown

Projecting Midnight Regulations



By Sofie E. Miller & Daniel R. Pérez

July 2016



Regulatory
Studies Center

THE GEORGE WASHINGTON UNIVERSITY

TABLE OF CONTENTS

Introduction	1
Chapter 1 ♦ Midnight Rulemaking: Agency Independence and the Rush to Regulate	5
What Makes a Regulatory Agency Independent?	6
The Midnight Period	7
Executive vs. Independent Regulatory Agency Rulemaking during Midnight	8
Data Source, Sample, & Method	8
Results: Independent Agencies Immune to “Midnight”	12
Conclusion: Agency Structure Affects Regulatory Output	14
Chapter 2 ♦ Modeling Midnight: A Quantitative Forecast of Regulatory Activity	16
Modeling Approach	17
Data: Measuring Regulatory Activity	17
Method: Predicting Midnight Regulation	18
Defining the “Midnight Period”	19
Types of Regulatory Activity	20
Findings	20
Sensitivity Analysis	22
Conclusion: Economically Significant Regulation to Increase Substantially	25
Conclusion	26

INTRODUCTION

The final months of presidential administrations are accompanied by a significant increase in regulatory output as the executive branch relies increasingly on unilateral activity in a rush to implement its remaining policy priorities. This has come to be known as the “midnight period.” This report contains two robust, quantitative models that contribute to the scholarship in this area by: predicting the number of economically significant rules likely to be issued during the Obama administration’s final months, and finding that independent regulatory agencies do not increase their regulatory output during presidential transitions. These findings indicate that there is more than a 99% chance that executive regulatory agencies will increase their output of economically significant rules¹ during the midnight period. On average, these models suggest a threefold increase in economically significant rules—from an average of 4 to 12 per month during each midnight month. The report also details why this last-minute flurry of regulatory activity may be of concern and what incoming administrations can do to begin asserting their policy priorities as they necessarily deal with the remnants of the previous administration’s agenda.²

The Midnight Period

Although this report, and indeed most of the scholarship regarding the midnight period focuses on analyzing increases in regulatory output in recent decades, anecdotal evidence of the general tendency for the executive branch to increase its reliance on unilateral actions to continue shaping policy during its lame-duck period can be found as early as the 19th century.³ Scholars have confirmed⁴ the existence of significant increases in regulatory output during the midnight

¹ [Executive Order No. 12866](#), 58 Federal Register 190 (Oct. 4, 1993): Sec. 3(f) (1): A rule is considered economically significant if it is likely to “have an annual effect on the economy of \$100 million or more.”

² This report reflects the views of the authors, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

³ For a description of John Adams’ appointment of “midnight judges” and other last-minute presidential actions see: William G. Howell and Kenneth R. Mayer, “The Last One Hundred Days.” *Presidential Studies Quarterly*. Vol 35, Issue 3 (September 2005).

⁴ Using quarterly page counts in the Federal Register as a proxy for regulatory output, see: Jay Cochran III “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters,” (October 2000) Mercatus Center, Working Papers in Regulatory Studies. For a monthly breakdown and extended dataset

period as early as 1948. There is also a strong consensus within this literature that the primary cause⁵ of this occurrence is the transition from one administration to another. The midnight period is most commonly defined as the final three months of an administration, occurring either when a president fails in his bid for reelection or they conclude their second term in office.

There are likely several explanations⁶ that account for this spike in regulatory output, which occurs regardless of administration or political party. The most intuitive concerns the incentives faced by regulators, particularly the president's political appointees,⁷ racing to finish their regulatory agenda before priorities are shifted by the incoming administration. Staff at regulatory agencies, in general, are likely to rush to complete rules they have already put work into before they acquire new managers who might require them to either start over, or cause delays due to the need to get their new bosses "up-to-speed" on the details of the outstanding regulation.⁸

Susan E. Dudley, who served as Administrator of the Office of Information and Regulatory Affairs (OIRA) during the 2008 – 2009 midnight period, recounts her office's experience in providing agency oversight during a surge of regulatory activity even after the President's Chief of Staff had issued a memorandum to agencies in May 2008 urging them to "resist the historical tendency of administrations to increase regulatory activity in their final months" and had set a deadline of November 1, 2008 for completing rules:

Initially, there was broad support for avoiding the midnight crunch, but... we faced strong objections...not only from political appointees [but] career employees who had worked hard on many of the regulations, were disappointed when they did not get them across the finish line before the end...many...had been through presidential transitions before... [and] did not relish having to break in a new crew of political appointees before completing their projects.⁹

Presidential appointees, including agency heads, face additional incentives to complete their regulatory agenda since the transition to a new administration brings an end to their tenure.

confirming Cochran's results, see: Veronique de Rugy & Antony Davies, "Midnight Regulations and the Cinderella Effect, *Journal of Socio-economics*, Vol. 38, Issue 6 (December 2009).

⁵ Anne Joseph O'Connell "Agency Rulemaking and Political Transitions" *Northwestern University Law Review*, Vol 105, No. 2 (2011)

⁶ Jack M. Beermann "Midnight Rules: A Reform Agenda" *Michigan Journal of Environmental & Administrative Law*. Volume 2, Issue 2 (2013).

⁷ Susan Dudley "Reversing midnight regulations" *Regulation* Vol. 24, No. 1 (Spring 2001) available at: <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/dudley.pdf>

⁸ Susan E. Dudley "Observations on OIRA's Thirtieth Anniversary" *Administrative Law Review* Vol. 63, Special Edition (2011) pp. 113-129. Also Beermann (2013)

⁹ Dudley (2011) p. 122-3.

Are Midnight Rules a Problem?

There are several normative claims made regarding the need for reforms that prevent or mitigate the occurrence of midnight rules.¹⁰ The claim that rules issued during the midnight period might be of significantly lesser quality deserves the most attention. This might be the case for several reasons. Empirical studies have estimated that for each additional economically significant rule submitted to OIRA during the midnight period,¹¹ the mean review time for all regulations decreases by about two thirds of a day.¹² Additionally, as agencies rush to meet deadlines and significantly increase the pace with which they publish rules, it is possible that less time is spent on ensuring that the regulatory analysis justifying the need for the rule is of good quality. This likely also has important implications for the time that agencies spend on incorporating valuable public feedback during notice and comment periods into further improving their rules. Finally, agencies might lose the opportunity to incorporate feedback from the public altogether for any rules published as interim final rules.¹³

Although it is notoriously difficult to measure the quality of regulations (given their scope, the consideration of unintended consequences, etc.), scholars have attempted to do so.¹⁴ Such findings corroborate that shorter review times correlate with lower-quality analysis. Rules reviewed during the midnight period, in particular, were rated among the lowest quality of analysis.¹⁵ OIRA is tasked with improving the quality of regulatory analysis, but it is asked to do significantly more during the midnight period without an increase in staff or budgets to compensate.¹⁶

¹⁰ Ibid. Beermann catalogues a thorough list of reasons people object to midnight rules including: views that an incumbent administration might be attempting to illegitimately impose its agenda on a future administration, the fact that these rules are published throughout a period when a sitting president is less accountable to the electorate, and the fact that rules issued during midnight might be of significantly lesser quality (resulting in a loss of public welfare).

¹¹ Housed within the Office of Management and Budget, OIRA is responsible for regulatory coordination and oversight of regulatory agencies. This includes providing feedback to executive regulatory agencies regarding the regulatory analysis that supports their proposed rules, with the purpose of improving its quality and ensuring that agencies reasonably considered public input (when applicable) before a final rule is issued.

¹² Patrick A. McLaughlin “The Consequences of Midnight Regulations and Other Surges in Regulatory Activity” *Public Choice*, Vol. 147, Issue 3, (June 2011).

¹³ Curtis W. Copeland “Midnight Rulemaking: Considerations for Congress and a New Administration” CRS Report for Congress. November 24, 2008 available at: <https://www.fas.org/sgp/crs/misc/RL34747.pdf>

¹⁴ Patrick A. McLaughlin and Jerry Ellig, “Does Haste Make Waste in Regulatory Analysis?” (July 13, 2010). Available at SSRN: <http://ssrn.com/abstract=1646743>

¹⁵ Ibid.

¹⁶ Susan Dudley and Melinda Warren, “Regulator’s Budget from Eisenhower to Obama” George Washington University Regulatory Studies Center. Available at: <https://regulatorystudies.columbian.gwu.edu/regulators%E2%80%99-budget-eisenhower-obama>

Responses to Midnight Rules

If there is a legitimate reason to be concerned with the quality of regulations published during the midnight period, then it is important to know what tools an incoming administration has at its disposal to begin asserting its control over the regulatory process. This report concludes with a list of actions that an incoming president and Congress can take to begin implementing their policy priorities. However, it is worth noting that to underestimate the durability of midnight regulations would be to ignore the empirical record. Scholars find that the vast majority of rules persist even in the face of scrutiny by incoming administrations.¹⁷ In many cases newly-elected presidents, in particular, find that they “cannot alter orders set by their predecessors without paying a considerable political price...or confronting serious legal obstacles.”¹⁸

Quantitative Analysis: What to Expect this Midnight?

