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Presidential Power in Transitions

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ARTICLES

PRESIDENTIAL POWER IN TRANSITIONS

JACK M. BEERMANN

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INTRODUCTION

The transition between presidencies has long created controversies. Whether the issue is "midnight judges" or "midnight regulations," presidential action at the end of a term has long provoked scrutiny and criticism. Presidents have also raised eyebrows at the beginning of their terms by asserting their authority in an attempt to undo what their predecessor in office left behind. More than one president has taken action aimed specifically at "midnight regulations," such as ordering a freeze on the issuance of new regulations, a review of regulations issued at the end of the prior administration, or other similar action.

Although the old President formally retains all the powers of the presidency until the new President is inaugurated, an increased pace of regulatory action late in the term may appear unseemly. In fact, one might expect that once an election has taken place and a new President has been elected, especially if that President is of a different party, the incumbent President should not order significant regulatory actions that the new President or his newly appointed officials are likely to oppose. The new administration should not be forced to spend its first several months in office digging out from under a large pile of activity that occurred immediately before the transition.

The longstanding controversy over presidential power in transitions was reignited by the transition between the administrations of Presidents William Clinton and George W. Bush. Besides charges of vandalism to and theft of government property, such as the removal of the letter "W" from government-owned keyboards,\(^1\) there were more serious charges that President Clinton and his administration took actions in the waning days of his presidency in an effort to extend his influence beyond the limits of his term. In its last three months, the Clinton administration published more than 26,000 pages in the Federal Register, beating the previous record of more than 24,000 pages held by the departing Carter administration in 1980-1981.\(^2\) Although the Clinton

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\(^1\) Immediately after President George W. Bush took office, there were reports of extensive vandalism to executive branch offices, including the removal of the "W" key from some computer keyboards. See Aides Cite Some Vandalism, AP ONLINE, Jan. 26, 2001. These claims were denied by Clinton administration employees, and although the claim stayed alive for some time, no more than a few isolated incidents were substantiated, with the exception of minor pranks that reportedly are traditional when the new President is of the other party. See Judy Keen, Ex-Clinton Staffers on Vandalism, Got Proof?, USA TODAY, June 4, 2001, at 7A.

\(^2\) Accounts of the number of Federal Register pages in President Clinton's last quarter range from a high of 26,542, to a low of 25,605. See Congressional Review Act: Hearing Before the House Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, Comm. on Gov't Reform, 107th Cong. (March 27, 2001) (testimony of Dr. Wendy L. Gramm, Distinguished Senior Fellow Director, Regulatory Studies Program, Mercatus Center, George Mason University), available at 2001 WL 2006447 (testifying that there were over
administration may be particularly notable for the sheer volume of its end-of-term activity, it is by no means unique. The increase in regulatory activity at the end of presidential terms has been well-documented going back to at least 1948.3

More qualitatively, it appears that important regulatory matters were finally resolved as the end of the Clinton administration approached. Regulations that had been under review for years, going back as far as the first week of the Clinton administration, were finally issued in the months before President Bush took office.4 In addition to agencies issuing regulations, President Clinton, in the waning days of his presidency, personally took a number of actions in areas that are statutorily or constitutionally delegated to the discretion of the President. He designated many new national monuments and expanded the boundaries of several others. He also granted a number of pardons, at least one of which prompted an investigation into influence peddling.5

President George W. Bush responded in several ways to the activity at the end of the Clinton administration. Most significantly, President Bush’s Chief of Staff issued a memorandum directing agencies to delay the effective dates of recently published rules, not to issue any new regulations, and to withdraw finalized but not yet published regulations from the Federal Register. This action effectively delayed their issuance, since publication in the Federal Register is the required last step before regulations become effective.6 The


3 Cochran, supra note 2, at 3.

4 For example, a revision of the gag rule, which regulates whether federally funded family planning clinics may discuss abortion with their clients, was proposed in the first year of the Clinton administration and was issued in the last year of the administration. See The Title X “Gag Rule”, 58 Fed. Reg. 7455 (Feb. 5, 1993) (suspending the gag rule); see also Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 65 Fed. Reg. 41,270 (July 3, 2000) (to be codified at 42 C.F.R. pt. 59) (adopting final rules concerning the revocation of the gag rule).

5 See, e.g., Susan Milligan, Inauguration Day; Reluctantly, a President Lets Go, BOSTON GLOBE, Jan. 21, 2001, at A1 (describing President Clinton’s actions in the last days of his presidency, including the events of his last day).

6 See Memorandum for Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) [hereinafter Card Memorandum]; see also infra note 127 (providing the text of the memorandum). According to one commentator, after this memorandum was issued, agencies “withdrew 124 regulations from the [Office of the
Office of Management and Budget ("OMB") engaged in a review of late-term Clinton administration rules, and in some cases, Bush administration officials suspended the effectiveness of rules in order to conduct reviews.7

The friction that occurs at the transition point between two administrations raises a number of interesting issues regarding presidential power and administrative law generally. Is the flurry of activity at the end of an administration legally suspect? I do not ask merely whether the impending change of administrations places a formal bar against administrative action, but also whether actions at the end of an administration may be more vulnerable to attack on judicial review or to revision by the incoming administration. Focusing on the activities of the incoming administration, does the President have the power to take actions like those taken by President Bush in 2001, such as delaying the effective date of issued regulations or withdrawing regulations from the Federal Register before they are published? As a general matter, should presidential or administrative action be judged (legally or politically) more harshly, or possibly more leniently, because it occurs at the point of transition?

When assessing the legality of presidential or administrative action in periods of transition, it is necessary to look first at the reasons why presidential and administrative action tends to increase at the term's end. The reasons for the phenomenon may influence views both on the propriety of late-term action and on the new administration's power to deal with the effects of such action. Looking principally at actions taken during the waning days of the Clinton administration, it appears that most "midnight regulation" falls into one of three rough categories, which I term "hurrying," "delay," and "waiting." "Hurrying" results from the normal tendency to work right up until a deadline—the end is approaching and what once seemed like plenty of time is


7 For example, at the beginning of the Bush administration, the Environmental Protection Agency ("EPA") suspended a rule on arsenic in drinking water, but later lifted the suspension after a review revealed that the rule had a sound policy basis. See National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 16,134 (Mar. 23, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) (temporarily delaying for sixty days the rule promulgated by the EPA to lower current arsenic standard in water from 50 parts per billion (ppb) to 10 ppb); accord National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 20,580 (Apr. 23, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142); cf. National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 28,342 (May 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) (announcing the administration's decision to leave the compliance date for the new arsenic standard unchanged).
now reduced; the administration must “hurry” to finish its work. Sometimes hurrying is a result of a desire to do more at the end of the term, cramming in as much work as possible to extend the administration’s influence beyond its temporal limit. By “delay,” I mean delay due to external forces, for example where Congress legislatively prohibits particular agency action for a time or where legislative authorization for agency action occurs late in the President’s term. Finally, by “waiting,” I mean a deliberate decision to wait until very late in the term to finalize action. For example, the outgoing administration may “wait” until after the November election to finalize action so that the President or the candidate of his party to succeed him (or party members seeking election to Congress) will not suffer adverse political consequences that might flow from a controversial action.

In addition to purely legal questions, the problem of “midnight regulations” raises interesting normative questions concerning what constitutes appropriate behavior for an outgoing President and administration. There are arguments, based both on principle and on consequences, that in some circumstances “midnight regulations” are problematic. The arguments of principle are somewhat difficult to grasp, but in essence, the question is whether the outgoing leadership of a country—especially where the voters have selected a different political party—should work for an easy, productive transition or instead should work to advance its own agenda and interests until the very last moment of power. Arguments based on consequences focus on the waste of time and effort that occurs when the new administration must dig itself out from under the remains of the outgoing administration, especially when the outgoing administration knows that this is inevitable.

The same late-term administrative actions can raise concerns on both fronts. Sometimes a prior administration’s actions appear to be designed merely to tie the hands of the next administration, for example by imposing rules very late in a term that will place procedural burdens on future administrative action. Rules imposed very late in the President’s term appear to be aimed primarily at the next administration. Other late-term action may entail a significant outlay of government resources without hope of actually coming to fruition in government policy, as when an administration initiates a long-term regulatory process at the very end of a term even though it is clear that the incoming administration has a different view on the matter involved.

