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Midnight Deregulation

Jack M. Beermann*

Presidential transitions are exciting and perilous. How the President-elect will make the transition from candidate to Chief Executive of the most powerful country on Earth is unknown and essentially unknowable until it happens. Even under ordinary circumstances the transition is an emotional time, with the new President's supporters hopeful and excited and the defeated candidate's supporters disappointed and anxious. For many reasons, these emotions were magnified in 2009 when Barack Obama assumed the presidency. On the one hand, the outpouring of emotion at the inauguration of the nation's first African-American President made this the most eagerly anticipated transition since the election of John F. Kennedy. On the other hand, perhaps fueled by extreme rhetoric during the campaign that questioned Obama's patriotism and status as an American citizen, Barack Obama's skeptics appeared more anxious over his ascendancy than the opposition had been to any President in living memory.

The focus of the transition is forward looking—what does the future have in store for this President and for the country that elected this President? Unfortunately, in recent decades, the new President's ability to propel the country into the future has been hindered by what has become a well known phenomenon, midnight regulation.¹ Rather than facilitate a smooth transition, outgoing administrations have attempted to push their,

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¹ For a general analysis of the midnight regulation phenomenon, see Jack M. Beermann, Presidential Power in Transitions, 83 Boston University Law Review 947 (2003).

oft repudiated, agendas into the future, leaving messes of various shapes and sizes for their successors to clean up.

The midnight regulation phenomenon has received a great deal of scholarly and popular attention, most notably after President Bill Clinton eclipsed President Jimmy Carter's record for the greatest increase in regulatory volume at the end of the term.² Consider midnight regulation in normative terms, focusing on the attitude officials take during periods of transition. Imagine you are the leader of an organization facing the end of your term in office. It could be a large corporation, a large non-profit organization, a small, local community service organization, whatever. What posture should you take toward the transition? Should you pave the way for your successor to have a smooth transition, for example by resolving some thorny issues and tying up loose ends or should you consider only your own interests and if that makes things difficult for your successor, so be it? In my view, the answer to these questions should be obvious, and it is only the inability to put politics aside for even a brief period around the transition that prevents outgoing presidents from doing right by the country rather than by their political party or personal ambitions.

The transition from George W. Bush to Barack Obama introduced a new wrinkle into the midnight regulation phenomenon: A great deal of the late term activity of the Bush

² The most widely noted quantification of the volume of midnight regulation is Jay Cochran, "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters," (working paper, Mercatus Center at George Mason University, 2001). See also Midnight regulations and the Cinderella effect, Veronique de Rugy & Antony Davies, *J. Socio-economics* (2009); Susan E. Dudley, *Midnight Regulations at All-Time High - Intellectual Ammunition*; WILLIAM G. HOWELL & KENNETH R. MAYER, *The Last One Hundred Days*, *Presidential Studies Quarterly* 35 no3 S 2005 533-53

administration is best characterized as “midnight deregulation” because, rather than impose new regulatory burdens, it loosened them. The open scholarly question is whether midnight deregulation raises issues different from or in addition to those raised by midnight regulation. The answer to this question turns in large part on whether the law and politics underlying deregulation differ in any relevant way from the politics underlying regulation.

My intuition is that the Bush administration waited until late in the second term to take so much deregulatory action because the opposition would have been great at any earlier time and because the campaign of Republican presidential nominee John McCain might have been negatively affected. This is consistent with one hypothesis underlying the midnight regulation phenomenon, namely that presidents wait until late in the term to take potentially unpopular action when the political consequences are reduced.³

However, there is a competing equally logical hypothesis, that at the end of the term, the President is free to rise above ordinary politics and take action that is in the public interest but which politics prevents in ordinary times when the administration is more concerned with accountability. Because these two hypotheses are each inherently plausible, a qualitative analysis and perhaps some speculation is required to offer an opinion on which better explains federal regulatory events in 2008-2009.

This article looks at midnight deregulation through the lens of the midnight regulation problem and asks whether the general understanding of midnight regulation should be adjusted to account for midnight deregulation. Part I describes the midnight regulation

³ See Beermann, *Presidential Power in Transitions*, supra note 3.

problem generally and the actions that administrations have taken to deal with the prior administration's midnight regulations. Part II is the analysis of the Bush administration's midnight regulatory action and a more general discussion of the midnight deregulation problem. Part III is the conclusion.

I. Midnight Regulation Mechanics

The midnight regulation phenomenon has become a familiar landmark on the presidential transition landscape. The volume of regulatory activity increases near the end of an outgoing President's term, especially when the incoming President is from the other political party. There are several reasons for the midnight regulation phenomenon, some of which are relatively benign and some that raise questions of the propriety of the action. The most benign reason for the increased volume of late term regulatory activity is the natural human tendency to work to deadline. Often, regulatory actions that have been pending for a long time, even several years, finally are finished right at the end of the President's term before a new administration, with different policies or priorities, takes office. There is nothing like a firm deadline to inspire action.