To summarize, there is a period of significantly increased regulatory activity known as the midnight period during an administration’s final months in office. There is also a reasonable concern regarding the quality of analysis that underlies these regulations due to the fact that important elements of the regulatory process—namely OIRA review and input provided to agencies via public comments—may be underutilized. Finally, midnight rules are not simple to undo; the vast majority of them survive the scrutiny of a newly-elected president and Congress.

Given these facts about midnight rules, this report presents two quantitative models to answer questions in preparation for thinking through the next presidential transition. How likely is it that the Obama administration will increase its regulatory output during the upcoming midnight period and to what degree? Are there systematic differences in the way that certain agencies behave during the midnight period? The report also concludes with a review of the tools available to the next president and Congress for addressing the midnight output of the previous administration.

¹⁷ Jason M. Loring and Liam R. Roth, “Empirical Study: After Midnight: The Durability of the ‘Midnight’ Regulations Passed by the Two Previous Outgoing Administrations” 40 Wake Forest Law Review (Winter 2005)

¹⁸ Howell and Mayer (2005)

Chapter 1

Midnight Rulemaking

Agency Independence and the Rush to Regulate

Daniel R. Pérez

Scholars studying bureaucratic structures and their outcomes on policymaking continue to debate the level of independence that U.S. independent regulatory agencies actually experience vis-à-vis their executive agency counterparts.¹⁹ To what extent do various institutional mechanisms actually affect agency behavior? This study analyzes the number of rules published by both executive and independent regulatory agencies, with a specific focus on regulatory activity during the final three months of presidential administrations, to examine the effects of institutional structure on agency behavior. Scholars have documented²⁰ significant increases in regulatory output throughout these final months, commonly referred to as the midnight period. These midnight months present a unique opportunity to analyze the extent to which executive and independent regulatory agencies face different pressures and constraints and thus differ in their response to presidential transitions.

¹⁹ Neal Devins, David E. Lewis “Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design” *Boston University Law Review*. Vol. 88, Issue 2 (April 2008). Rachel E. Barkow “Insulating Agencies: Avoiding Capture through Institutional Design” *Texas Law Review*, Vol. 89, Issue 1 (November 2010). Kirti Datla and Richard L. Revesz “Deconstructing Independent Agencies (And Executive Agencies)” *Cornell Law Review*. Vol. 98, Issue 4 (May 2013).

²⁰ Jay Cochran III “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters,” (October 2000) *Mercatus Center, Working Papers in Regulatory Studies*. Patrick A. McLaughlin “The Consequences of Midnight Regulations and Other Surges in Regulatory Activity.” *Public Choice*, Vol. 147, Issue 3, (June 2011). Anne Joseph O’Connell “Agency Rulemaking and Political Transitions” *Northwestern University Law Review*, Vol 105, No. 2 (2011)

This chapter begins by briefly discussing several of the structural differences commonly associated with independent agencies. It then proceeds to discuss several causal mechanisms that could explain the significant increases in regulatory activity observed during midnight months. Finally, I discuss the findings, their implications, and future research to improve the sophistication of the model presented in this paper. Ultimately, I find that, contrary to executive agencies, independent agencies do not significantly increase their regulatory activity during midnight months.

What Makes a Regulatory Agency Independent?

Many scholars point out that the actual level of independence resulting from an agency's structural characteristics may more closely approximate a continuum rather than a binary classification.²¹ Nonetheless, those considered independent regulatory agencies contain a mix of common characteristics²² designed to provide them a certain degree of autonomy relative to executive agencies. The most common characteristic of independent agencies is that their statutes permit a president to remove appointed agency heads and commissioners only “for cause,” that is, in cases of “inefficiency, neglect of duty, or malfeasance in office.”²³ Other common characteristics include: not being housed within cabinet departments, multi-member bodies in place of a single agency head, bipartisan balance requirements, and staggered terms so that different members' tenure expire at different times and don't necessarily coincide with changes in Presidential administrations. Some agencies even have their own independent funding stream that does not depend on the annual appropriations process but instead comes from fees levied on the industry they regulate.²⁴

There are several reasons why policymakers might structure an agency with any mix of these characteristics, but the reasoning can generally be described as an attempt to reduce the level of politicization within independent regulatory agency decisionmaking. Carrigan describes that “with respect to regulation specifically, structuring the agency to be independent of political

²¹ Jennifer Selin “What Makes an Agency Independent?” *American Journal of Political Science*, Vol. 59, Issue 4 (October 2015). Also, Datla and Revesz (2013) pp. 825 and Christopher Carrigan, Lindsey Poole “Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance” (Working Paper) Penn Program on Regulation (June 2015) pp. 7, available at: <https://www.law.upenn.edu/live/files/4707-carriganpoole-ppr-researchpaper062015pdf>

²² For a study of informal mechanisms that may also provide degrees of independence to an agency see: Rachel E. Barkow “Insulating Agencies: Avoiding Capture through Institutional Design” *Texas Law Review*, Vol. 89 (2010).

²³ Datla and Revesz (2013), citing language in the Interstate Commerce Act of 1887, which created the first federal independent regulatory agency—the Interstate Commerce Commission—setup to issue cease and desist order to railroads if it deemed they were charging customers unfair rates.

²⁴ Ibid. Examples include the Federal Reserve and the Securities and Exchange Commission.

control is one way that politicians can more credibly commit to the regulated industry that they are not going to change the rules capriciously.”²⁵

This research reinforces that executive branch agencies, whose appointee’s terms expire with the president’s, tend to increase regulatory activity at the end of presidential administrations. This paper does not attempt to identify or dissect the various forces that may drive this observed increase in regulatory activity during the midnight period. Rather, it examines whether agencies structured as independent behave differently than executive branch agencies. The research hypothesis is the fact that independent agencies are multi-headed, bipartisan commissions whose members are appointed to staggered terms that span different presidential terms will affect their regulatory output during presidential transitions.

Ultimately, this chapter’s findings confirm this, allowing a rejection of the null hypothesis that agency structure has no effect on regulatory output. The multivariate regression estimates that every midnight month increases the average number of economically significant rules issued by regulatory agencies threefold—from 4 to 12 per month. Most importantly, the model identifies executive regulatory agencies as the sole driver of this increase in regulatory output. Independent agencies do not exhibit a significant increase in their regulatory output during the midnight period.

The Midnight Period

Jack Beermann points out that there is reason to believe that this last minute regulatory push is not merely the result of direct intervention on the part of a sitting president.²⁶ His work on midnight rules includes interviews with officials involved in the rulemaking process in addition to empirical measures of regulatory activity. He concludes that the observed increases in regulatory activity are primarily the result of executive branch appointees working to complete their regulatory agendas and ensure their policy priorities are exercised while they still have the power to do so:

based on the above analysis and the interviews I conducted in connection with this Report, it appears that Midnight Rulemaking results predominantly from hurrying to complete work... that agency officials fear might be scuttled or delayed by the transition.²⁷

²⁵ Christopher Carrigan, Lindsey Poole “Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance” (Working Paper) Penn Program on Regulation (June 2015) pp. 7, available at: <https://www.law.upenn.edu/live/files/4707-carriganpoole-ppr-researchpaper062015pdf>

²⁶ Jack M. Beermann. “Midnight Rules: A Reform Agenda.” *Michigan Journal of Environmental & Administrative Law*. Volume 2, Issue 2 (2013).

²⁷ Ibid. p. 40

This observation is in line with other scholars who point out that “because agency heads tend not to retire from public life after their tenure, they... consider the impacts of their decisions on future career prospects.”²⁸ In summary, the President is not the only—or perhaps even most important—part of the Executive branch directly responsible for last-minute increases in regulatory activity.

Executive vs. Independent Regulatory Agency Rulemaking during Midnight

The midnight period (defined here as November to January during a president’s final year in office) presents a unique opportunity to quantify whether independent agencies respond differently to the forces commonly perceived to result in increased regulatory activity during midnight months. Not only are independent agencies structured with the intent of granting them a measure of reduced political control from the executive branch, but several aspects of their institutional design (such as the staggered terms of agency heads) might allow them to better avoid other pressures, such as meeting deadlines, vis-à-vis executive regulatory agencies.

The following sections analyze data on rules published by both independent and executive regulatory agencies to quantify the extent to which their regulatory output changes during the midnight period. The analysis tests my hypothesis that agency structure affects regulatory behavior during presidential transitions; their bipartisan leadership and staggered term structure should make them less likely than executive branch agencies to increase regulatory activity in the final months of a presidential term.