Some late-term action appears designed merely to embarrass the incoming administration. The outgoing administration may impose rules in a politically charged area, such as abortion or the environment, that it knows the incoming administration will dismantle. The timing suggests that there was no hope that the rules would actually be implemented, but rather were passed in an attempt to embarrass the new administration by forcing it to revise or repeal the rules. With regard to many late-term actions, especially procedural constraints on the President or administrative agencies, one must question why such constraints were not necessary during the outgoing administration’s term, but suddenly became essential at a time when they would constrain only the incoming
administration. Absent a reasonable explanation, the likely conclusion is that the actions were designed solely to tie the hands of the successor and may not be at all necessary.

The flurry of administrative activity at the end of a term may thus be seen as an abuse of presidential power and contrary to social welfare. People should be able to trust the President to behave with honor and good judgment at the end of the term. This includes an expectation that the President will not sabotage or resist the inevitable change of administrations by trying to extend the administration’s influence beyond the end of its term. Presidents should refrain from taking major policy initiatives late in their terms, especially when the incoming administration is sure to take a different view and is able to reverse the action. Further, administrations should not take action just to make the transition more difficult, for example, by flooding the Federal Register with rules and other documents in the administration’s final days that surely will be reexamined by the incoming administration.\(^8\)

Conversely, there are reasonable arguments supporting the notion that such end-of-term actions are not undesirable. Beginning with the premise that the President retains all of the presidential powers until the transition actually occurs, late-term presidential and administrative action may be desirable both as a matter of principle and practicality. As a matter of principle, the actions of an aggressive outgoing administration are within the powers recognized under the Constitution and are part of this country’s political process. The outgoing administration’s actions may be legitimate attempts to enhance the outgoing party’s political power and advance its performance in subsequent elections. Efforts to embarrass or hamstring the incoming administration are all part of the political process and are perfectly acceptable as a matter of principle. Simply put, the outgoing administration should be free to advance its political agenda until the end of its term.

Aggressive late-term action may also be desirable from a more pragmatic standpoint. A lame-duck President and administration may be freed from interest group pressure and thus be able to advance social welfare without concern for the political consequences. Late in the President’s term, and especially during the period between the end-of-term election and the inauguration of a new President, the President’s need for ongoing interest group support may be reduced so that the President can act with a much greater

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8 Commentators have previously recognized the problems with this sort of activity near the end of a president’s term, but they (as I) have found it difficult to articulate exactly what is wrong with the late term increase in activity. Professor Nina Mendelson characterizes it as “unseemly,” “suggest[ing] an unsatisfied craving for power,” as possibly “generat[ing] a broader cynicism about those in power” and, when conducted by an agency, as “antidemocratic.” Nina A. Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives, 78 N.Y.U. L. REV. 557, 564-67 (2003). Professor Mendelson observes, however, that the effects of what she calls “burrowing” are not so simple and fuller analysis is necessary to appreciate fully the costs and benefits of various forms of burrowing. See id. at 567.
focus on the overall public interest. Further, the incoming President has adequate recourse for anything the outgoing President might do, and Congress might also subject late-term action to effective oversight. It is thus unclear whether “midnight regulation” is really cause for serious concern. However, even if “midnight regulations” present little, if any, normative concern, questions remain concerning how and why they happen, and the ways in which they are dealt with by incoming Presidents. It is these questions with which this article is primarily concerned.

This article proceeds as follows. Part I describes actions that a President might take in the waning days of an administration. Part II describes the reactions that late-term actions might provoke from the incoming administration. Both of these parts draw predominantly on examples from the transition between Presidents Bill Clinton and George W. Bush. Part III discusses possible reforms to help incoming administrations deal with “midnight regulation,” and determines that, while reforms aimed at both outgoing and incoming administrations are possible, reforms aimed primarily at enhancing the ability of incoming administrations to handle “midnight regulations” are likely to be more desirable. This part also includes a more general discussion of presidential involvement in the administrative process. Part IV concludes that “midnight regulations” are likely here to stay, but if the phenomenon is viewed as problematic, reforms are possible.

I. ACTIONS BY OUTGOING PRESIDENTS AND ADMINISTRATIONS: “MIDNIGHT REGULATION”?

In this Part, I explain and analyze the end-of-term action Presidents take that may excite controversy. I will use examples drawn principally from the transition between the Bill Clinton and George W. Bush presidencies, because it is the most recent, and a great deal of information about it is readily available. The analysis includes a discussion of why a President might wait until the end of a term to take certain actions, and whether existing constraints hinder the President from taking action at the end of a term. In the next Part, I examine actions taken by incoming Presidents, using many examples from the early days of George W. Bush’s presidency. There, I discuss the tools the new President can employ to dismantle the predecessor’s actions, and analyze the formal and informal constraints that hinder or prevent the new President from utilizing those tools.

As a general matter, it should be obvious that the incumbent President remains in office and retains all the powers of the presidency until the moment the new President is inaugurated, and that agency officials retain all the powers of their offices until they resign or are removed. As a formal matter, the President can take whatever actions the Constitution, treaties, statutes, rules and customs allow. It should be just as obvious, however, that when the

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9 The possibility of reform is based on the assumption that “midnight regulations” present a real problem.
President needs cooperation from Congress (or at least the Senate), the President often cannot, as a practical matter, exercise the full extent of his powers throughout the term, and the ability to act in some areas may be curtailed markedly as the end approaches. The most obvious example of this is the power to appoint federal judges and other federal officials with protected job tenure, such as commissioners with fixed terms. Appointments take time—backgrounds must be checked, support must be garnered, agency officials must be consulted. Even if all the executive branch work is complete, a minority in the Senate can prevent the confirmation of appointments made by an outgoing President. Only if the outgoing President's party has a filibuster-proof majority in the Senate is the President able to push through last minute appointments.

A. The Pace and Nature of Regulatory Action at the End of the President's Term

As noted above, research reveals that the pace of regulatory activity clearly increases as the end of a presidential term approaches. Measured simply by the number of pages published in the Federal Register, one study concluded that “one can expect an average increase in regulatory output of 27.4 percent” in the last three months of an administration, when compared with the same three month period in years in which there is no looming change of administrations. As the author of the study admits, the volume of Federal Register pages is a rather crude measurement of regulatory activity, but still, there is not much question that certain kinds of regulatory activity increase as the end draws near.

President Clinton's administration took several different sorts of actions that might be categorized as "end-of-term" actions. Federal agencies issued important rules right up to the very end of President Clinton's second term, including the ergonomics rules and revised rules on the obligations of federal contractors in the affirmative action area, both issued by the Department of Labor, the revision of the gag rule discussed above, issued by the Department

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10 STANDING RULES OF THE SENATE, S. DOC. NO. 106-1, R. XXII, at 21 (2000) (providing that debate shall be ended by a three-fifths majority vote). A minority in the Senate can prevent an appointment at any time, but the power of the minority at the end of the term may be amplified because the outgoing President may have little or nothing to offer the minority in exchange for cooperating in the confirmation process. Id.

11 See Mendelson, supra note 8, at 606-10 (discussing the tendency of outgoing administrations to shape the future of agencies by moving political appointees to civil service career positions and promoting loyal employees within civil service positions; these strategies avoid the necessity of Senate confirmation).

12 See Cochran, supra note 2, at 12.

13 Id. at 2 n.4 (listing several potential limitations in using the number of Federal Register pages as a proxy for end-of-term regulatory activity, but also explaining why the page count should function as an approximation of the total volume of regulations issued).
of Health and Human Services ("HHS") in the last year of President Clinton's second term after being under consideration for his entire presidency,\textsuperscript{14} and rules on arsenic in drinking water issued by the EPA in January 2001, just before President Bush took office.\textsuperscript{15} In addition to agency rules issued by various organs of the executive branch, President Clinton himself issued a number of executive orders and released proclamations creating new national monuments and expanding the boundaries of several existing national monuments.\textsuperscript{16} The President also issued many pardons and clemencies during the last several days of his administration. In one relatively unpublicized matter, in December 2000, the administration issued a waiver of conflict of interest rules to allow the Commissioner of Internal Revenue to participate in agency dealings with a company in which the Commissioner owned a substantial amount of stock.\textsuperscript{17}

B. The Reasons for Late-Term Regulatory Action: Hurrying, Delay, and Waiting

One of the most durable and significant steps an outgoing administration can take is to issue new agency rules near the end of a term. Why would there be an increase in the issuance of agency rules at the end of a term? The most obvious answer, and the one focused on by the authors of the Mercatus Institute study, is the Cinderella constraint: the end of the term deadline is approaching and it is time to finish.\textsuperscript{18} There is no question that a looming deadline is often an effective impetus to finish work, and here, because of its finality, the deadline is likely to be very effective. Regulators are often aware that they will not be able to act once the transition has occurred. No extensions are possible when the ability to issue the rule is tied to the occupant of the White House.