As the transition approaches, the incumbent administration may hurry not only to finish work that is well underway but may also try to do as much as possible to project its policy agenda into the future. If the outgoing administration knows or suspects that the new administration will have different views in important policy areas, the outgoing administration may initiate and complete regulatory action late in the term out of a

conviction that its policies are superior to those of the incoming administration or to strengthen the outgoing group's future political chances. Projecting a repudiated policy agenda into the future seems less legitimate than simple hurrying to meet a deadline, because it frustrates the electorate's desire to change directions. However, continued and unending political competition creates an irresistible temptation for outgoing administrations to do whatever they can to further the agenda until the very last.

Another familiar reason for midnight regulation is what I have called "waiting." An outgoing administration may wait until late in the term to take action for political reasons. Waiting can lead to action just before the election to maximize an anticipated positive political impact or to action after the election that is anticipated to be unpopular and thus might harm the incumbent's party in the election. Waiting until just before the election seems problematic for two reasons, first because it is an abuse of the incumbency to time regulatory action to influence election results and second because, assuming earlier action would have been better for public policy, waiting to maximize positive political impacts represents placing personal political ambition ahead of the public interest.

At first blush, waiting until after the election may appear to be unambiguously problematic. We want our political leaders to be responsive to the popular will and not to time action to avoid the political consequences. From this perspective, the ability of an outgoing administration to take significant action during the transitional period is an unfortunate defect in our constitutional structure. That's not to say that the lame duck period should be eliminated. In addition to needing time to accomplish the mechanics of

the presidential transition, the disputed 2000 election illustrates that the process of counting the votes and certifying the winner takes time. Although the best design of a democratic process for changing leaders may include a lame duck period, midnight regulation may be an unfortunate side effect of a generally superior system for selecting leaders.

Although the negative first impression of waiting until after the election to take regulatory action is compelling, there may be circumstances when waiting is desirable or is at least a positive side effect of the constitutional structure that creates the lame duck period. The influence of interest groups and other powerful political forces in our governmental system is often bemoaned as the reason why so much regulatory action seems counterproductive from a pure policy standpoint. During the transition period, an outgoing President is freed from immediate political concerns and may feel free to take action that may be good for the public but harmful to interest groups with disproportionate influence over the government.⁴ A lame duck President can rise above everyday politics and take public-regarding action. The lame duck's successor may benefit if the outgoing President clears the waters of political minefields and lingering problems, paving the way for a smooth transition and for the new President to hit the ground running.

⁴ Term limits can have a similar effect. Presidents in their second term may be somewhat less beholden to interest groups since they don't have to worry about reelection. For a study of the effects of term limits on the behavior of governors, see Timothy Besley & Anne Case, Does Electoral Accountability Affect Economic Policy Choice? Evidence from Gubernatorial Term Limits, 110 *Quarterly Journal of Economics* 769 (1995).

It does not seem possible to predict theoretically which tendency actually dominates during the transition period. Rather, it appears to be an empirical question that can be resolved only by examining each particular late term action. One source of possible clues to whether late term action was taken in the public interest is the reaction of the incoming administration to that action. If one takes acceptance of late term action by the incoming administration as an indication of either its consistency with the public interest or at least an indication that it is not the product of projecting a repudiated agenda into the future, then it would be helpful to look whether midnight regulation tends to be rejected or revised by the incoming administration. This is not a perfect measure because there are many reasons other than pure agreement for why an incoming administration might accept its predecessor's midnight regulation.⁵ Although complete data are not available, the data that are available can help us get a sense of the degree to which midnight regulation is inconsistent with the preferences of the incoming administration.

Before getting to the data, it is necessary to take a step back and examine the general approach administrations take when confronted with the late term actions of their predecessors. Incoming administrations dating back to Ronald Reagan have taken very similar approaches at the outset of their administrations to the problem of midnight regulation.⁶ They have tended to take the following steps upon taking office: 1. They have instructed all agencies to stop issuing rules until they are reviewed and approved by

⁵ The administration may have different priorities, it might not want to expend its political capital on reversing controversial regulations or it might have a long term or comprehensive plan for new regulations in an area under which the prior administration's midnight action would endure for some time after the transition.

⁶ See Christopher Carlberg, Essay, Early to Bed for Federal Regulations: A New Attempt to Avoid "Midnight Regulations" and its effect on Political Accountability, 77 Geo. Wash. L. Rev. 992, 995-96 (2009) (detailing actions by incoming Presidents since Ronald Reagan).

an official appointed by the incoming President. This has amounted to a regulatory freeze because it takes some time for appointments to be made and for new appointees to conduct the reviews. 2. They have instructed the Office of Federal Register not to publish any new regulations issued by the prior. This results in the regulations being subjected to review by the new administration. 3. They have instructed agencies to review regulations issued by the prior administration but not yet in effect, and to delay the effective date of any such regulations if necessary to complete the review.⁷