Data Source, Sample, and Method

To study the relative behavior of independent and executive agencies during the midnight period, I collected data on executive regulatory agency rulemaking using the Reginfo.gov website²⁹ maintained by the Office of Information and Regulatory Affairs (OIRA) and the General Services Administration (GSA). I also used the Government Accountability Office (GAO) database³⁰ for published rules issued by independent regulatory agencies. In order to keep the data collection process manageable and focus on the rules that were likely to have the greatest impact, the analysis narrows its scope to focus on rules with expected annual impacts of \$100 million or more, or “economically significant”³¹ rules promulgated by executive regulatory

²⁸ Datla and Revesz (2013)

²⁹ <http://www.reginfo.gov/public/do/eAdvancedSearchMain>

³⁰ <http://www.gao.gov/legal/congressional-review-act/overview>

³¹ [Executive Order No. 12866](#), 58 Federal Register 190 (Oct. 4, 1993): Sec. 3(f) (1): A rule is considered economically significant if it is likely to “have an annual effect on the economy of \$100 million or more.”

agencies and “major”³² rules promulgated by independent agencies. My data cover the period from November 1997³³ through January 2016.

It is worth noting in advance that the parameters defining an “economically significant” rule and a “major” rule are similar but not identical;³⁴ still, the similarities in their classification should be sufficient to avoid any concerns of measurement validity in treating these rules as equal for the purpose of analyzing the impact of the midnight period and institutional structure on agency rulemaking. One final concern is that the dataset might undercount the actual number of “major” rules issued by independent agencies. Given that these agencies do not benefit from oversight by OIRA, it is possible that an incentive to under-classify the true cost of a rule exists and will not be corrected absent this oversight mechanism. Although it’s possible that this could alter the findings, separate regressions—not included in this paper—that included all rules published by independent regulatory agencies act as a robustness check. They confirm these findings, namely that independent agencies do not display increases in regulatory activity during the midnight period.

Table 1 lists the variables considered; the dependent variable is the number of economically significant/major rules published by regulatory agencies in a given month. The primary independent variable is an interaction term identifying a midnight month for an executive regulatory agency, which was derived by multiplying the indicator variables for whether an agency was an executive regulatory agency and whether or not the month is a midnight month. The other variables control for differences due to variations in agency budgets or particular months of the year.

I first estimated a bivariate regression using the number of large rules issued by agencies as the dependent variable and whether each rule was issued during a midnight month as the independent variable for both executive and independent regulatory agencies, separately. I then estimated a multiple regression using data on the number of regulations issued by both executive and independent agencies to control for effects that could be the result of differences in: agency budgets, months of rulemaking, whether an agency is executive or independent, and whether the rule was issued during the midnight period.

³² 5 U.S.C § 801(a)(1)(A): The CRA defines a major rule as one “likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”

³³ The choice to begin the dataset in November of 1997 allows for consistent classification of “major” rules by independent regulatory agencies as defined in the Congressional Review Act, 5 U.S. Code § 804

³⁴ For a concise analysis of this difference see: <http://www.regblog.org/2011/09/27/measuring-regulatory-activity-what-can-we-learn-from-the-unified-regulatory-agenda/>

Table 1. Variables

Variable Name	Definition	Level of Measurement
<i>BigRules</i>	Dependent variable; economically significant or major rules published by regulatory agencies	Interval-ratio
<i>ExecXmidnight</i>	Primary independent variable; interaction term, that multiplies the indicator variables: <i>Executive</i> and <i>Midnight</i>	Nominal
<i>January, February, etc.</i>	Indicator variables controlling for differences due to month	Nominal
<i>Budget</i>	Yearly budget allocated to executive or independent agencies in \$10 billion USD	Interval-ratio
<i>Midnight</i>	Indicator variable for whether or not the month is during a Midnight period	Nominal
<i>Executive</i>	Indicator variable for whether or not the agency is an executive regulatory agency	Nominal

The results for executive agencies largely confirm the findings in the literature,³⁵ namely that executive regulatory agency rulemaking exhibits a statistically significant increase during the midnight period. The results for independent agencies, which are not analyzed in the literature, indicate that there is not an appreciable increase in the number of major regulations issued during midnight months.

Sample Description

Table 2 shows the summary statistics of monthly regulatory activity for executive and independent regulatory agencies; each for 219 observations (months) from November 1997 through January 2016, with 0 observations missing. Some of the differences in rulemaking statistics between executive and independent agencies already lend credence to the expectations of agency behavior during the midnight period as described above.

For executive regulatory agencies, the average number of economically significant rules issued per month is 4.13 and ranges from a low of 0 to a high of 22. As shown in Figure 1, this

³⁵ Jay Cochran III “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters” George Mason University. Mercatus Center. March 8, 2001. Patrick A. McLaughlin “The consequences of midnight regulations and other surges in regulatory activity” *Public Choice*. Vol. 147, Issue 3 (June 2011).

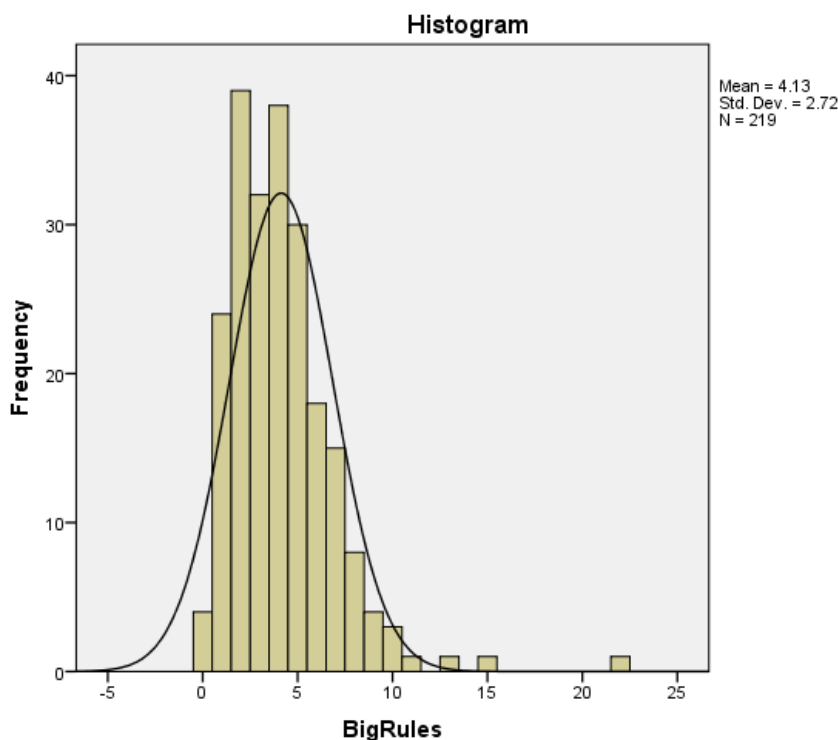
distribution is appreciably positively skewed, since there are several large outliers (22 is roughly a 430% increase from the average number of rules issued per month), most of which occur during midnight periods.

For independent regulatory agencies, the average number of major rules issued per month is 1.16 and ranges from a low of 0 to a high of 5. Although this distribution is also positively skewed, its magnitude (much less than executive agencies) also correlates with my initial hypotheses about independent agency responsiveness to political pressure during the midnight period. Once again, even these initial calculations suggest that independent agencies do not exhibit significant increases in regulatory activity measured by the number of major rules published per month.

Table 2. Background Characteristics of Sample

	Mean	Median	Min	Max
Economically Significant rules issued by executive agencies	4.13	4.00	0	22
Major rules issued by independent agencies	1.16	1.00	0	5

Figure 1. Distribution of Economically Significant Rules, Executive Regulatory Agencies, from November 1997 through January 2016



Results: Independent Agencies Immune to “Midnight”

As shown in Table 3, the bivariate regression on executive agency rulemaking demonstrates that the midnight months are associated with an increase of 8 additional economically significant rules. This difference was statistically significant at the 1% level (p -value = .000). This indicates a large, positive effect since the average number of economically significant rules issued by executive regulatory agencies is 4.13 (this is roughly a 300% increase from an average of about 4 rules to 12 per month). On the other hand, the bivariate regression on independent agency rulemaking estimated that the midnight period had no effect on the number of major rules published. The difference was not statistically significant at conventional levels (p -value = .486).

Additional interesting relationships are shown through the multivariate regression results. For example, holding all other variables constant, there is a statistically significant relationship between agency budgets and rulemaking, although the effect is fairly weak with an estimated .01 additional rules each month for every \$10 billion increase in agency funding; this was statistically significant at the 1% level (p -value=.000). There was also a reasonably strong relationship between the month of August and rulemaking, with an estimated 1.22 additional rules during the month of August. This was significant at the 1% level (p -value=.004). Although this effect is not accounted for in any major theory, there is at least anecdotal³⁶ evidence that agencies promulgate more rules during Congress’ yearly month-long recess in August.