The focus on the Cinderella constraint is, however, incomplete, or at least

\begin{footnotesize}
\begin{enumerate}
\item See Milligan, supra note 5.
\item See John Berlau, IRS Boss Snagged Clinton Waiver, INSIGHT ON NEWS, May 7, 2001, available at http://www.insightmag.com/main.cfm?include=detail&storyid=213244 (last accessed Oct. 23, 2003) (detailing the Clinton administration's waiver of the conflict of interest rules, allowing IRS Commissioner Charles O. Rossotti to join in agency discussions and decisions relating to a company in which he owned a substantial interest). The waiver was not published when granted, but a law suit was subsequently brought to compel disclosure. See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (detailing Judicial Watch's attempt to gain access to, inter alia, information concerning Commissioner "Rossotti's receipt of a conflict-of-interest waiver").
\item See Cochran, supra note 2, at 4 (describing the "Cinderella constraint" as the rush of work done by the President, Cabinet officeers, and agency heads "to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight").
\end{enumerate}
\end{footnotesize}
too general to be helpful, because administrative and presidential action is pushed to the end of the President's term for various reasons. In general, there are three distinct phenomena that contribute to late-term administrative action, although it appears that often the phenomena combine to help explain the timing of a single action. I call the three hurrying, waiting, and delay. Hurrying means that an administration is rushing at the end of the term to accomplish more, hoping to project its substantive agenda as far into the future as possible. This is the purest version of the Cinderella constraint. Waiting refers to the tendency of the administration to wait until very late in the term for a specific reason, such as avoiding political consequences that might have been costly earlier in the term or taking action that the administration is happy to apply to a subsequent administration, but did not want to apply to itself. Delay means that the action was delayed by some external force, such as pressure or even a prohibition from Congress or because of a cumbersome procedure.

Administrative action, including the promulgation of rules, most likely increases at the end of the term due to a combination of these factors. In some instances, action is delayed against the administration’s wishes and needs to be finished in a hurry. In others, the push at the end of the term is simply an attempt to accomplish more in the allotted time or a desire to extend the administration’s influence beyond the end of a term. In still other cases, the push at the end of the term is the result of a decision to wait in order to avoid adverse political consequences or to aim administrative action at the next administration without affecting itself.

It may seem somewhat surprising that so much important regulatory activity does not occur until the end of the term. If something is important enough to trigger federal action, it is logical to think that the agency would want to complete the rulemaking process as quickly as possible. Consequently, one might think that a great deal of end-of-term activity must involve agencies acting as quickly as possible, and that the outgoing administration hurries at the end of the term to do even more than it had been doing throughout the years or is acting to overcome the consequences of delay by external forces. While the above factors certainly contribute to the end-of-term increase in regulatory activity, intentional waiting also appears to be an important contributing factor. The discussion that follows attempts to illustrate how the three phenomena contribute to the apparent end-of-term rush.

There are many potential explanations for the delay in completing the rulemaking process. Simple procrastination is surely one explanation. However, there are many other likely contributors. Stringent judicial review has made the rulemaking process more thorough and time consuming. The more of a record an agency perceives it needs to support a rule, and the more care necessary to avoid procedural defects, the longer the process will take. This will naturally push more rules toward the deadline. In general, less deferential judicial review tends to lengthen the rulemaking process, pushing it closer to the end of the administration.
Other factors also make significant contributions to delay. Executive orders
providing for centralized review require that proposed rules be submitted to
OMB in advance of promulgation to give OMB a period of time to review the
rules.\textsuperscript{19} It takes time to prepare a submission to OMB, including, in most
cases, a cost-benefit analysis and various other required elements. OMB is
allowed time to complete its review and it may reject part or all of a proposed
rule or prescribe revisions, requiring more time for the agency to respond to
OMB's concerns.\textsuperscript{20} An agency may also be required to prepare an
environmental impact statement or a report to comply with laws protecting
endangered species. These and other steps in the regulatory process tend to
increase the time needed to complete the rulemaking process, pushing more
rules further into the President's term.

The politics surrounding the rulemaking process may also contribute to the
tendency for rule promulgation to take longer. When agencies consider rules,
the process does not begin with the publication of a proposal and end with the
close of the comment period and a quick issuance of rules based on the record.
Rather, in advance of a rulemaking, the agency may consult with key members
of Congress and private interests to test the waters regarding possible
proposals. Rules frequently undergo several rounds of such consultation
before a proposal is actually published in the Federal Register. Congress
sometimes responds quite directly, enacting legislation against the proposed
rules. For example, the Clinton administration's ergonomics rules were
delayed by repeated appropriations riders prohibiting the Department of Labor
from using any of its funds to promulgate a rule on ergonomic injuries.\textsuperscript{21}

Political delay can affect rules even when notice and comment are
accomplished expeditiously. After the comment period closes, agency officials
may leak possible decisions, which provokes lobbying by interested persons.
This can lead to reconsideration of the rules, after which a new proposal is
generated and subsequently leaked, provoking another round of lobbying and
so on. This process can continue for a long time, until agency officials finally
determine that they have reached the optimal position in terms of maximum

executive order requiring all major regulations to be accompanied by a "regulatory impact
analysis" submitted to OMB to centralize the control of the regulatory process); see also
U. Chi. L. REV. 821, 824-30 (2003) (describing the origination of OMB's role in the
regulatory process); Richard H. Pildes & Cass R. Sunstein, \textit{Reinventing the Regulatory
democracy and the administrative state); Erik D. Olson, \textit{The Quiet Shift of Power: Office of
Management & Budget Supervision of Environmental Protection Agency Rulemaking Under
OMB oversight of agency rulemaking).

\textsuperscript{20} See sources cited supra note 19.

\textsuperscript{21} See, e.g., Department of Labor, Health and Human Services, Education, and Related
support for the rules, minimal opposition to the rules, and greatest public policy gain (if that is a relevant consideration). At that point, or at the end of the term if the deadline forces action, the agency issues its rules.

Politics may also explain why administrations choose to wait until the very end of the President’s term to take important administrative action. As the end of a term nears, the political costs of taking action may decrease, which may free an administration to take action that it could not have taken earlier in its term. As discussed above, an administration strives to optimize net political gains. Near the end of a term, political costs and benefits may be less important to the administration, including the President. An outgoing President is unlikely to seek elective office again and, as the term draws to an end, the President may have little need for political support and may no longer be worried about political opposition. An outgoing President may no longer need cooperation from Congress and thus may care much less if an administrative action provokes opposition.

It is difficult, in the abstract, to draw any conclusions on whether waiting to avoid political consequences is desirable or not. The fact that the President acts on important matters after the political consequences are lessened appears to be an affront to democracy. Still, public choice scholarship often laments the influence narrow interests have over government action, and an outgoing administration, free of the necessity of seeking reelection and concern about its ability to advance its entire program, might be able to rise above narrow interests and take action in its waning days that benefits the general public interest.

Action at the end of a term may sometimes be more important to agency officials than to the President. Although the President may have some concern over his opportunities after leaving office, the President is likely to be relatively secure with regard to his prospects after the end of the term when compared to other officials in the administration. The President might be worried about his place in history, and perhaps somewhat concerned with the prospects of his party, but agency officials are likely to have more immediate concerns regarding their employment prospects after the transition. Many non-career officials need to secure positions after the term, and the actions they take while in government service may affect their prospects. Action taken at or near the end of an administration may assist the search for employment in the industry their agency regulated. For officials who intend to remain in an agency after the transition, end-of-term action might be important to secure their position in the new administration, such as action involving a program they helped design or which they would be involved in implementing.