Although the procedures put in place by the incoming administrations have been pretty uniform, the results of this action have varied. In a study of the actions of Presidents Bill Clinton and George W. Bush, the authors found that President Clinton amended or repealed a much higher percentage of the prior administration's midnight regulations than did President George W. Bush.⁸ This can signify a number of differences between the two transitions. It may simply mean that Presidents Bush⁹ and Clinton differed in their views on the importance of reexamining the past as opposed to embarking on the future. It may mean that more of the George H.W. Bush administration's midnight regulations were the product of "waiting" until after the election to avoid political consequences while those of the Clinton administration were simply the product of hurrying to finish work that had been delayed during the administration's eight years. It may mean that the political differences between the George H.W. Bush and Clinton administrations were

⁷ For discussion of steps incoming administrations can take against midnight regulation, see Jack M. Beermann, *supra* note x at x, Jack M. Beermann, *Combating Midnight Regulation*, 103 Nw. U. L. Rev. Colloquy 352 (2009); Nina Mendelson, *Quick off the Mark? In Favor of Empowering the President-Elect*, 103 Nw. U. L. Rev. Colloquy 464 (2009).

⁸ Empirical Study, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 Wake Forest Law Review 1441 (2005).

⁹ For simplicity, the administration of George W. Bush is referred in this article as the "Bush administration." The administration of his father is referred to as the administration of G.H.W. Bush.

greater than the differences between the Clinton and Bush administrations so that Bush was more likely to leave the Clinton-era regulations in place. This explanation is consistent with the fact that when Bush reopened Clinton midnight regulations, it was very controversial, which is consistent with an administration with a relatively weak mandate for change.

In light of the dubious political desirability of midnight regulatory action and the apparent institutionalization of the practice, it is not surprising that a pattern of reaction by incoming administrations to midnight regulation has developed. It is a shame that administrations cannot resist the temptation to engage in the practice even after experiencing first hand the burdens midnight regulation imposes at a time when the new administration should be able to act on its electoral mandate as reflected in its regulatory agenda. The political gains from midnight regulation to the party of the outgoing administration must be so great that even the Bush administration, which had taken a principled stand against midnight regulation, felt compelled to engage in the practice.

The Bush administration was the first to take a stand against midnight regulation.

President Bush's Chief of Staff Josh Bolten issued a memorandum that ordered all agencies to publish proposed regulations by June 1, 2008, and to finalize regulations by November 1, 2008, unless extraordinary circumstances warranted later promulgation..

This decision was probably born of the Bush administration's experience with the Clinton administration's record-setting volume of midnight regulation. Whether the motive behind the memorandum was to take a stand against midnight regulation or to simply

immunize the Bush administration's late term actions from reversal by the next administration,¹⁰ the effect would have been the same—the volume of midnight regulation would have been substantially reduced and the new administration would have been relieved of the necessity of sifting through mountains of paper to ensure that its agenda was not being subverted by midnight regulation.

Alas, things did not turn out the way they had been planned. Bush-era agencies did not meet the June 1-November 1 deadlines, and regulatory action was taken right up to the moment of transition to the Obama administration. OMB Watch characterized as controversial 27 regulations that were published in the period between October and December 2008 and were published as final rules as late as January 21, 2009, the day after President Obama took office.¹¹ It was also reported that there was a substantial spike in significant regulations in the last quarter of the Bush administration.¹² Bush's midnight regulations are subject to the same analytical framework that has been applied to the midnight activity of prior administrations. However, there is a twist to this regulatory activity that merits separate scrutiny. While the Bush administration's late term action included the imposition of regulatory burdens, a substantial portion of the

¹⁰ For an argument that the Bolten memo was designed to immunize the administration's midnight actions from reversal, see Christopher Carlberg, *supra* note x. This raises a definitional question: are actions taken before the November election properly called "midnight regulation?" There are arguments both ways. On the one hand, if an administration completes its work before the election of its successor, then it has not used the lame duck period to avoid the political consequences of its actions and it has not loaded last minute work on its successor. On the other hand, if the volume of regulatory activity increases substantially just before the earlier deadline and if new proposals are rushed through during this period, then it seems like midnight regulation with the clocks turned back a few hours.

¹¹ OMB Watch, *Turning Back the Clock: The Obama Administration and the Legacy of Bush-era Midnight Regulations*, http://www.ombwatch.org/files/regs/PDFs/turning_back_the_clock.pdf.

¹² See Veronique de Rugy, *Bush's Midnight Regulations: The 43rd president may set yet another dubious record*, Reason Magazine, Feb. 2009, <http://reason.com/archives/2009/01/14/bushs-midnight-regulations> ("George W. Bush is set to out-regulate even his father, with a projected 70 significant rules during his midnight period.")

midnight regulatory activity of the Bush administration was deregulatory, easing preexisting regulatory burdens or enforcing statutory standards leniently.¹³

The primary question explored in the remainder of this article is whether midnight deregulation is different from midnight regulation. Is there reason to believe that the politics of midnight deregulation are different from the politics of midnight regulation?