As Table 3 further demonstrates, the effect of the midnight period on agency rulemaking is not evident unless we account for agency structure. The effect of midnight on regulatory agency rulemaking without accounting for agency structure is not significant at any conventional level (p -value=.967). However, when looking at the effect of the midnight period for executive agencies relative to independent agencies and non-Midnight months, there is a strong, positive effect (holding all other variables constant). The analysis estimates that a midnight month is likely to increase executive regulatory output by 8.1 additional economically significant rules holding constant month and agency budgets; this effect is significant at the 1% level (p -value=.000). Figure 2 illustrates the average effect of a midnight month on agency rulemaking.

In summary, our primary independent variable of interest—being a regulatory agency during a midnight month—demonstrated a statistically significant and strong effect on the number of economically significant rules published; we can comfortably reject a null hypothesis stating that agency structure has no effect on rulemaking during the midnight period.

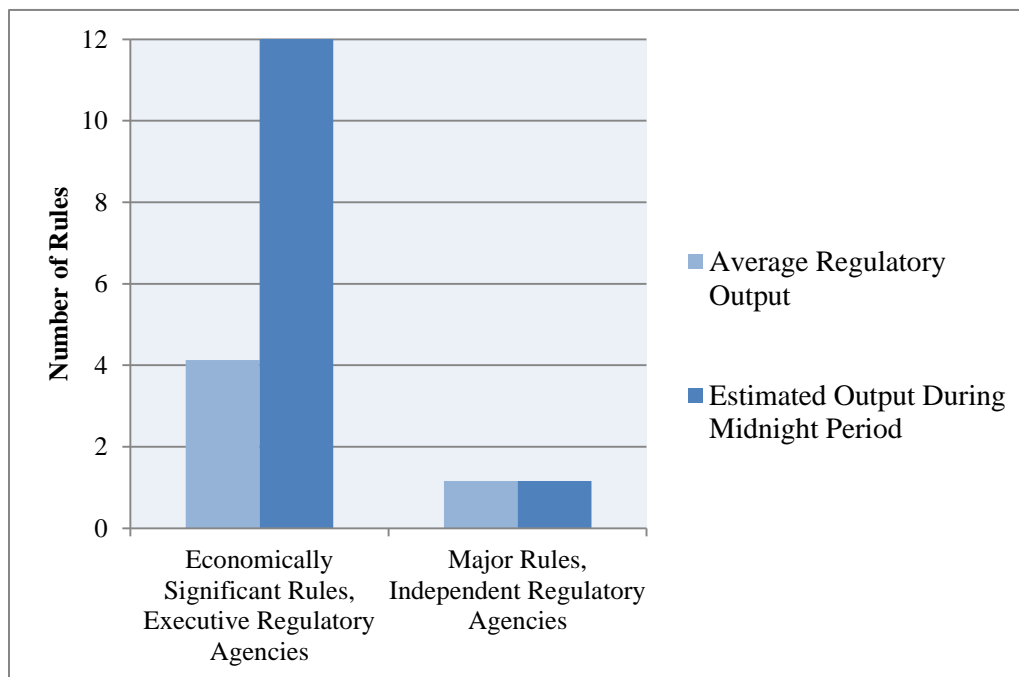
³⁶ Dan Goldbeck, “August: The Dog Days of Regulation?” Insight, American Action Forum. August 11, 2015
available at: <https://www.americanactionforum.org/insight/august-the-dog-days-of-regulation/>

Table 3. Regression Results of Agency Rulemaking

	Bivariate (Executive Regulatory Agencies)	Bivariate (Independent Regulatory Agencies)	Multivariate
Midnight Period	8.265*** (.979)	0.354 (.507)	0.031 (.766)
Executive Regulatory agency during the Midnight Period			8.106*** (1.061)
Agency Budget			0.010*** (.002)
Executive Agency			0.610 (.494)
January			0.185 (.431)
February			-0.528 (.427)
August			1.222*** (.427)
December			0.762 (.425)
Constant	3.901	1.146	0.930
Observations	219	219	438
R²	0.247	.002	0.527

Notes: i) * p<0.10 ** p<0.05 *** p<0.01; ii) Dependent variable is the number of economically significant or major rules published by executive or independent regulatory agencies per month with 219 observations for the bivariate regressions and a combined 438 observations for the multivariate regression; iii) Standard errors in parentheses; iv) Data obtained from OIRA and GAO databases.

Figure 2. Estimate of Midnight Period on Regulatory Agency Rulemaking, Average Output



Conclusion: Agency Structure Affects Regulatory Output

This analysis demonstrates that independent regulatory agencies behave differently than their executive agency counterparts during the midnight period. Unlike executive regulatory agencies, they do not significantly increase their regulatory activity during midnight months (measured by the number of major rules published). This indicates that there is something systematically different about independent regulatory agencies that allow them to avoid several of the pressures that lead to an increase in regulatory output during the final months of presidential administrations. It supports the hypothesis that the different institutional arrangements of these agencies makes them less susceptible to pressures to wrap up regulatory activity at the end of a presidential administration.

The issue of measurement validity was already discussed earlier regarding the slight difference in terminology between “economically significant” and “major” for classifying rules; ultimately the difference is not likely to significantly alter the results given our large number of observations and the fact that separate regressions were run using all rules published as a robustness check of the results. As far as internal validity is concerned, the control variables allow the model to account for any spurious relationships that might otherwise challenge causal assumptions about the midnight period being merely an intervening variable (e.g. perhaps there is something particular about all Novembers, Decembers, and Januarys, etc.)

While it's true that this study looks specifically at independent vs. executive regulatory agency rulemaking within the U.S., it's conceivable that its lessons on agency structure and policy outcomes could be applied as a framework to other jurisdictions outside the U.S.; the findings might be relevant in thinking through other comparative cases.

Future Research

There are several enhancements that could help increase both the level of sophistication of this model, and its utility in quantifying the contribution of specific institutional arrangements in providing independence from the executive branch. This research relies on data on all rules published by independent agencies and significant rules published by executive regulatory agencies. Further research could break these down by agency, instead of its current binary classification of total executive or independent, to help tease out additional information about regulatory activity during the midnight period.

Finally, an expanded regression model could employ binary indicator variables to estimate the effects of particular institutional arrangements (staggered terms, multi-member bodies, etc.) for each agency. This would help disaggregate agencies into a continuum based on the level of their respective increase in regulatory activity during midnight months. These additions can serve to strengthen our confidence in the model's estimates and better quantify the effects of specific institutional arrangements.

Chapter 2

Modeling “Midnight”

A Quantitative Forecast of Regulatory Activity

Sofie E. Miller

During the last few months of a President’s tenure, regulatory agencies tend to finalize large swaths of rules in anticipation of a new administration with new regulatory priorities.³⁷ These last-minute regulations are termed “midnight” rules, and are a matter of speculation leading up to an election and a new administration.³⁸ The certainty of a new administration in 2017 raises questions as to how much regulatory activity the public can expect during the waning months of President Obama’s administration—especially given the perception that President Obama has been more active on the regulatory front than some of his predecessors.³⁹

Republican and Democratic presidents alike have made use of the final months of their administrations to promulgate rules to advance their agendas.⁴⁰ Based on rulemaking activity of past administrations, our model forecasts how many new rules President Obama will publish at the end of his term, and whether we can expect significantly more regulatory activity than during

³⁷ Patrick McLaughlin. “The consequences of midnight regulations and other surges in regulatory activity.” *Public Choice* Vol. 147:3. 2011.

³⁸ Cheryl Bolen. “OIRA Wish for 2016: An Orderly Regulatory Process.” *Bloomberg BNA*. February 1, 2016. <http://www.bna.com/oira-wish-2016-n57982066769/>. See also: Nick Timiraos, “Obama Readies Flurry of Regulations,” *The Wall Street Journal*, April 7, 2016 <http://www.wsj.com/articles/obama-readies-flurry-of-regulations-1460077858>, and Tim Devaney, “White House racing to finish new regs,” *The Hill*. April 8, 2016. <http://thehill.com/regulation/275615-obama-administration-racing-to-finish-regs>

³⁹ Daniel R. Pérez. “President Obama’s Regulatory Output: Looking Back at 2015 and Ahead to 2016.” *The George Washington University Regulatory Studies Center*. January 12, 2016. <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/West-%20Pace%20of%20E.S.%20Rule%20Increased-2.pdf>

⁴⁰ Jay Cochran. “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters.” *The Mercatus Center, George Mason University*. March 2001. <http://mercatus.org/publication/cinderella-constraint-why-regulations-increase-significantly-during-post-election>

the midnight periods of other administrations. The use of a predictive probabilistic model to forecast regulatory activity during the midnight period is in contrast to previous studies that have relied on regressions.⁴¹ This model both supports and builds off of previous quantitative analysis in this field to predict a large increase in economically significant rulemaking during Obama's final months in office.

In particular, it forecasts that the number of economically significant rules issued over the next seven months will exceed President Obama's previous activity by over 100%. When we use a more traditional definition of midnight—the post-election quarter between November 2016 and January 2017—the model predicts an increase of over 200%.