An administration may wait to take important action for other, even more suspect, reasons. There may be instances in which an administration waits to act because, while it is happy to tie the hands of the next administration, it does not want to operate under the rules adopted late in the term. Imagine, for example, an administration adopting strict conflict of interest rules covering administrative officials near the end of its term. It preferred not to operate
under the restrictive rules, but it finds it appropriate to impose those rules on its successor. Another related reason for waiting is that the administration may act only to force its successor to take politically costly action. Returning to the example above, the new administration might find the late-term rules too restrictive, but it may be reluctant to repeal them and bear the political consequences of appearing more ethically lax than its predecessor. The same phenomenon may lead to reluctance to repeal a late-term environmental regulation—an incoming administration may not want to appear antienvironmental, even if it is convinced that the regulation is unwise.22

Regardless of the political reasons favoring waiting until the end of a term to take important agency action, there are also strong disincentives against waiting. These disincentives mean that it would be surprising if waiting is a very common strategy. First and simplest, the agency might not finish on time, thus causing all the preparatory work to go to waste and failing to accomplish the action's goals. Second, taking action at or near the end of the term greatly reduces the administration's ability to enjoy the political benefits flowing from the action. Although officials other than the President might benefit if late-term action helps the President's party in subsequent elections, unless the President's party is continuing in power, there is very little time at the end of a term for beneficiaries of late-term action to reward the administration by cooperating in other areas. This may indicate that the action was not that important, or that the political benefits from taking it were not that great or were outweighed by the political costs that would have been incurred if the action had been taken earlier. Third, end-of-term actions may be substantially less effective. If the rule needs to be enforced or interpreted, or if additional action is needed to make a mechanism associated with the rule work properly, the new administration can significantly undercut the effectiveness of the rule. If the rule is challenged on judicial review, the new administration may not enthusiastically defend the rule, and the rule might be invalidated or limited when a better defense might have vindicated the rule.

The lengthy process of promulgating rules means that the category of "midnight regulations" should be quite small in terms of regulatory action that occurs "below the political radar." The process for submitting rules to OMB for approval, conducting notice and comment proceedings, and engaging in the usual less formal political process surrounding rulemakings means that an administration must, in the vast majority of cases, inform the public of rulemaking proposals well before the presidential election in November. Further, the President must be concerned with Congress's procedure for reviewing major rules—if Congress is likely to disapprove a late-term rule, the President should try to finish the work early enough so any resolution of disapproval is presented to him rather than his successor. Add to the length of the process the disincentives to late-term action discussed above, and it seems

22 Consider the outcry regarding the Bush administration's reexamination of the arsenic in drinking water rule. See supra note 7 and accompanying text.
unlikely that administrations will purposely wait until the last minute to promulgate many important rules. Thus, in the rulemaking context, external delay and hurrying are likely to be better explanations for late-term rules than waiting.

C. Examples from the Clinton Administration

1. Administrative Rulemaking at the End of the Term

   a. Legislative Rules

   To further explore the use of the rulemaking power at the end of the term, I examine some of the rules issued near the end of the Clinton administration in order to understand the timing. Of all of President Clinton's end-of-term rules, the most widely publicized was the Occupational Safety and Health Administration's ("OSHA") so-called "ergonomics" rule. This rule addressed a broad spectrum of musculoskeletal disorders caused by repetitive motion, lifting heavy weights, working with vibrating machinery, and the like. The rule called for sweeping reforms to work practices and in workplaces where such disorders were present. The Clinton administration had considered the issue throughout its tenure, finally publishing the rule on November 14, 2000 to become effective on January 16, 2001, just a few days before President Clinton left office. The rule never actually went into effect because a majority in both Houses of Congress rejected the rule under the procedure for congressional review of agency rules established in 1996. This was the first time Congress used that procedure.

   The best explanation for the promulgation of the ergonomics rule so close to the end of President Clinton's tenure is that it was delayed by external forces. Although on the surface this rule looks like a midnight regulation, as it was promulgated after the last election before the President left office, it does not appear that the rule was timed by the agency to avoid the political

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consequences of promulgating it during President Clinton’s term. The agency made its intentions clear when it issued an Advance Notice of Proposed Rulemaking in 1992, relatively early in President Clinton’s first term. This notice set off a storm of political activity, and Congress attached appropriations riders to the Department of Labor’s budget for several years, prohibiting OSHA from going forward with the rule. This battle continued until the 2000 fiscal year when the rider was left out of the Labor appropriations bill under a serious veto threat by President Clinton.

Once the appropriations rider was eliminated, OSHA acted relatively quickly, proposing a rule in November 1999 and promulgating it a year later in November 2000. In the year between proposal and adoption, OSHA received “nearly 11,000 comments and briefs consisting of nearly 50,000 pages collectively” and held “9 weeks of public hearings and receive[d] 18,337 pages of testimony from 714 witnesses.” Given the broad scope and high expense of the rule, OSHA was compiling the sort of record that would give the rule a chance to survive judicial review, and it was facilitating the sort of political activity that ought to occur when an agency engages in major rulemaking. Unfortunately, the timing doomed the rule because, by the time the agency promulgated the rule and Congress rejected it, President Clinton was no longer in office to veto Congress’s action. President Bush, who was not as enthusiastic about ergonomic injury regulation as his predecessor, signed the rejection, thus preventing the ergonomics rule from becoming law.

There is also the lingering question of why President Clinton waited until his last year in office to utilize his presidential power. Why didn’t he threaten to veto the appropriations bill years earlier when the ergonomics rules had a fighting chance to survive? Perhaps President Clinton acted late in his term to symbolically help his Vice President’s campaign, but was unwilling to bear the political costs that the ergonomics rules would have entailed earlier in his term. In other words, it may be that actions with the appearance of delay may turn out to be, at least in part, instances of waiting—the President could have taken action to remove the delay but chose not to until late in the term.

Another example among the numerous end-of-term rules issued by the Clinton administration is the EPA’s rule reducing the amount of arsenic allowed in drinking water. This rule was actually published in the Federal

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27 See Ergonomics Program, 65 Fed. Reg. 68,262. OSHA stated that in 1999 and 2000 it “focused most of its rulemaking resources on issuing an ergonomics standard before the end of the former Administration’s term.” See Pub. Citizen Health Research Group v. Chao, 314 F.3d 143, 157 (3d Cir. 2002) (internal quotation omitted). The ergonomics rule was issued in slightly less than a year, which prompted the court to characterize the procedure under which the rule was issued as “remarkably compressed.” Id.


29 See supra note 25.
Register on January 22, 2001, two days after George W. Bush became President, but it was submitted to the Federal Register for publication before the transition. While this action appears to be about as midnight as midnight can get, examining the chronology reveals that there may not have been much delay in promulgating the rule. The EPA promulgated the rule in response to a 1996 congressional directive, which stated that the agency should propose a standard for arsenic in early 2000 and finalize a rule by January 1, 2001. The rule was proposed on June 22, 2000, six months late and just a few months before the November presidential election. The EPA could have acted more quickly, and perhaps it waited just to put the new President in the awkward position of having to reject an important environmental rule. Still, waiting until after the election does not appear to be a good political explanation for the delay, since the rule was proposed well before the 2000 election. While it certainly took the agency some time to study the issues thoroughly enough to issue a sensible proposal, perhaps the issuance of the proposal was further delayed by the usual political jockeying that occurs in Washington around any major issue. Whatever the cause, it is curious that Congress itself set a timetable under which it was virtually certain that the rule would be issued by the outgoing President in the period between the election and the inauguration of his successor.

One of the most interesting regulations issued in the final year of the Clinton administration was the revision of the rule regulating the activities of family planning clinics that receive federal funds. The statute governing the distribution of federal money prohibits federal funding for “programs where abortion is a method of family planning.” Given the controversial nature of the abortion issue, each administration has tended to interpret and enforce this provision in line with the administration’s overall position on abortion. During the Reagan administration, a rule was adopted, through notice and comment rulemaking, that not only prohibited clinics receiving federal funds from providing abortions, but also prohibited all clinic personnel from counseling

33 The rule’s effective date was March 23, 2001 with some of the provisions actually going into operation much later to give water suppliers time to make the changes necessary to comply with the rule. The new administration’s EPA administrator withdrew the rule for reconsideration. See supra note 7 and accompanying text.
patients on abortion as a method of family planning and from referring patients elsewhere for abortions.\textsuperscript{35} This rule, which was upheld against statutory and constitutional challenges,\textsuperscript{36} was referred to as the "gag rule" because it restricted communication between clinic personnel and their patients. A violation of the rule could result in a loss of federal funding for the clinic.\textsuperscript{37}

The first President Bush directed HHS to interpret the gag rule as not restricting doctor-patient communication.\textsuperscript{38} The D.C. Circuit held as unlawful an interpretative rule issued by HHS in response to the President's directive, on the ground that, because the agency promulgated the gag rule through notice and comment rulemaking, it could not be fundamentally administratively altered without a new notice and comment proceeding.\textsuperscript{39} There things stood until President Clinton took office. On his second day in office, President Clinton ordered his new HHS Secretary to suspend the existing gag rule and promulgate a replacement.\textsuperscript{40} The Secretary complied in both regards on February 5, 1993, suspending the gag rule (without notice and comment)\textsuperscript{41} and proposing new regulations for public comment.\textsuperscript{42} The gag rule remained in administrative limbo until July 3, 2000 when the new rule was made final.\textsuperscript{43}

Under the new rule, clinics are not only allowed to provide information on abortion, but they must offer pregnant women the opportunity to receive information on abortion.\textsuperscript{44}

The timing of the new rule makes it appear that the only reason for


\textsuperscript{37} See 42 U.S.C. § 300a-6.