II. The Politics of (Midnight) Deregulation

Although no comparative study is available as of this writing, it appears that the volume of Bush midnight regulation was fairly high. One report stated that as of Nov. 12, 2008, there were “up to 90 proposed regulations” that might be finalized before the administration left office.¹⁴ The report noted that the goal was to finalize them by November 22, 2008, sixty days before the Obama administration took office. Sixty days is key because under the Congressional Review Act, significant regulations become final no sooner than sixty days after they are published in the Federal Register. Once the November 22 deadline was missed, December 19, 2008, became another key date because under the Administrative Procedure Act, rules may not go into effect less than 30

¹³ Some of the Bush-era midnight regulations were indisputably deregulatory in that they removed or eased preexisting regulatory burdens or paved the way for privatization. Others might be characterized as deregulatory because they provoked charges that the regulated industries got off easy in the regulatory process. Some Bush-era midnight regulations imposed new, increased regulatory burdens on groups such as labor unions, women seeking reproductive services including abortion and charities suspected of raising money for terrorist activities.

¹⁴ The midnight deregulation express: In his last days in power, George W. Bush wants to change some rules, by Matthew Blake 11/12/08, <http://washingtonindependent.com/17813/11-hour-regulations>

days after they are issued,¹⁵ and that date was the last weekday more than 30 days before President Obama took office.

The Bush-era midnight regulations appear to suffer from all the defects with midnight regulation that have been previously identified. They left the Obama administration with a high volume of last minute regulatory activity to sift through, which can be a distraction for a new administration trying to take the reins of government. The new administration was also put in the uncomfortable position of having to expend political capital cleaning up the mess that it might have better used on pursuing its own agenda. Many of the midnight regulations had been rushed through the regulatory process much faster than usual, raising the spectre of ill-considered regulations that had not gone through the normal vetting process. Finally, the Bush midnight regulations, as should be expected, reflected the political agenda of the outgoing administration, which the electorate had arguably rejected in the November election.

As noted, the midnight regulations issued by the Bush administration can be sorted into three categories. The first category involves the imposition of new regulatory burdens in areas in which it would be expected based on the policy views of the administration. For example, on January 21, 2009, the Department of Labor published a rule increasing annual reporting requirements for small labor unions and on December 19, 2008, the Department of Health and Human Services issued a rule requiring health care providers to certify, on penalty of losing federal funds, that they will allow their employees to withhold services

¹⁵ 5 U.S.C. s. 552(d).

based on the employees' religious or moral beliefs. These rules increased regulatory burdens on the regulated parties.

These may be good rules, but their timing should raise suspicions—if they are such good ideas, why did the administration wait until its last month in office to issue them? This question is especially relevant with regard to these rules because they involve reporting to government agencies. By issuing these rules, the two departments are basically saying that we operated under an inadequate regulatory regime for eight years and we happened to get around to fixing it just as we are about to transfer power to a new regime that might not share our view that the preexisting regulations were inadequate. The Obama administration took steps to reverse both rules, and the labor union reporting requirement was successfully withdrawn based on substantive disagreements with the Bush rule.¹⁶

Comments were accepted on a proposal to withdraw the health care rule, but although the comment period ended in April 2009, it has apparently not yet been acted upon.¹⁷

The second category of Bush-era midnight regulations includes rules that imposed regulatory burdens but were attacked as too lenient. A prime example is a rule issued on January 15, 2009, by the Department of Agriculture imposing revised country-of-origin labeling rules.¹⁸ Although this rule may have imposed new regulatory burdens, it is best understood as a deregulatory action. The rule was a statutorily required element of

¹⁶ [Federal Register: October 13, 2009 (Volume 74, Number 196)]
[Rules and Regulations]
[Page 52401-52413]

¹⁷ Federal Register: March 10, 2009 (Volume 74, Number 45)]
[Proposed Rules]
[Page 10207-10211]

¹⁸ [Federal Register: January 15, 2009 (Volume 74, Number 10)]
[Rules and Regulations]
[Page 2657-2707]

enforcing a 2008 statute that increased country-of-origin reporting requirements. The statute imposed a September, 2008, deadline for new rules, which the administration met with interim rules imposed on August 1, 2008. The final rules were attacked as allowing exemptions for a high percentage of pork, frozen vegetables, nuts, fruit salads and salad mixes.¹⁹ When Congress requires an agency to adopt regulations and the agency adopts lenient rules, the agency's action is best understood as deregulatory in spirit when measured against congressional intent in favor of more stringent regulation.

The third category of Bush midnight rules includes several controversial rules that are indisputably deregulatory. Prime examples are two rules adopted by the Environmental Protection Agency, emissions measuring provisions adopted on January 15, 2009,²⁰ and hazardous waste burning rules adopted on December 19, 2008.²¹ Both of these rules were very controversial and were viewed by some as potentially harmful to the environment. Both eased pre-existing environmental regulations and are classic examples of waiting until after the November election to issue rules that might have had political consequences for the election. Environmental issues were important to the 2008 election, and there was no apparent reason why these rules could not have been issued before the election, given that they had been proposed in 2006 and 2007, respectively.

¹⁹ See Statement of Wenonah Hauter, Executive Director of Food and Water Watch, July 28, 2009, <http://www.foodandwaterwatch.org/food/foodsafety/equivalency-testimony.pdf>.