Modeling Approach

This model uses the rate of monthly regulatory activity during the midnight periods of presidents George H.W. Bush, Bill Clinton, and George W. Bush to predict future rates of regulatory activity during the 2016-2017 Obama midnight.

Data: Measuring Regulatory Activity

The Office of Information and Regulatory Affairs (OIRA)⁴² and the Federal Register⁴³ provide publicly available data on the number of significant rules, economically significant rules, and total rules finalized during each month of the past two decades. Executive Order 12866 defines a “significant rule” as a rule that materially alters the budgetary impact of entitlements, grants, user fees, or loan programs, or one that raises novel legal or policy issues.⁴⁴ An “economically significant” rule is defined as a rule that has an annual effect of \$100 million or more on the economy, or one that adversely affects “the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”⁴⁵

⁴¹ See, for example, Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Center at George Mason University, Working Paper, 2001), <http://www.mercatus.org/PublicationDetails.aspx?id=17546>.

Veronique de Rugy & Anthony Davies, *Midnight Regulations and the Cinderella Effect*, 38 J. Socio-Economics 886, 887 (2009)

Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 Admin. L. Rev. 163, 168 (2009).

Patrick A. McLaughlin. “Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time.” Mercatus Center Working Paper. http://mercatus.org/sites/default/files/publication/WPPDF_Empirical_Tests_for_Midnight_Regulations.pdf

⁴² Data on “significant” and “economically significant” rules back to 1981 is accessible from the Office of Information and Regulatory Affairs’ website (www.RegInfo.gov).

⁴³ Historical data on number of rules back to 1994 is accessible from the Federal Register (<https://www.federalregister.gov/>).

⁴⁴ Executive Order 12866. “Regulatory Planning and Review.” September 30, 1993.

⁴⁵ Executive Order 12866. “Regulatory Planning and Review.” Sec. 3(f)(1) September 30, 1993.

Because Executive Order 12866 was signed in 1993, the definitions for economically significant and significant rules have officially existed for only two midnight periods (Clinton-Bush and Bush-Obama). However, EO 12866 was preceded by President Reagan’s Executive Order 12291 in 1981, which established a definition for “major” rules that was essentially identical to the post-1993 definition of “economically significant” rules.⁴⁶ Therefore the definition for economically significant rules has remained essentially constant since 1981, which includes five midnight periods, and these data are also available via OIRA databases. However, available data on published rules from the Reagan administration is internally inconsistent and cannot be verified; therefore this model includes only three midnight periods.⁴⁷ OIRA databases also contain pre-1993 data on “significant” rules, but this definition is not consistent with the definitions established in EO 12866 which limits the number of midnight periods for which we can collect significant rule data.

Within these rule data we can specify the months that represent transitions from one administration to another, the “midnight” period, and quantify how the rate of regulation during those periods differs from other sample periods. This model uses the rate of change from the overall monthly average by presidential administration to measure and predict the rate of regulatory activity.

Method: Predicting Midnight Regulation

If each month represents a specific case, and each case contains a set number of new rules (or a percent change from mean regulatory activity), we can randomly select “midnight” cases from the dataset to represent the different regulatory scenarios that are possible during the Obama midnight. Each case (month) is associated with a number of new rules and a percentage change in the rate of regulation. For example, the table below displays some of the months and associated economically significant rulemaking activities of previous administrations.

⁴⁶ Executive Order 12291. “Federal Regulation.” February 17, 1981. Rescinded by Executive Order 12866, September 30 1993.

⁴⁷ We are interested in the number of published rules, not concluded rules (which indicates the time at which OIRA completed review of a regulation). Some rules that are listed as “concluded” during the Reagan administration were never listed as “published” on the OIRA database even if they were actually published; this inconsistency leads us to omit this data until it can be cross-checked against entries into the Federal Register, which has not yet been digitized pre-1994.

Midnight Period Economically Significant Rules (September-January)

Case Period	Year	Month	# Economically Significant Rules	% Change from Average Rate
1	1992	September	4	6.08%
2	1992	October	2	-46.96%
3	1992	November	5	32.60%
4	1992	December	2	-46.96%
5	1993	January	28	642.54%
6	2000	September	4	15.65%
7	2000	October	3	-13.27%
8	2000	November	10	189.12%
9	2000	December	6	73.47%
10	2001	January	22	536.05%
11	2008	September	1	-70.38%
12	2008	October	13	285.02%
13	2008	November	15	344.25%
14	2008	December	9	166.55%
15	2009	January	11	225.78%

We build a simulation that randomly selects cases from a sample of midnight months to build a month-by-month projection of future midnight rulemaking activity for a given time period scenario, based on the average rate of rulemaking during the Obama administration. Running a simulation that returns these total rulemaking scenarios 2,000 times provides a range of probable estimates of regulatory activity during the forthcoming midnight period.

Defining the “Midnight Period”

Typically, the midnight period is defined as beginning after the November presidential election, and ending with the start of a new administration in January of the following year. However, for reasons discussed in greater detail below, economically significant regulatory activity was spread throughout the final year of the Bush 43 administration rather than concentrated in the post-election period. For this reason, and because the more traditional definition limits our model to nine relevant observations (November 1992 – January 1993, November 2000 – January 2001, and November 2008 – January 2009), we examine regulatory activity under three definitions of “midnight.” The model forecasts activity during the last seven months and the last five months, as well as the final three months of President Obama’s presidency.

Further, this model uses two alternate samples to predict midnight activity. The base case model uses historical cases from the months being forecasted—e.g., November – January—to predict regulatory activity during that timeframe in the Obama administration. The second sample, used for sensitivity purposes, draws on cases that include the previous two months of regulatory activity (e.g. sampling September – January to forecast November – January).

This model forecasts regulatory activity during the final seven months of Obama’s presidency—from July 2016 to January 2017—to provide an overview of potential regulatory activity during the remainder of the President’s tenure. Because this model draws from a pool of observations

that are not traditionally considered part of the midnight period, this forecast is a relatively conservative estimate of rulemaking during Obama’s final months in office.

Types of Regulatory Activity

This model focuses on output of significant and economically significant final rules published in the Federal Register. Because of the significant number of total rule output in any given year, and the relatively small proportion of significant rules,⁴⁸ midnight periods do not typically affect total rule output. As a robustness check, this model uses the same parameters to forecast total rules to indicate whether the modeling approach provides reasonable results.⁴⁹ We find that the projected midnight effect on total rules is, as one would expect, essentially nonexistent, reinforcing the use of this model to predict trends in other types of rulemaking.

In addition, concerns about midnight regulation typically center on increases in significant or economically significant rules. These rules represent the largest economic impact on private parties and generally incur both significant costs and benefits to the public. Because of their substance and substantive impact, these rules are more likely to be a component of a president’s agenda.

Of note is that these definitions are limited to rules promulgated by the Executive Branch. OIRA, which keeps data on significant and economically significant rules, does not have authority to review rules promulgated by independent agencies, such as the National Labor Review Board, the Consumer Financial Protection Agency, and the Securities and Exchange Commission. However, other research in this report finds that these are less susceptible to the influence of an outgoing president’s regulatory agenda, in which case they are less relevant to this model.

Findings

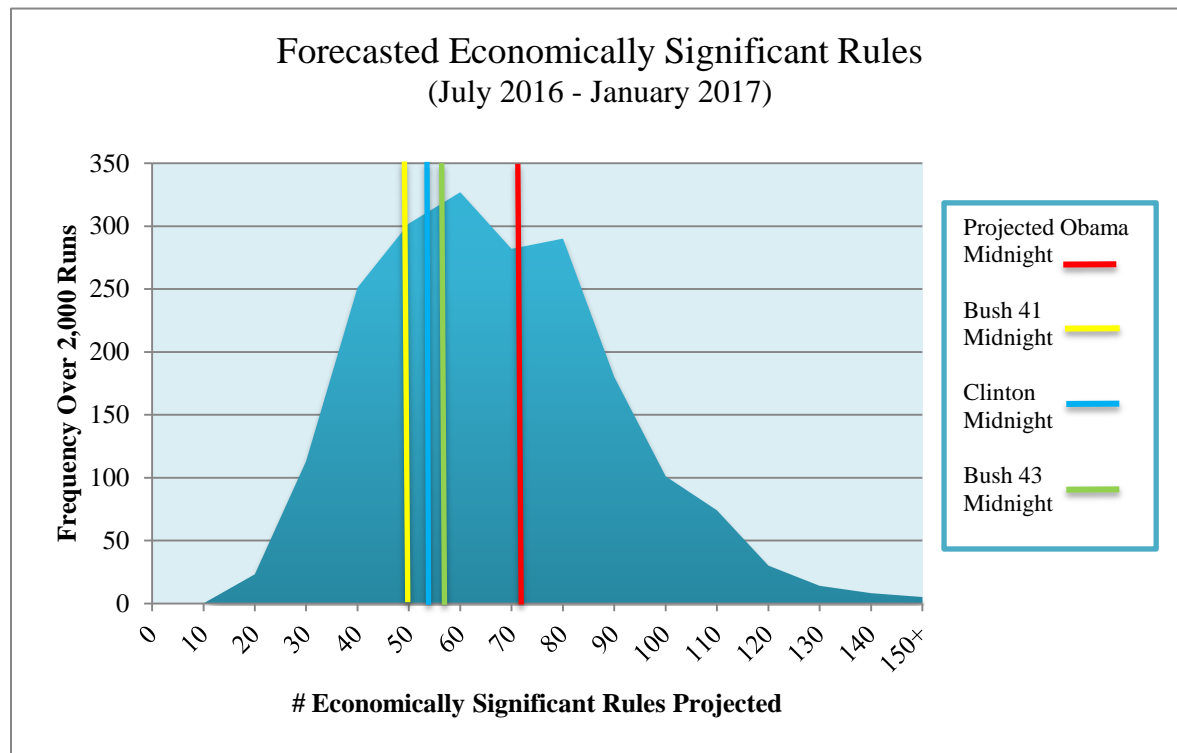
This model predicts a significant increase in economically significant rules, along with a modest increase in significant rules during Obama’s final months in office. The base case scenario, which uses percent change in rule activity from the long-term average to forecast the number of midnight regulations, uses rule data from 1989-2015 for economically significant rulemaking, and data from 1993-2015 for significant rules.