\textsuperscript{38} See Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 230 (D.C. Cir. 1992) (referring to the President's memorandum to the Secretary of HHS urging that the confidentiality of the doctor-patient relationship be preserved).

\textsuperscript{39} See id. (holding that the agency must grant the opportunity for public notice and comment before changing the rule).

\textsuperscript{40} See The Title X "Gag Rule", 58 Fed. Reg. 7455, 7455 (Feb. 5, 1993) (memorandum from President Clinton to the Secretary of Health and Human Services suspending the gag rule).


\textsuperscript{44} See id. at 41,279.
promulgating it at all was to tie the hands of the incoming administration (provided the other party won the election), or at least force that administration to engage in the notice and comment process if it wished to re-impose a more restrictive version of the rule. As far as I can discern, no external force delayed the promulgation of this rule. Given that President Clinton and his administration acted forcefully to suspend the more restrictive gag rule in their first days and weeks in office, and that the final rule was issued before the 2000 election, it seems unlikely that the administration was waiting so as to avoid the political consequences of the rule. Perhaps the administration wanted to wait until all the elections that could affect President Clinton during his term were over, but that seems unlikely given the timing of the initial assault on the previous rule.

The notion that the administration promulgated the rule near the end of President Clinton’s term merely to make it more difficult for a successor to implement a different policy is also supported by the nature of the rule. The rule’s only purpose is to establish parameters under which clinics could lose their federal funding for using abortion as a method of family planning through an administrative procedure initiated within HHS. There are no other consequences for violating the rule. In light of President Clinton’s control over HHS during his administration, there was apparently no need for the rule during the first seven years of his presidency (except that the statute governing the program required that grants and contracts under the program be administered according to regulations promulgated by the Secretary of HHS), and it was highly unlikely that HHS would begin proceedings to take away the federal funds of family planning clinics in the last few months of the administration. In the run of rules possibly called “midnight regulations,” this one seems particularly suspect because it appears to have no legitimate, non-timing related purpose.

This episode raises questions about whether this rule is an appropriate subject for notice and comment rulemaking at all. Originally, HHS used regulations and memoranda issued without notice and comment to inform funding recipients of its policies regarding permissible activities. It may only be presidential involvement due to politics that led to the use of notice and comment procedures for later versions of the rules. Section 553 of the Administrative Procedure Act (“APA”), the provision on notice and comment rulemaking, explicitly states that it does not apply to rules concerning agency

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46 The statute governing the program required that grants and contracts under the program “shall be made in accordance with such regulations as the Secretary [of the HHS] may promulgate.” 42 U.S.C. § 300a-4(a) (2000).

grants and contracts.\textsuperscript{48} Even if section 553 applied to these categories of rules generally, this particular rule is more in the nature of an interpretative rule, construing the legislative prohibition against the use of abortion as a method of family planning, or in the nature of a policy statement, informing a possible target of federal enforcement action of when the agency might take such action.\textsuperscript{49} Section 553 exempts both interpretative rules and policy statements from its notice and comment requirements.\textsuperscript{50}

Because an incoming administration can easily revoke or revise rules issued without notice and comment, an outgoing administration might try to make it more difficult for the incoming administration by using notice and comment procedures to issue rules, such as these family planning rules, that could have been issued without notice and comment. The conventional wisdom seems to be that it takes new notice and comment rulemaking procedures to revise or amend such rules,\textsuperscript{51} even if the rules did not require notice and comment in the first place.\textsuperscript{52} By using notice and comment, moreover, administrations have been able to tie their successors' hands in the abortion rulemaking arena.

The history of the rules on abortion funding, even before President Reagan's gag rule, bears out the impression that administrations have used notice and

\textsuperscript{48} Administrative Procedure Act, 5 U.S.C. § 553(a)(2) (2000) (providing an exception from the notice and comment requirements for matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts").

\textsuperscript{49} See Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 65 Fed. Reg. at 41,278.

\textsuperscript{50} See Administrative Procedure Act, 5 U.S.C. § 553(b).

\textsuperscript{51} See Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 231 (D.C. Cir. 1992) ("When an agency promulgates a legislative regulation by notice and comment... it may not subsequently repudiate that announced meaning and substitute for it a totally different meeting without proceeding through the notice and comment rulemaking normally required for amendments of a rule.").

\textsuperscript{52} See id. at 239 ("Moreover, this case concerns not an agency's first attempt at interpreting a statutory term but a situation where the agency has, through legislative rulemaking, already interpreted that statute, and is now changing that interpretation."). The main argument in favor of the conventional wisdom is that it avoids controversy over the proper procedure for revoking or revising a rule—administrations know that any rule promulgated pursuant to notice and comment requires the use of similar procedures to revoke or revise the rule. However, I am not so sure that this should be the case.

The fact that a prior administration decided to provide interested parties and the public with more procedures than are required does not necessarily imply that all future administrations must do the same with regard to the issue. What if an agency decided to go beyond APA requirements and allow persons interested in a rulemaking to cross-examine experts who have submitted comments in the rulemaking proceeding? Would a subsequent administration revising the rule also be required to allow cross-examination? I think not. The conventional wisdom seems even less attractive if the apparent reason for the prior administration's procedural generosity was to impose constraints on its successor. By issuing an interpretative rule or policy statement, an administration could promulgate and later revise the rule without having to use notice and comment procedures.
comment proceedings in this area primarily to constrain their successors. In 1977, during President Carter’s first year in office, his administration proposed codifying the existing HHS practice via notice and comment rulemaking, but did not actually promulgate the rules until early 1980, his last year in office. The timing of this codification suggests that President Carter might have used the issue to gain political support for his reelection campaign, or perhaps tried to lock his successor into the practice that had developed under the rule during his administration. This rule remained in place until the last year of the Reagan administration. In July 1987, President Reagan announced that HHS would propose a new rule “to give effect to the statutory prohibition on the use of Title X appropriated funds in programs that include abortion as a method of family planning.” The administration conducted notice and comment rulemaking, which culminated in 1988 with the issuance of the gag rule. President Reagan’s timing also suggests motives involving abortion politics more than concern over illegitimate uses of federal funds.

It is very interesting that all three notice and comment rulemakings used to implement the statutory prohibition of Title X occurred in the last year of a President’s administration. This suggests a category of midnight regulations that should arouse suspicion, i.e. regulations promulgated by an administration merely to affect its successor. The fact that there was no reason why the administration could not have promulgated the rules earlier, and there was no special need for the rules at the time they were promulgated, may raise questions regarding the legitimacy of the rules. President Carter could have continued his relatively liberal policy without engaging in notice and comment rulemaking. If President Reagan did not feel the need to tighten up on President Carter’s policy for more than six years, it is difficult to understand why he felt the need to stiffen the policy in the eighth year of his administration. It seems unlikely that the Reagan administration would have been able to strip clinics of federal funds in those last few months. Similarly, once President Clinton had control over HHS’s enforcement mechanism and had successfully suspended the operation of the gag rule, it is unclear why he needed to promulgate new rules in the last year of his administration. If the administration was concerned about following the statutory mandate that

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56 Id. ("[T]he rules proposed compliance standards . . . to specifically prohibit certain actions that promote and encourage abortion as a method of family planning . . . ").
regulations promulgated by the Secretary of HHS must govern the grant program, then the administration should have issued the rules earlier, not seven years after the initial proposal. Further, the simple fact that the administration could have promulgated these rules without notice and comment raises suspicions that they were designed primarily to hinder or inflict costs on the next administration. Given that abortion is a perennially controversial issue, there is a strong hint of politics in these rules, i.e. that each administration promulgated these rules when they did to influence electoral politics and embarrass potential successors rather than as part of a sincere effort to enforce federal law.

b. Nonlegislative Rules

In addition to notice and comment rules, as noted above, agencies can also issue interpretive rules, guidance statements, and policy statements, which do not require notice and comment procedures. It does not appear that there was a surge in the issuance of interpretive rules near the end of the Clinton administration. In the period between November 5, 2000 and the end of the Clinton administration, an electronic search of the Federal Register revealed only one interpretive rule issued by an executive branch agency, and only one policy statement, which was more in the nature of an interpretive rule set down for comment by an independent agency. Starting the search from June 1, 2000 reveals that executive branch agencies issued only four additional interpretive rules or policy statements. Four interpretive rules and two policy statements in the last seven months of an administration does not look like much of an end-of-term rush.