²⁰ [Federal Register: January 15, 2009 (Volume 74, Number 10)]
[Rules and Regulations]

[Page 2376-2383]. This rule was proposed in 2006.

²¹ [Federal Register: December 19, 2008 (Volume 73, Number 245)]
[Rules and Regulations]

[Page 77953-78017] This rule was proposed in September, 2007. 72
FR 33284 (June 15, 2007)

They were not driven by new legislative developments and they were not delayed by any external force such as an appropriations rider.

These and several additional examples of Bush-era midnight deregulation²² raise the question of whether midnight deregulation is special. Is midnight deregulation more likely to reflect waiting to avoid political consequences, less likely to reflect such waiting or basically the same as midnight regulation generally in this regard? While this question may be impossible to answer definitively, it may be possible to form an impression of the phenomenon of deregulation during the midnight period.

Consider the politics of deregulation outside the midnight period. The politics of deregulation are indeterminate. In some circumstances, deregulation can result from a rebellion against protectionist regulation that raises prices and reduces quality and variety by suppressing competition. In the 1970s, for example, Stephen Breyer, then a staffer for Massachusetts Senator Edward Kennedy, advocated for airline and trucking deregulation and Senator Kennedy took up the cause.²³ The politics of deregulation at that time aligned established regulated industries against the general public as consumers and potential competitors who would benefit from deregulation. Greater competition and price deregulation would reduce prices and increase consumer choice. In this situation,

²² Examples include: Exemption of reporting for federal contractors, 12/19/08; Privatization of Public Toll Roads, 12/19/08; Certification for the Employment of H-2B Aliens, 12/19/08; Revisions to H-2A Guest Worker program, 12/18/08; Air Pollution Reporting from Farms, 12/19/08; Endangered Species Consultation, 12/16/08; Mountaintop Mining, 12/12/08; Gun Safety in National Parks, 12/10/08; Vertical Tandem Lifts, 12/10/08; Emergency Land Withdrawals, 12/5/08; Rerouting Hazmat Rail Shipments, 11/26/08; Rail Transportation Security, 11/26/09; Runoff from Factory Farms, 11/26/09; Truck Driver Hours of Service, 11/09/08; Family and Medical Leave, 11/17/08; Definition of Solid Waste, 10/30/08. This list is drawn from the OMB Watch report "Turning Back the Clock," supra note x.

²³ See Martha Dethick & Paul J. Quirk, *The Politics of Deregulation* (1985).

continuing regulation would have involved bowing to powerful and narrow special interests that enjoyed significant benefits at the expense of the general public, which is the least desirable situation for regulation. The deregulation movement of the 1970s was a reform in favor of broad interests against narrow opposition.

The deregulatory movement of the 1970s may to some seem aberrant, reflecting a unique set of circumstances. Those who are generally supportive of environmental and health and safety regulation, for example, may suspect that most instances of deregulation reflect the triumph of narrow special interests over the general public good.

Environmental regulation imposes costs on industry for the benefit of people who benefit from clean air, water and soil—in other words, everyone. The wide dispersion of benefits and the concentration of costs means that such regulation is unlikely to occur in the first place, and when it does, there will be constant pressure from regulated industry for reform and repeal.

The problem with this analysis is that it is always possible that the initial regulation was not in the public interest but rather reflected narrow powerful interests such as regulatory entrepreneurs and businesses seeking to raise the costs of their competitors. The realities of national politics may make any government action impossible without some powerful interest pushing behind the scenes even if regulation on its face appears to be motivated by the public interest. Even if regulators are well-intentioned, they are so likely to make mistakes or be forced by political realities to settle for regulation that is worse than the

status quo. This leads some regulatory skeptics to adopt a libertarian position, being convinced that regulation always ends up benefiting the few at the expense of the many.

The indeterminacy of the politics of deregulation makes generalizing concerning midnight deregulation impossible. Despite the uncertainty, it seems safe to say that some of the Bush-era midnight deregulation suffers from the worst tendencies of midnight regulation and that those tendencies may be exacerbated in the case of deregulation. Agencies waited until after the November election because they feared the political consequences if they had acted earlier. The public may have viewed action such as easing restrictions on burning hazardous wastes and deregulating runoff from factory farms into waterways as benefitting narrow interests at the expense of the health and welfare of the general public. Had these actions and others like them been in the public interest, it is unclear why the administration waited until after the election to reveal them.

The differences between the deregulatory movement of the 1970s and the midnight deregulation of 2008-09 also support the possibility that the Bush-era action was not an instance of rising above politics to take public-regarding action that could not be accomplished in ordinary times. These actions may have been motivated by intense lobbying by regulated industries who wanted out from under what they viewed as excessive regulation. Reports are that there was constant zealous lobbying for deregulation during the Bush administration. The opponents of deregulation appear to have been general public interest advocates rather than representatives of regulated industries pushing to maintain the regulatory status quo against a public-spirited

deregulatory movement. When regulated parties are anxious to be relieved of regulatory burdens, and a narrow constituency for change in favor of the general public interest is absent, deregulation during the midnight period seems more likely to reflect narrow interests than the broad public interest.