The below graph shows the distribution of possible outputs of economically significant rules in the final seven months of the Obama administration. In 97% of runs, the number of economically significant rules is greater than 33—the Obama administration’s current seven-month average—indicating that we are likely to see an increase in economically significant rulemaking during the Obama midnight. The model predicts a mean of 72 economically significant rules between July

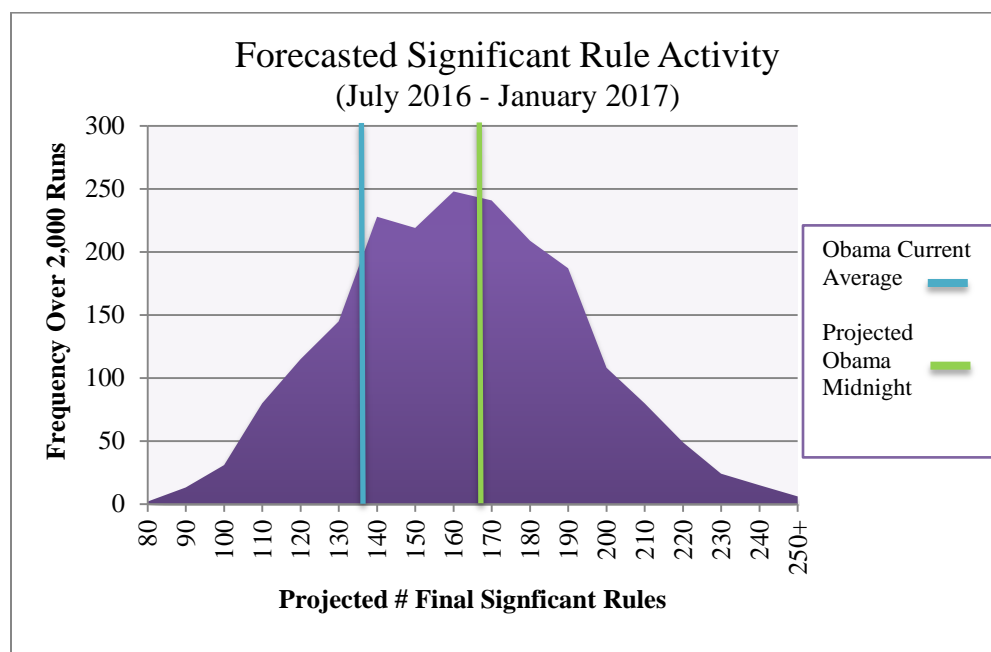
⁴⁸ E.g., 3,408 total final rules in 2015, 3,541 in 2014, and 3,659 in 2013. For reference, significant and economically significant rules constituted only 5.3% and 1.7%, respectively, of all final rules issued in 2015.

⁴⁹ We find this approach to be robust because it estimates total rule activity that essentially mirrors the current administration trends. This is in keeping with historical total rule activity during midnight periods.

2016 and January 2017, a 118% increase over Obama's current average rate of regulation. In over 70% of cases, the number of predicted rules exceeds the number issued during Bush 41's, Clinton's, and Bush 43's final seven months in office (50, 55, and 57, respectively).



This modeling approach suggests a higher rate of growth in economically significant rules than in significant rules. As seen in the below graph, the model forecasts a mean of 167 significant rules, far fewer than were issued during the final seven months of the Clinton and Bush administrations (238 and 242, respectively). However, this is no surprise: Obama has on average issued between 21% – 40% fewer significant rules per month than the previous two administrations. Because Obama's baseline is lower, so too is the probability that his administration will issue more significant midnight rules than his predecessors.



While Obama’s rulemaking pace will likely not exceed Clinton’s or Bush’s, in 85% of cases he is predicted to issue more significant rules during the next seven months than his current seven-month average of 136.

Sensitivity Analysis

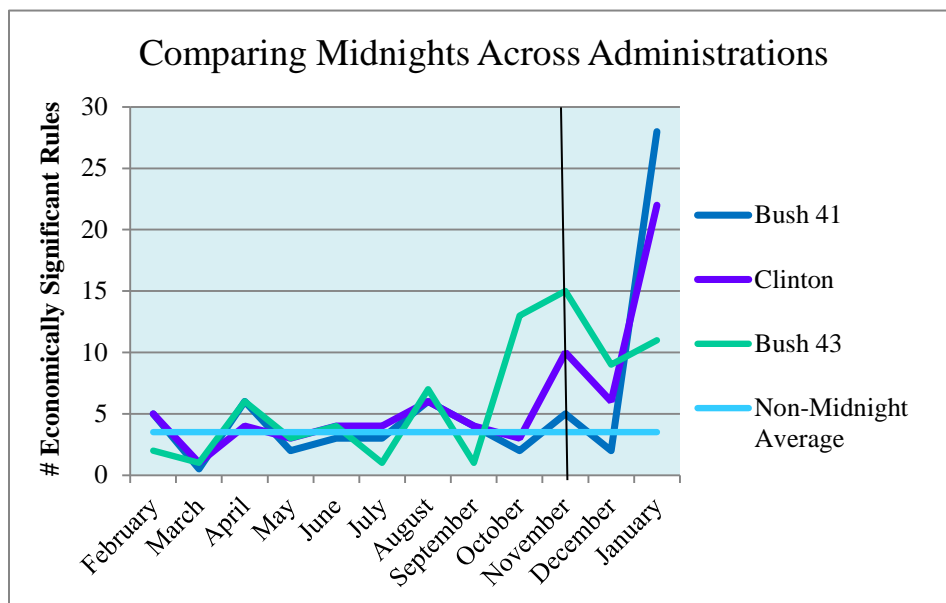
This analysis is sensitive to multiple parameters, including the type of regulation measured, the months of rulemaking classified as midnight in the projections, and the scope of the sample used to draw cases. For sensitivity purposes, we compare results under different scenarios of each parameter to identify which factors have the greatest impact on forecasts of regulatory activity.

Alternate Midnight Periods

In order to draw on a larger sample of observations, this model’s base case scenario uses data from July through January of previous midnight periods to predict regulatory outcomes for July 2016 through January 2017. The midnight period is typically defined much more narrowly, beginning instead during the fall of an election year. While this definition of midnight is more traditional (and perhaps more relevant because it focuses on activity completed after election results are known), it does not necessarily represent the final-year regulatory patterns of past administrations.

An end-of-term regulatory surge has occurred in different time periods for different presidencies. For example, President Clinton’s and President’s George H.W. Bush’s primary midnight activity was concentrated in the very final months of their administration. Perhaps to avoid that final-quarter surge, President George W. Bush took action that served to spread an increase in

regulatory activity across several months of his final year in office.⁵⁰ These differences in final-year regulatory patterns, as measured by the number of final economically significant rules published, are illustrated in the below graph.