57 National Forest System Land and Resource Management Planning; Review of Decisions to Amend or Revise Plans, 66 Fed. Reg. 1864 (Jan. 10, 2001) (to be codified at 36 C.F.R. pt. 219) (interpreting land and resource management planning rules “to make explicit its intent regarding the procedure(s) that citizens and entities may use to appeal or object to plan revisions or amendments . . . .”).


There may be situations, however, in which an outgoing administration finds it worthwhile to issue interpretive rules or policy statements late in its term. An outgoing administration may, for example, issue an interpretive rule or policy statement in a controversial area to force the incoming administration to take a public stand on the issue. This could be especially true when the fight between the parties is over the political center. For example, an outgoing Democratic administration might issue a policy statement regarding the enforcement of an abortion-related statute in an attempt to provoke an incoming Republican administration into revoking or revising it, giving the Democrats an issue for future campaigns.

In the final year of the Clinton presidency, federal agencies were far from idle, however, as they published numerous other documents without notice and comment in an apparent rush to complete work before the end of the term. These documents included agency guidances and notices informing the public of new initiatives.\(^{60}\) Even where the agencies requested comments, the agencies sometimes felt the need to have a very short comment period so they could complete the matter before the end of the administration. For example, on December 18, 2000, the Food and Drug Administration issued a proposed guidance on how to report adverse effects following the use of veterinary medicines.\(^{61}\) The notice requested that comments be filed in time “to ensure their adequate consideration in the preparation of the final document by

\(^{60}\) In the period between June 1, 2000 and the end of the Clinton administration, the EPA was particularly active, issuing numerous documents informing the public of the establishment of new agency initiatives and asking for voluntary cooperation in some of these initiatives. See, e.g., Water Quality Criteria: Notice of Availability of Water Quality Criterion for the Protection of Human Health: Methylmercury, 66 Fed. Reg. 1344 (Jan. 8, 2001) (issuing water quality criteria for the chemical methylmercury); Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000) (announcing, as a final policy, the EPA’s support of using alternative dispute resolution in dealing with conflicts); Voluntary Children’s Chemical Evaluation Program, 65 Fed. Reg. 81,700 (Dec. 26, 2000) (announcing creation of a program to evaluate the potential health risk to children from exposure to certain chemicals); Data Collection and Development on High Production Volume (HPV) Chemicals, 65 Fed. Reg. 81,686 (Dec. 26, 2000) (announcing data on potentially harmful chemicals produced in mass quantities). While this still does not appear to be a rush of the same magnitude as the rush to complete final rules that occurred at the end of the Clinton administration, it seems that the EPA was hurrying to move things along in the direction favored by the Clinton administration in areas in which the incoming administration was not as likely to act.

\(^{61}\) International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH); Draft Guidance on “Pharmacovigilance of Veterinary Medicinal Products: Management of Adverse Event Reports (AER’s)” (VICH GL24); Availability; Request for Comments, 65 Fed. Reg. 79,111 (proposed Dec. 18, 2000) (requesting comments on a draft guidance describing a reporting system for identifying adverse events after the use of a marketed veterinary medical product).
January 17, 2001. Although I have not done the empirical work necessary to confirm that the volume of guidances and other similar notices increased at the end of the Clinton administration, I can at least conclude that in its fading days, the administration issued many such documents. This increased activity raises the issue of whether it is appropriate for an administration to hurry to complete this kind of regulatory work at the end of its term.

The question naturally arises as to why an administration would publish many of these less formal documents near the end of its term. It seems that a combination of reasons lead to such action. There was probably a great deal of hurrying to finish work that was not yet complete in a timely manner, simply due to the normal effects of an impending deadline. There was also probably some hurrying to get more done near the end of the term in order to have influence after the transition, and to force the incoming administration to affirmatively dismantle agency actions with which it disagreed. This could be calculated to cause political problems for the new administration. There may also have been some waiting involved, i.e. waiting to issue some potentially controversial matters until it was so late in the administration that the political consequences would not much matter. The last explanation is less likely with guidance documents, interpretive rules, and the like, since these are probably less controversial and have less of an effect than legislative notice and comment rules. However, there is still the possibility that this effect exists even with regard to less important and less visible agency actions.

2. Presidential Action at the End of the Term

While federal agencies, and not the President himself, issued the rules and performed the other actions discussed above, President Clinton also took many actions at or near the end of his term that required his personal action. These actions included issuing executive orders, designating national monuments, and granting presidential clemencies and pardons.

a. Executive Orders

Executive orders are a relatively formal method available to the President to direct policy within the executive branch. As the President has become a more visible and active leader of the administrative process, the executive order has become a more important tool of presidential policymaking. President Clinton was an active issuer of executive orders, and commentators have raised questions over whether President Clinton used executive orders to circumvent normal legislative and administrative processes. The argument is that

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62 Id. at 79,112.

63 Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2290-99 (2001) (tracing President Clinton’s use of executive orders and other directives as compared to previous presidents); see Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. Legis. 1, 37-43 (2002) (asserting that President Clinton’s use of executive orders was often inappropriate because his orders went
President Clinton’s executive orders were efforts to unilaterally implement policies that he could not convince Congress to adopt legislatively.\textsuperscript{64} If this is true, then it is true no matter when the orders were issued, so I will not debate the point. This article focuses on the timing of executive orders and asks whether there are special reasons for concern about executive orders issued late in a President’s term.

In the period between June 1, 2000 and the end of his presidency, President Clinton issued at least thirty-eight executive orders, with twenty-one orders issued after the November election.\textsuperscript{65} In other years of the Clinton presidency, the number of executive orders in a similar time period typically averaged in the low to mid-twenties,\textsuperscript{66} except in the first year of his presidency, when he issued forty-two executive orders between June 1, 1993 and January 20, 1994. Again, while every President retains all presidential powers until the moment of the successor’s inauguration, a President who takes important actions in the waning days of an administration may leave the impression of improperly extending his influence beyond his term and perhaps making the transition more difficult for his successor.

Looking at the very end of President Clinton’s term, he issued nine executive orders after January 15, 2001 or almost one-fourth of the executive orders issued in the nearly eight month period beginning on June 1, 2000.\textsuperscript{67} For example, on January 18, 2001, President Clinton issued an executive order prohibiting federal agencies from promoting the export of tobacco.

\textsuperscript{64}I did not find Branum’s analysis convincing, mainly because she did not examine in particularity the authority President Clinton cited for his executive orders, nor did she seem to grasp that President Clinton directed his orders at the behavior of government officials rather than the public. In any case, as discussed in the text, resolution of this controversy is not necessary for the purposes of this article.

\textsuperscript{65}Federal courts have invalidated at least two executive orders in their entirety. The first, and most famous, was the order by President Truman directing the Secretary of Commerce to seize steel mills to prevent their closure during a labor dispute. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (holding that the order was beyond the power granted to the President by the Constitution or any statute). The second was an order by President Clinton directing federal agencies not to do business with companies that hire permanent replacements during labor disputes. Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996) (holding that the order was preempted by the National Labor Relations Act, which allowed employers to hire permanent replacements for strikers under certain circumstances).

\textsuperscript{66}I performed an electronic search and totaled the number of executive orders issued during this time period.