A look at a few of the deregulatory actions taken during the midnight period of 2008-09 illustrates that these do not look like the sort of public interested deregulatory actions that we would want an outgoing President to take. For example, on December 16, 2008, the Fish and Wildlife Service (Department of Commerce) and the National Oceanic and Atmospheric Administration (Department of the Interior) published a final rule implementing the Endangered Species Act (ESA) that allowed federal officials to approve some projects without, as had been previously required, consulting government habitat managers and biological experts.²⁴ This rule also provided that in cases in which consultation over species protection is required, global warming cannot be a consideration. What public interest could possibly support excluding global warming from consideration in the protection of species?

The ESA consultation rule discussed above was the product of a rushed regulatory process and there was no apparent need to change preexisting consultation requirements that required quick, end of term, action. The rule was proposed on August 15, 2008, which means that the entire rulemaking process took four months, a relatively short period for rulemaking. It was so controversial that the initial 30 day comment period was

²⁴ [Federal Register: December 16, 2008 (Volume 73, Number 242)]
[Rules and Regulations]
[Page 76272-76287]

extended and ultimately 235,000 comments were received by the end of the comment period in mid-October. One of the primary arguments made against the proposal was that the preexisting regulations that had been in effect for more than 20 years were working fine and there was no need for change. Other commentators complained that the process was rushed with inadequate time for analysis and comment. This rule appears to be a paradigm case of midnight deregulation.

The most damning element of the ESA consultation rulemaking is inherent in the type of rule involved. The ESA consultation rule does not regulate conduct in the private sector. Rather, it addresses only internal government operations. The outgoing Bush administration operated for eight years less 34 days under the broader 1986 consultation requirements. Suddenly, in its last few months in office, it found it necessary to change an internal government procedure that would be implemented only by its successors. It would seem especially appropriate to leave internal government operations to the next administration once it is so late in the administration that the change would not affect operations in the outgoing administration.²⁵ Given that this change was inconsistent with the general political views of the incoming administration and the Democratic Congress, it is no surprise that Congress legislatively allowed the agencies to withdraw this rule

²⁵ The Bush administration apparently considered a major change in OSHA risk assessment procedures in the waning days of its administration, after apparently completing “only one major health rule for a chemical in the workplace, and it did so under a court order.” Carol D. Leonnig, U.S. Rushes to Change Workplace Toxin Rules, *Washington Post*, Wednesday, July 23, 2008. This proposal surfaced in July, 2008, after the administration’s own June deadline for new regulatory proposals. As a procedural change that would be applied, if at all, to the Bush administration’s successor, it raises the same sort of questions as the ESA consultation rule, namely if the procedural change was so important to accomplish in the final months of the administration, why wasn’t it worth doing in the previous seven plus years?

without going through normal notice and comment procedures²⁶ and that the administration did so shortly thereafter.²⁷

Another example of Bush midnight deregulation is a rule promulgated by the Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, exempting certain categories of farms from reporting airborne emissions of hazardous substances from animal waste.²⁸ This rule was proposed on December 28, 2007, and was published as final nearly a year later on December 18, 2008, with an effective date of January 20, 2009, the day that President Obama was inaugurated. The Wall Street Journal reported that agribusiness lobbied hard for this change, arguing that existing reporting requirements imposed unnecessary burdens.²⁹ The subject matter of this rule, emergency reporting of the release of air hazardous pollutants from animal waste, is a small element of a substantial controversy over emissions from animal wastes. Farm animals generally, and cows, in particular, emit significant amounts of methane which is a greenhouse gas, and efforts to monitor and regulate these emissions have provoked substantial political fighting.³⁰ In a related matter, the House of Representatives voted to bar the EPA from monitoring greenhouse

²⁶ Pub. L. 111-8. Section 429(a)(1) and (2) of the 2009 Omnibus Appropriations Act

²⁷ [Federal Register: May 4, 2009 (Volume 74, Number 84)]
[Rules and Regulations] [Page 20421-20423] The State of California had previously filed suit to overturn the rule. See Samantha Young, California Sues Bush to Block Midnight Deregulation of Endangered-Species Rules, Associated Press Posted: 12/30/2008 12:36:49 PM PST

²⁸ Federal Register: December 18, 2008 (Volume 73, Number 244)]
[Rules and Regulations]
[Page 76948-76960]

²⁹ See Stephen Power, EPA Exempts Factory Farms From Emissions Reporting Rule, WSJ December 12, 2008 <http://online.wsj.com/article/SB122911925393902761.html>.