One cause of this difference in midnight activity was issuance of the May 2008 “Bolten memo” by Chief of Staff Joshua Bolten, which instructed agencies that final rules to be published by the end of the Bush administration must be proposed no later than June 1, 2008, and finalized no later than November 1, 2008.⁵¹ In the Obama administration, OIRA Administrator Howard Shelanski issued a similar memo on January 17, 2016 instructing agencies to adhere to the timelines for their rules established in the fall 2015 Unified Agenda.⁵²

The pattern of final-year regulatory activity may also be influenced by the Congressional Review Act of 1996, which established expedited procedures by which Congress could overturn a regulation. Since, under the CRA, regulations issued in the last few months are potentially subject to disapproval by the new Congress (and beyond the reach of the outgoing president’s veto authority) recent outgoing administrations have greater incentives to complete regulatory priorities before their final quarter.⁵³

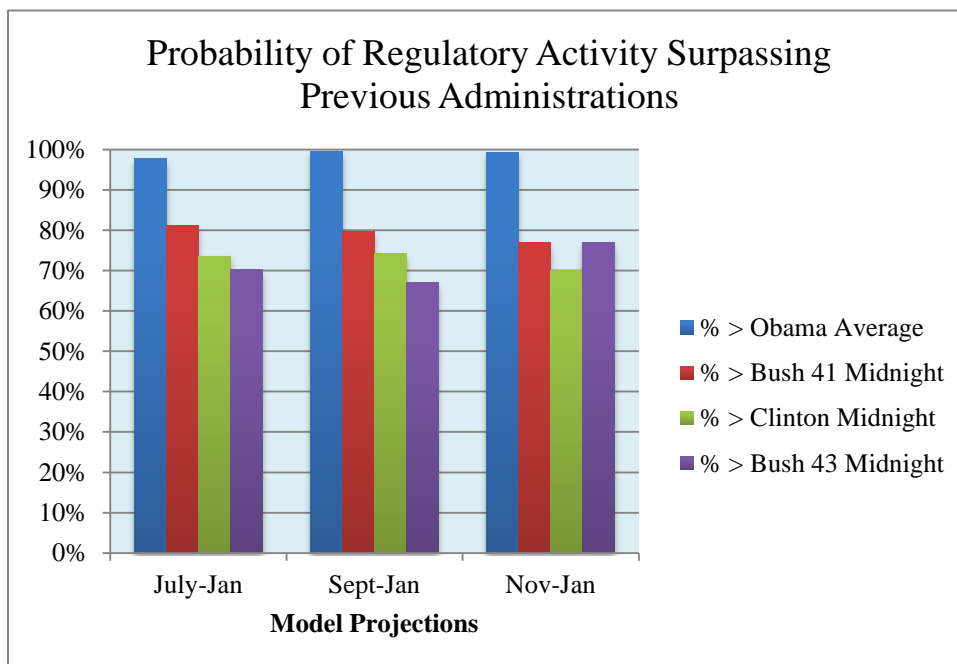
⁵⁰ Susan Dudley. “Regulatory Activity in the Bush Administration at the Stroke of Midnight,” *Engage*, Vol. 12, Issue 2, Summer 2009. http://www.fed-soc.org/library/doclib/20090720_DudleyEngage102.pdf

⁵¹ Joshua B. Bolten, Chief of Staff. “Memorandum for the Heads of Executive Departments and Agencies: Issuance of Agency Regulations at the End of the Administration.” May 9, 2008.

⁵² Howard Shelanski, Administrator, Office of Information and Regulatory Affairs. “Memorandum for Deputy Secretaries: Regulatory Review at the End of the Administration.” December 17, 2015. https://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf

⁵³ Christopher M. Davis & Richard S. Beth. “Agency Final Rules Submitted After May 16, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act.” *Congressional Research Service*. February 4, 2016.

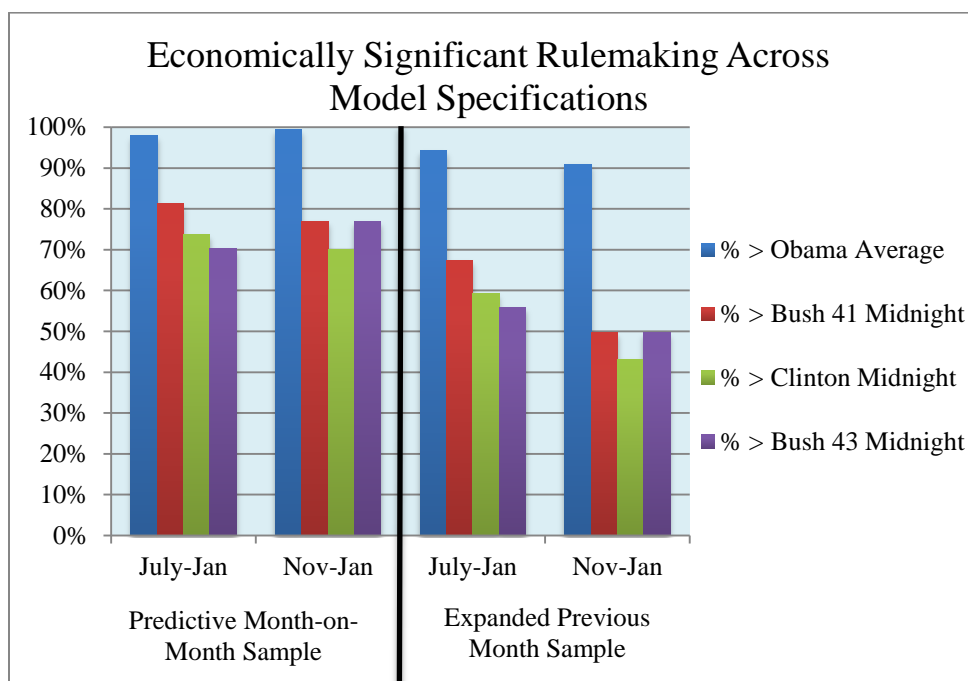
It is unclear whether regulatory activity in President Obama's final year in office will be more similar to the patterns established by Bush 41 and Clinton or that of Bush 43. For that reason, this model also forecasts regulatory outcomes for September 2016 through January 2017 and November 2016 through January 2017. The below chart compares the probability across models that the Obama midnight will exceed Obama's current rulemaking average and rates of regulation during previous midnight periods.



Each model finds strong probability that the Obama midnight will include higher rates of rulemaking than during the rest of the Obama administration. Likelihood that an Obama midnight will also surpass the Bush 41 midnight is also strong across models, between 75 – 81% likelihood. While a forecasted Obama midnight is also likely to surpass both the Clinton and Bush 43 midnights in all models, it does so at lower rates (between 68 – 75%) depending on the time periods considered.

Alternate Sampling Periods

As discussed above, this model uses two samples from which to draw midnight observations: one sample that is limited only to the months being projected, and another which also draws from the previous two months (e.g. data from July – January is pulled to predict rulemaking in September – January). Using an extended sample period to forecast regulatory activity under different definitions of midnight has the advantage of offering more data points, but may be a less accurate predictor of future activity (since, for example, it includes regulatory output in July to predict output in December). With this approach, Obama's midnight is extremely likely to exceed his current rate of rulemaking in all scenarios, but his midnight is less likely to surpass previous administrations'. The model outputs are compared and contrasted in the figure below.



Conclusion: Economically Significant Regulation to Increase Substantially

Across all models, there is a strong likelihood—greater than 97%—that Obama will issue more economically significant rules during his final months in office than he has during similar periods earlier in his administration. Our models find that this administration's output of economically significant rules will increase by over 100% over the next seven months, or by over 200% between November 2016 and January 2017. Our model anticipates that agencies will finalize approximately 12 economically significant rules per month between September 2016 and January 2017, an increase more than 150% from Obama's current rulemaking average. He is also likely to issue more economically significant rules during the midnight period (regardless of which definition we use) than his predecessors have.

On the other hand, while Obama is also very likely to increase his significant rulemaking activity during these periods, his rate of significant rules will not likely surpass previous administrations'. Our model anticipates that agencies will finalize approximately 30 significant rules per month between November 2016 and January 2017, an increase more than 50% from Obama's current rulemaking average for similar timespans.

CONCLUSION

The end of a president's term provides interesting insights into how political factors influence rulemaking activity, specifically the issuance of economically significant rules (those with estimated annual impacts of \$100 million or more). As we find earlier in this report, it also presents a key opportunity to test whether an agency's structure affects regulatory activity during presidential transitions.

The final months of an outgoing presidential administration typically generate a significant volume of regulatory activity. This increased regulatory activity during the "midnight" period has been documented as early as the Carter administration's transition to Reagan,⁵⁴ and has accompanied every presidential transition since, regardless of political party.

Several causal mechanisms are likely responsible for the observed increase in regulatory activity during midnight months. The President is running out of time and Congress is a lame duck in the wake of a presidential election. As a result, the administration relies on unilateral action that only requires cooperation from other members of the executive branch, such as issuing regulations, to propagate its policy priorities.⁵⁵

There are a number of consequences from this rush to regulate, not the least of which is constraining the policy options available to the incoming elected president. For example, rules issued during the latter half of an election year tend to have poorer quality analysis,⁵⁶ suggesting that agencies may have spent less time carefully thinking through the consequences of their rules before publishing them. Because of the compressed timeframe, midnight regulations may also suffer from insufficient public participation in the rulemaking process, as the public may not have time to submit comments and agencies may not have time to incorporate valuable feedback. An increase in economically significant rules from executive regulatory agencies during

⁵⁴ Susan Dudley. "Reversing Midnight Regulations." *Regulation* Vol. 24, No. 1 (Spring 2001) available at: <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/dudley.pdf>

⁵⁵ William G Howell & Kenneth R Mayer "The Last One Hundred Days." *Presidential Studies Quarterly*. Vol 35, Issue 3 (September 2005).