\textsuperscript{67}See supra note 65.
countries and promoting the use of tobacco in other countries.\textsuperscript{68} This order also required HHS to conduct a "pilot study of tobacco use in a country other than the United States."\textsuperscript{69} Other executive orders issued that same day prohibited the importation of rough diamonds from some areas in Sierra Leone,\textsuperscript{70} and, pursuant to an earlier executive order setting the matter down for notice and comment, created the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve.\textsuperscript{71}

Additional executive orders issued near the end of President Clinton’s term in office go beyond what one would expect from a leader of a large organization in the weeks and months before his departure. For example, on December 23, 2000, President Clinton established a task force to look into the future of Puerto Rico’s status.\textsuperscript{72} On January 15, 2001, President Clinton issued an executive order establishing a task force on Washington, D.C., apparently formalizing a task force that had existed since 1995 without an executive order.\textsuperscript{73} That same day, President Clinton established the “President’s Commission on Educational Resource Equity” to study and deal with the problem of inequality in educational resources.\textsuperscript{74} On January 10, 2001, President Clinton issued a detailed executive order regarding the protection of migratory birds that, in part, required federal agencies “taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations . . . to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.”\textsuperscript{75} This executive order also directed the Service to take steps to ensure that other agencies complied with their obligations under the order.\textsuperscript{76}

\textsuperscript{68} Exec. Order No. 13,193, 66 Fed. Reg. 7387, 7387 (Jan. 18, 2001) (“[E]xecutive departments and agencies shall not promote the sale or export of tobacco or tobacco products . . . .”).

\textsuperscript{69} Id.

\textsuperscript{70} Exec. Order No. 13,194, 66 Fed. Reg. 7389 (Jan. 23, 2001) (“[T]he direct or indirect importation into the United States of all rough diamonds from Sierra Leone . . . is prohibited.”).


\textsuperscript{72} Exec. Order No. 13,183, 65 Fed. Reg. 82,889 (Dec. 29, 2000) (creating a task force to advance the executive branch’s policy of answering questions regarding Puerto Rico’s future status, and explaining the process by which the determination of such status should be accomplished).

\textsuperscript{73} Exec. Order No. 13,189, 66 Fed. Reg. 5421 (Jan. 19, 2001) (creating a task force to assist the District of Columbia in “achieving financial stability, economic growth, and improvement in management and service delivery”).

\textsuperscript{74} Exec. Order No. 13,190, 66 Fed. Reg. 5424 (Jan. 19, 2001) (creating a commission to analyze inequalities in educational resources).


\textsuperscript{76} Id. ("[T]he service shall develop a schedule for completion of the MOUs within 180
Assuming that all of these orders were within the President’s power, there is no legal authority for invalidating an executive order merely because the President issued it very late in his term. The timing of these orders does, however, raise questions about their propriety. For example, in the last order described above, the outgoing President directed numerous federal agencies to undertake a two-year planning process, and instructed a lead agency to monitor the performance of other agencies. Given the timing, little or no action in response to this order was likely to occur before the new President assumed office. There is no good reason, in the absence of an emergency, for a President to initiate such a process so late in his term.

The orders establishing the task force on Puerto Rico and the Commission on Educational Resource Equity suffer from similar apparent infirmities. The problems involved in these orders did not suddenly materialize in the last days or months of President Clinton’s term, and it appears to constitute an abuse of the presidency to establish mechanisms like these on the way out the door. Perhaps if Vice President Gore had won the election and these orders were part of a cooperative effort to achieve a seamless transition, these orders would not be problematic. However, when the new President is likely to have a significantly different regulatory agenda, the outgoing President should step aside and allow the new President to govern, and should not waste government assets in an obviously futile endeavor.7

The question arises as to why President Clinton waited until the end of his presidency to issue these orders. These orders are not different in kind from actions he took throughout his presidency. There is no evidence that either external forces or an overly complicated internal process delayed these matters. The President does not fall under the APA’s definition of “agency,” and thus does not have to comply with any of the APA’s delay-producing procedural requirements before issuing executive orders.78 The question therefore seems to be whether for some reason or combination of reasons the President waited until the end of his term to issue these orders, or whether they are merely instances of hurrying to accomplish more within the limit of the President’s term in office.

It is difficult to discern whether hurrying or waiting is the predominant phenomenon here. Perhaps President Clinton (and Vice President Al Gore) did not want to suffer the potential political heat generated by a set of anti-tobacco
and pro-environment actions, so he waited until after the election. However, other issues covered in the late-term orders do not appear to be as controversial, supporting the theory that President Clinton was hurrying to finish before his term ended. For example, establishing a commission to study educational resources is not the type of action likely to be costly in an election year and thus the administration may have wanted to do this earlier but simply did not get around to it. The task force on the District of Columbia had already been in existence. The executive order merely formalized it. The only controversial element of these orders appears to be the timing—establishing commissions and task forces in the last week or month of an administration looks more like naked moves to exercise power over the successor administration rather than legitimate attempts to deal with pressing problems.

The late-term executive orders, perhaps even more than late-term regulations, appear designed in part to inflict political costs on the President’s successor. In many cases, the outgoing President should not expect that his successor will actually implement or enforce the policies expressed in the late-term executive orders, especially if the incoming President disagrees with those policies. Procedurally, an incoming President is free to revoke prior Presidents’ executive orders. Politically, this freedom may not be a reality. An incoming President can suffer serious political consequences by revoking or amending executive orders. For example, if President Bush disagrees with President Clinton’s approach on promoting tobacco in foreign countries or protecting migratory birds from harm by federal agencies, revoking or watering down President Clinton’s executive orders might provoke a public outcry from the interests behind the orders. This may seem like a fair price for a new President to pay to assume the reins of power, but not when the prior President instituted the policy in the waning days of his administration. If the issuing President’s administration did not live under the executive order, why should the successor’s administration do so? If the matters covered by President Clinton’s late-term orders were so important, it is curious that they were not important for nearly eight years of President Clinton’s administration.

b. Designation of National Monuments

Another set of late-term actions by President Clinton involved the designation and expansion of national monuments. Under the Antiquities Act of 1906, the President has the power to designate as national monuments areas of federal land that contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . .” In January

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80 Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2000). For a general discussion of the Act, see Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906, 37 GA. L. REV. 473 (2003); see also Christine A. Klein, Preserving Monumental Landscapes Under the Antiquities Act, 87 CORNELL L. REV. 1333, 1334-38 (2002) (arguing that Presidents have used the Act to preserve much more land than Congress intended and that there have been
2001, President Clinton designated several new national monuments and expanded the boundaries of several existing monuments. Similar flurries of national monument activity occurred in January, June, and November of 2000, with almost no national monument activity in the earlier years of the Clinton presidency. Designation of federal land as a national monument generally provides greater protection for that land than does simple status as part of a national park or forest. This is because, in the Proclamation creating the designation, the President has the power to specify what can or cannot be done with the designated area. The Antiquities Act does not address revocation of such designations and the Attorney General has interpreted this silence to mean that only legislation can revoke the designations. Designation can be controversial because it may prevent activities such as grazing, logging, mining, and oil drilling on federal land that previously may have been open to such exploitation. Compared with other Presidents, President Clinton was relatively active in designating and expanding national monuments, but almost all of this activity occurred near the end of his time in office. The question thus arises why he waited until the last year and even the last month of his administration to make so many of these designations. In the terms used in this article, was this an instance of hurrying, delay, or waiting?

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83 For example, on President Clinton's last day in office, he created the Sonoran Desert National Monument. See Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 17, 2001). In creating the monument, President Clinton specified that, grazing permits on Federal lands within the monument south of Interstate Highway 8 shall not be renewed at the end of their current term; and provided further, that grazing on Federal lands north of Interstate 8 shall be allowed to continue only to the extent that the Bureau of Land Management determines that grazing is compatible with the paramount purpose of protecting the objects identified in this proclamation. Id. at 7356.


85 See 39 Op. Att'y Gen. 185, 188 (1938) (concluding that the President does not have "the power to abolish a monument entirely"). Critics have challenged some designations as beyond the authority granted to the President by the Antiquities Act. Despite good arguments that some designations go beyond the purpose of the Act, these challenges have not succeeded. See Klein, supra note 80, at 1363-65.

86 Designation transfers management of the land to the National Park Service, an agency within the Department of the Interior, whose express purpose is to conserve the land under its control. See Klein, supra note 80, at 1361.