³⁰ See Mike Markarian, A Free Pass for Factory Farms?, http://hsIf.typepad.com/political_animal/2009/10/free-pass-for-factory-farms.html, October 28, 2009 (reporting House vote to include provision in appropriations legislation that would prevent the EPA from monitoring greenhouse gas emissions from farms).

gas emissions from farms. OMB Watch reports that environmental groups have filed suit to block the effectiveness of this rule.³¹

This animal waste pollution reporting rule appears to be another example of waiting to take politically sensitive action for the wrong reason, i.e., to avoid political heat for something that is not in the public interest. The timing of the rule's adoption, and the effective date of Inauguration Day strongly support this impression. However, it is not as clear cut a case as the ESA consultation rule for a variety of reasons. First, the regulatory process was not so rushed this time. The proposal was exposed to the light of day for nearly a year before the election, allowing plenty of time for the proposal to be relevant in the November election. By contrast, when a rule is proposed after or shortly before the November election, it seems more likely that the process was timed to avoid accountability. Second, the House vote on the subject shows that there is substantial political support for lenient regulation of farm animal waste emissions. The constituency behind this rule may not be as narrow as some midnight rules. Third, the agency's explanation for the change makes sense, that the reason for reporting emissions under this rule is to allow for emergency responses, and such responses are never forthcoming in notifications regarding farm animal emissions. Finally, the fact that the Obama administration has not reversed the rule indicates that the rule may not be all bad.

Despite the impossibility of determining whether midnight deregulation is generally less desirable than midnight regulation, a look at some of the Clinton administration's midnight actions might help get a handle on the differences. Few if any of the midnight

³¹ OMB Watch, Turning Back the Clock, supra note x.

regulations promulgated by the Clinton administration were deregulatory. Two of the most widely known Clinton-era midnight regulations were OSHA's ergonomics rule, which contained wide-ranging provisions concerning repetitive stress workplace injuries and an EPA rule regarding arsenic levels in drinking water. The Ergonomics Rule does not fit the paradigm very well because OSHA had been working on the issue even before President Clinton took office, and the final rulemaking was delayed by appropriations riders until the last year of the Clinton presidency. After a veto threat resulted in an OSHA appropriation free of the rider, OSHA proposed a rule on November 23, 1999 and a final rule on November 14, 2000, just after the election of George W. Bush. This rule was very controversial for imposing potentially massive costs on business, and the final rule ultimately was rejected by Congress under the Congressional Review Act, the only time a rule has been rejected under that Act.³²

The Arsenic in Drinking Water rule is a more classic example of midnight regulation, although it too has a wrinkle in that action on arsenic in drinking water was legislatively compelled. In 1996, Congress directed the EPA to propose an arsenic standard in early 2000 and finalize before by January 1, 2001. Despite four years notice that it had to act, EPA did not propose a rule until June 2000, and the rule it promulgated was not actually published in the Federal Register until January 22, 2001, after George W. Bush had been President for two days. Acting under directives from the President, the EPA Administrator suspended the effectiveness of the rule, but after an extended delay, when

³² Rejection by Congress was facilitated by the fact that the rule was promulgated late enough in the Clinton administration that President Bush was in office by the time Congress's resolution rejecting the rule was presented to the President. President Bush signed it, while President Clinton, had he still be in office, might have vetoed it.

further study supported the necessity of the rule, it was allowed to go into effect as written.

There was at least one example of midnight deregulation in the Clinton-era as well, in the abortion area. In the first week of his presidency, President Clinton order the Department of Health and Human Services (HHS) to suspend what had been known as the abortion gag rule and promulgate a substitute, presumably one that would be more permissive. The subject of the abortion gag rule is funding for family planning clinics. Federal law prohibits federally funded clinics from using abortion as a “method of family planning.” The interpretation of this prohibition, which by law must be announced via legislative rulemaking, has wavered from permissive in Democratic administrations to restrictive in Republican administration. HHS under President Clinton operated without a regulation in effect between February 3, 2003, and July 3, 2000, when a permissive regulation, similar to the rule that governed during the Carter administration, was put in place. This regulation would govern HHS funding decisions for the last six months of the Clinton administration and then Clinton’s successor. This is also not a classic midnight regulation because it was adopted months before the November election, perhaps timed to attempt to influence the election but certainly to be applied (or revised) mainly by President Clinton’s successor.

President Clinton’s rule on abortion funding presents a prime example of undesirable waiting to promulgate midnight (de)regulation. Like President Bush’s rule on ESA consultation, it governed internal government processes and owing to its timing, it would

mainly bind the administration's successors. Also like the ESA consultation rule, there was no apparent reason why the rule could not have been issued earlier in the administration. In the abortion case, the agency essentially operated illegally for more than seven years with no guidelines for determining whether federally funded clinics were acting within permissible bounds related to abortion. The two examples also have another element in common—they may have been designed in part to force the incoming administration to expend political capital to reverse them. This raises one of the most nefarious aspects of midnight regulation, that it distracts incoming administrations from their forward-looking agendas and forces them to spend time, energy, and political capital cleaning up the leftovers. This may be good politics but it is unlikely to be good government.