⁵⁶ Jerry Ellig. "Midnight Regulation: Decisions in the Dark?" *Mercatus Center at George Mason University*. August 28, 2012. <http://mercatus.org/publication/midnight-regulation-decisions-dark>

midnight could also result in less time for review by the Office of Information and Regulatory Affairs (OIRA), which could also lead to rules of lesser quality. In sum, midnight rules

Findings: Economically Significant Rules to Surge during Midnight

This report uses two robust quantitative methods to predict the number of regulations that regulatory agencies will issue during the final months of President Obama’s administration: a regression model that examines both executive and independent agency rulemaking, and a probabilistic model that forecasts the number of economically significant rules to be finalized. Both models find that rulemaking increases significantly during the midnight period for executive branch agencies and predict a surge in economically significant regulation during President Obama’s midnight period. However, Pérez finds that independent agencies⁵⁷ do not experience a similar increase in rulemaking during this period.

Using a regression model, Pérez finds that there is indeed an increase in regulatory activity surrounding the midnight period. Specifically, he estimates that during the post-election midnight quarter (November through January) executive agencies issue an additional eight economically significant rules⁵⁸ per month, which would increase rulemaking to a monthly average of 12 economically significant rules per month. Miller reinforces the direction of these findings using a predictive model that focuses on executive branch agencies and several definitions of midnight (the last seven, five, and three months). Running the model over 2,000 simulations, she estimates a total of 12 economically significant rules per month issued between September and January.

Miller’s model, which draws on rates of rulemaking during previous administrations’ midnight periods to predict rulemaking for the duration of the Obama administration, suggests a substantial increase in economically significant rulemaking during the next seven months. Overall, Miller’s analysis suggests that there is a greater than 97% probability that economically significant rulemaking will increase between July 2016 and January 2017, and a greater than 99% probability that economically significant rulemaking will increase between November 2016 and January 2017. On average, Miller’s model suggests that agencies will increase the issuance of economically significant rules by over 150% between September 2016 and January 2017.

These results corroborate findings of prior studies of regulatory activity during the midnight period. However, the forecast increase in published regulations may be limited to executive branch agencies; Pérez finds that independent regulatory agencies appear to be relatively

⁵⁷ In the U.S., most regulatory agencies are part of the executive branch, such as the Department of Health and Human Services, the Occupational Safety and Health Administration within the Department of Labor, and the Environmental Protection Agency. Others are “independent” regulatory agencies; these are often multi-member commissions, such as the Federal Communications Commission or the Securities and Exchange Commission.

⁵⁸ Economically significant rules are those expected to have an annual effect on the economy of \$100 million or more.

unaffected by presidential transitions. These findings contribute to the literature on independent agencies, and suggest that elements of their institutional design, including the fact that they are headed by commissioners whose tenure is not tied to the president's, may lead to different incentives and behavior than those faced by executive agencies.

Traditional Tools for Revisiting Midnight Regulations

Given that this uptick in regulatory activity represents the policy priorities of an outgoing presidential administration, what can a newly sworn-in president and congress do to gain control over the regulatory agenda? As former OIRA Administrator, Susan Dudley, has noted elsewhere,⁵⁹ the next president, congress, and the courts have several options for dealing with last minute regulations from the outgoing president that do not align with their priorities. Presidents of both parties have used these tools to deal with their predecessors' midnight rules.

The Next President's Options

While the next president cannot simply overturn a final regulation without going through the full notice-and-comment rulemaking procedure, presidents can stop regulations that are not yet published, delay the effective date of published-but-not-yet-effective regulations, and use enforcement discretion to modify the impact on citizens of regulations that are already in effect. Depending on how vigorously the new administration defends litigation over controversial regulations, it can influence court decisions which may lead to regulations being overturned or remanded for reconsideration. If congress chooses to use its authority under the Congressional Review Act (CRA) to disapprove a midnight regulation, the next president can support or veto that resolution.⁶⁰

According to Dudley, the next president has two primary options for stopping the flow of new rules when he or she is in office: 1) preventing regulations from being submitted to the Federal Register until they first are approved by the new administration, and 2) withdrawing not-yet-published regulations from the Federal Register.⁶¹ While the latter tool has been used by many past presidents, a pending rule governing the Federal Register may restrict the ability of a president to pull back unpublished regulations from the Federal Register;⁶² ironically this rule,

⁵⁹ Susan E. Dudley. "Regulatory Reboot: Options for Revisiting Midnight Regulations." *The George Washington University Regulatory Studies Center*. February 23, 2016.

<https://regulatorystudies.columbian.gwu.edu/regulatory-reboot-options-revisiting-midnight-regulations>

⁶⁰ Susan E. Dudley. "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future." 65 *Case Western Reserve Law Review*. 2015.

⁶¹ Susan E. Dudley. "Regulatory Reboot: Options for Revisiting Midnight Regulations." *The George Washington University Regulatory Studies Center*. February 23, 2016.

<https://regulatorystudies.columbian.gwu.edu/regulatory-reboot-options-revisiting-midnight-regulations>

⁶² The Administrative Committee of the Federal Register issued a proposed rule in October 2014 (RIN 3095-AB84) that may limit an incoming administration's ability to pull back regulations that have been sent to the Federal

which restricts presidents' ability to pull back midnight regulations, may itself be published as a midnight rule.

Other tactics include extending the effective dates of controversial regulations to buy time for a new administration to consider its legal options. More direct actions, such as revising or withdrawing already-issued final regulations, are procedurally difficult and extremely time consuming as they require the rulemaking process to begin again from scratch. Doing so would require:

seeking public comment on alternative approaches, developing an administrative record, and issuing a final rule based on that record. This would take at least a year and probably longer. Then, the rule would most certainly be the subject of litigation, with plaintiffs being able to point to the previous record to question the merits of the revised rule.⁶³

The next administration can also determine how vigorously it chooses to defend a predecessor's regulations in court, where controversial rules—such as the Clean Power Plan rule⁶⁴ and the Waters of the U.S. rule—will likely be litigated.

Congress' Options for Midnight Regulation

Tools for addressing midnight rules are not limited to the Executive branch; Congress also has the ability to alter implementation and enforcement of these rules. Two primary options for reversing midnight rules are the Congressional Review Act (CRA) and the appropriations process.⁶⁵

The CRA grants Congress the ability to issue a “joint resolution of disapproval” on a final rule within 60 session days of when it was issued. While the current Congress has sent many joint resolutions of disapproval to President Obama, he has unsurprisingly not been willing to sign them and reverse his own administration's regulatory priorities. The promise of a new president in 2017 provides Congress with a new opportunity to use the CRA to disapprove a rule—a power

Register but not yet published; this rule had not been finalized as of the publication of this report. Specifically, as currently worded, §18.13 would limit agency withdrawals and modifications of documents from the Federal Register to instances meant “to address an emergency or to prevent a violation of law.”

<https://www.gpo.gov/fdsys/pkg/FR-2014-10-28/pdf/2014-25520.pdf#page=1>

⁶³ Susan E. Dudley. “Regulatory Reboot: Options for Revisiting Midnight Regulations.” *The George Washington University Regulatory Studies Center*. February 23, 2016.

<https://regulatorystudies.columbian.gwu.edu/regulatory-reboot-options-revisiting-midnight-regulations>

⁶⁴ “The fate of the Obama administration's signature climate change rule is in the hands of the courts.” *E&E Publishing LLC*. http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal

⁶⁵ Susan E. Dudley. “Regulatory Reboot: Options for Revisiting Midnight Regulations.” *The George Washington University Regulatory Studies Center*. February 23, 2016.

<https://regulatorystudies.columbian.gwu.edu/regulatory-reboot-options-revisiting-midnight-regulations>

which has only once been used successfully. Though it has not been used successfully since 2001, the CRA is a powerful tool for the legislative branch. After disapproval, agencies are prohibited by statute from issuing a substantially similar rule.

Via the appropriations process, Congress can also direct agencies to alter enforcement of past presidents' regulatory priorities. However, it is worth noting that to underestimate the durability of midnight regulations would be to ignore the empirical record. Scholars find that the vast majority of rules persist even in the face of scrutiny by incoming administrations.⁶⁶ In many cases newly-elected presidents, in particular, find that they "cannot alter orders set by their predecessors without paying a considerable political price...or confronting serious legal obstacles."⁶⁷ As a result, it is particularly important for observers and participants to keep an eye on the impending midnight regulatory activity forecasted in this report.

⁶⁶ Jason M. Loring & Liam R. Roth. "Empirical Study: After Midnight: The Durability of the 'Midnight' Regulations Passed by the Two Previous Outgoing Administrations." 40 *Wake Forest Law Review* (Winter 2005)

⁶⁷ William G. Howell & Kenneth R. Mayer. "The Last One Hundred Days." *Presidential Studies Quarterly*. Vol 35, Issue 3 (September 2005).