More generally, these examples suggest that midnight deregulation is more likely than midnight regulation to reflect favors to special interests that would not be palatable absent timing that reduced the political consequences. The passage of broad, public-interest oriented programs such as environmental regulation and consumer protection is often difficult to explain given public choice predictions that narrow interests are likely to dominate politically. Programs with widely dispersed benefits and concentrated costs are the least likely to be adopted because the beneficiaries are at an economic disadvantage in lobbying. They come about from public interest that is so intense that the general population is able to overcome barriers to organizing and push regulation over the objections of organized narrow interests. When such programs are attacked during the midnight period, deregulation is likely to reflect the narrow interests that were defeated in

the public-regarding initial regulatory push. This is how the Bush midnight deregulation was portrayed by some, although it is not certain that the portrayal is accurate. Conversely, when an administration increases regulatory burdens after the election, this may be an instance of taking advantage of the opportunity to rise above normal politics and act in the public interest when the administration is more likely to be able to ignore interest group naysayers.

There are obvious challenges to my argument that midnight deregulation is more likely to be contrary to the public interest than midnight regulation. Critics would dispute the premise that regulation is often in the public interest. They would argue that behind every apparently public-interested instance of regulation is a narrow interest that is the primary beneficiary. Doesn't it make proponents of health care reform nervous when the American Medical Association endorses the plan? Fred McChesney argued that FTC regulation of the funeral industry benefitted competitors who offered cremation and other less expensive funeral options.³³ Because he found dubious public interest support for the FTC funeral rules, his study strongly suggests that the influence of competitors of traditional funeral providers combined with misguided public concern resulted in unwise regulation. His hypothesis was that "the Rule exists to improve the position of specialized cremators and other sellers not subject to the Rule[.]"³⁴

³³ Fred McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 J. L. & Pol. 1, 66-71 (1990). State regulation of the funeral industry is also portrayed as likely to be contrary to the public interest in David E. Harrington & Kathy J. Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J. L. & Econ. 199 (2002). The authors conclude that state regulation of the funeral business increases costs and allows traditional funeral homes to steer clients toward more expensive services.

³⁴ McChesney at 67.

Accepting the argument that behind every supposedly publicly-oriented regulatory program is a private, narrow beneficiary likely to have secretly financed the lobbying campaign necessary to establish the program would lead inexorably to an extreme libertarian position under which all regulation is suspect and the only good regulatory action is complete deregulation.³⁵ The only acceptable reason for federal government regulatory action would be to protect the public from unwise state law, although it is theoretically difficult to explain why the federal system, in light of public choice problems, would be able to produce better regulatory decisions than the states.³⁶ This analysis circles back to the indeterminacy of midnight regulation in the first place. In line with the pessimistic public choice model, midnight deregulation would be more likely to reflect the public interest than midnight regulation, and the midnight period would be a welcome escape from the political pressures that lead to unwise regulation. Under a neutral model, the contrary appears more plausible, that midnight deregulation is more likely to reflect the triumph of narrow interests than midnight regulation. This may be a

³⁵ See Cynthia R. Farina, Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor, 28 Fla. St. U. L. Rev. 109, 111 (2000) This view cannot be true, i.e. it cannot be true that regulation is never in the public interest. For a detailed account of how industry defends itself against regulation, see David Michaels, *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health* (2008). In thinking, for example, about the current controversy over global warming recall that companies like DuPont fought tooth and nail against regulation of the substances scientists claimed had caused ozone depletion in the upper atmosphere. The skeptics did whatever they could to cast doubt on the scientific basis for concern over ozone depletion and they also predicted dire economic consequences of the proposed ban on the substances that were allegedly behind the problem. See Jeffrey Masters, *The Skeptics vs. the Ozone Hole*, http://www.wunderground.com/education/ozone_skeptics.asp. The fight against ozone depletion is now regarded as a success, although it is unclear whether the ozone hole is actually shrinking and whether factors other than chemicals, such as weather patterns, may contribute to the size of the hole. See *Ozone Layer - An Environmental Regulation Success Story*, http://www.scientificblogging.com/news_articles/ozone_layer_environmental_regulation_success_story (reporting on research indicating that atmospheric ozone levels have increased over the last 14 years at a rate of 1% per decade); *Ozone hole in 2008 is larger than last year*, http://www.thaindian.com/newsportal/india-news/ozone-hole-in-2008-is-larger-than-last-year_100104758.html;

³⁶ This is why I am suspicious of advocates of federal regulatory preemption of state tort law. The advocates of preemption find public choice problems with regulation except when it matches their one of their policy preferences, such as a distaste for products liability litigation.

case in which beauty is in the eye of the beholder, and people with different views on the general wisdom of regulation will have irreconcilably different views on the desirability of midnight deregulation.

III. Conclusion

Midnight regulation has become a common element of presidential transitions in the United States. The volume of deregulatory activity at the end of the presidency of George W. Bush raised the question whether midnight deregulation should be understood differently from midnight regulation generally or whether it is simply a manifestation of the same general tendency to work to deadline and wait to take unpopular action until after the presidential election. While it is impossible to answer this question definitively, it appears that when an administration waits until the midnight period to take deregulatory action, it is more likely to be contrary to the public interest than when an administration waits to increase regulatory burdens. There are many reasons to be skeptical of midnight regulation, and the ability of an outgoing administration to slip deregulation beneath the political radar adds to the reasons why reform aimed at midnight regulation may be in order.