87 See Squillace, supra note 80, at 475 (characterizing the number and size of the monuments designated by President Clinton as "remarkable").
The most obvious candidate would appear to be waiting. Perhaps President Clinton believed that the political costs of designating national monuments were greater than the benefits. His first designation—Utah’s Grand Staircase-Escalante National Monument in 1996—was controversial because some felt it was a threat to ranching and mining interests.\(^8\) Political forces, including governors and federal legislators in states with potential monuments, appear to have lined up against designations, perhaps because designation reduces flexibility in the use of the land in question.\(^9\) On the other side, environmentalists pushed for more designations and for the creation of “wilderness areas,” which protect land even more than designating it as a national monument.\(^9\) Perhaps President Clinton decided that his best option was to wait until the end of his term neared to make the remainder of his designations in order to avoid the political fallout.

Another reason why waiting is a likely candidate is that the areas eligible for designation as national monuments are already under federal control, reducing the need for quick action. The President might not be able to protect his chosen areas from all exploitation, but he can at least influence agencies such as the Bureau of Land Management and the Forest Service to reduce the exploitation of the lands as far as possible within legal limits. The designations have their greatest effect after the transition, when a new President is powerless to revoke the designation without cooperation from Congress.\(^9\) Because the President’s successor cannot unilaterally revoke such designations, this action seems to be a good candidate for a President who wants to extend his influence beyond his term in office. A President’s policy in favor of designating national monuments is likely to bear fruit well beyond that President’s term. Subsequent administrations could neglect national monuments, the same as they can subvert the effectiveness of midnight regulations by failing to enforce them vigorously. However, the designation is there to stay and, in most instances, it is likely to be honored, even by administrations with less enthusiasm for the designation.

Additionally, some of President Clinton’s designations may have been timed with the election prospects of his Vice President in mind. While President Clinton designated or expanded many national monuments after the 2000

\(^8\) See Judith Graham, *U.S. Land Protection Plans Are Monumental If Congress Doesn’t Act to Preserve Millions of Acres, The Administration Likely Will Designate Up to a Dozen Protected Areas of a New Type*, CHI. TRIB., Feb. 18, 2000, at 3 (News) (describing protests of ranching and mining industries at the time of the designation).


\(^9\) See Tom Uhlenbrock, *Acres of Controversy; President Clinton’s Decision to Designate 1.7 Million Acres of Utah Wilderness as a National Monument Has Angered the Natives*, ST. LOUIS POST-DISPATCH, Oct. 17, 1996, at 1G (“Environmentalists want the monument’s best spots to remain pristine . . . .”).

\(^9\) See *supra* note 85 and accompanying text.
election, he designated a significant number before the election, and some were even announced by Vice President Gore, a presidential candidate at the time. This indicates that at least the Vice President thought that his election bid would be helped by the designation of national monuments. This would explain why the President timed so many designations for the period from January through July of 2000, during the 2000 presidential election campaign.

However, this does not explain why many designations occurred after the election. Perhaps the administration decided that too many designations, or at least certain designations, would harm the Vice President’s prospects. The timing of two particular designations on November 9, 2000, just two days after the presidential election, may indicate that President Clinton was waiting out of concern for Vice President Gore’s prospects. However, it is also possible that the administration simply may not have finished working on the designations before the election and hurried to complete them before the end of the term.

Another possible reason for waiting is that the President may not have viewed the designations as very important in the context of all of the other activities he spent time on during his term. Perhaps the President believed it was more important to attend to other matters, choosing to leave most national monument designations until the end of the term. This is also consistent with the notion that some hurrying occurred—once more important matters were attended to, the administration might have decided to see how many national monument designations it could squeeze in under the wire.

It may also be the case that once President Clinton decided to begin making monument designations, the process of designation resulted in some delay that prevented President Clinton from making all his designations before the 2000 election. It is unlikely, however, that the delay was so great that he could not have made a substantial number of designations before the last year of his presidency. Interest groups certainly lobbied the President concerning monument designation, with environmental and preservation interests pushing for designations and logging, oil, and perhaps ranching interests pushing against. Each side may have had allies within the executive branch.

There have also historically been turf wars between officials in the Department of Interior and Department of Agriculture concerning which agency would manage certain national monuments carved out of lands already controlled by federal agencies, such as the Forest Service in the Department of Agriculture. The Department of Agriculture’s mission involves the

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94 There have been instances of dual management, in which the Department of Interior manages the monument and the Department of Agriculture manages the surrounding forest.
exploitation of federal lands through logging and grazing. The designation of a national monument, however, places management of such lands in the hands of the Department of the Interior, a department with a much more conservation oriented mission. The fighting, which resulted in a compromise under which some monuments might be managed day-to-day by a designated agency under the overall supervision of the Interior Department, may have caused some delay. However, it is still unlikely that this delay made it impossible for President Clinton to make a substantial number of designations before the eighth year of his presidency.

c. Presidential Pardons

Another presidential power that President Clinton exercised near the end of his term was the pardon power. Presidents have traditionally granted pardons near the end of each year as a show of good will and forgiveness during the "holiday season." The process requires pardon and clemency seekers to...
apply to the pardon attorney in the Department of Justice, who makes recommendations to the Attorney General and ultimately the President. This process may include input from prosecutors and law enforcement officials who participated in the process that led to the conviction. In one recent case, for example, the Securities and Exchange Commission lobbied against a pardon for Michael Milken, who had been convicted of securities fraud for his junk bond dealings which cost investors over one-billion dollars.  

President Clinton apparently exercised this power in the usual annual way less frequently than his five predecessors, but he made up for it at the end of his term. President Clinton exercised his pardon power 176 times on his last day in office, January 20, 2001. This total includes 140 pardons and 36 clemency grants in which President Clinton reduced the sentences of federal prisoners. President Clinton had already begun issuing pardons in December 2000, issuing approximately 60 pardons in that month for a total of approximately 236 uses of the pardon power in the last two months of his presidency.

The large number of end-of-term pardons makes it appear as if President Clinton waited to exercise the pardon power until he was about to leave office so he would not bear the political consequences of the pardons. Certain factors in addition to timing support this inference. One explanation for President Clinton’s relatively sparing use of the pardon power was that, due to “longer incarcerations and a ‘get tough’ mentality[,] presidents of both parties have been using this power less frequently.” By delaying the remainder of his pardon activity until just before the end of his term, President Clinton would not have to buck this trend until it was too late for him to suffer any negative

99 See Michael Liedtke, Investors Hop on Leap Frog’s IPO, AP ONLINE, July 25, 2002, available at 2002 WL 24648758 (“When Milken’s supporters unsuccessfully sought a pardon during President Clinton’s final days in office in 2001, the SEC objected stridently. ‘Few people have done more than Milken to undermine public confidence in our markets,’ Richard Walker, the SEC’s enforcement director, wrote in a letter to the White House.”).

100 Thurman, supra note 98, at 3 (“In fact, Clinton has granted fewer pardons than any of the five presidents since Richard Nixon.”).

101 Jurist Legal Intelligence, Clinton Pardon Grants, January 2001, at http://jurist.law.pitt.edu/pardons6a.htm (last accessed Nov. 13, 2003) (providing an individualized list of each of the 141 pardons President Clinton granted during the last month of his term); see Amy Goldstein & Susan Schmidt, Clinton’s Last-Day Clemency Benefits 176: List Includes Pardons for Cisneros, McDougal, Deutch and Roger Clinton, WASH. POST, Jan. 21, 2001, at A1 (“Just two hours before surrendering the White House, President Clinton gave parting gifts that lifted 176 Americans out of legal trouble . . . .”).

102 Goldstein & Schmidt, supra note 101 (providing the exact number of pardons and prison sentence commutations); see Jurist Legal Intelligence, supra note 101; Jurist Legal Intelligence, Clinton Commutation Grants, January 2001, at http://jurist.law.pitt.edu/pardons6b.htm (last accessed Nov. 13, 2003) (listing each of the thirty-six commutations granted by President Clinton during the last month of his term).

103 Thurman, supra note 98, at 3.
political consequences.

Another factor in favor of the waiting hypothesis is that President Clinton granted two of his most noteworthy pardons at the end of his term: the pardons of Mark Rich and Patty Hearst. Most uses of the pardon power are relatively routine, involving a commutation or pardon for a sympathetic but unknown convict. However, the pardons of Mark Rich and Patty Hearst did not fit this mold. Mark Rich, a wealthy democratic financier, was a fugitive from justice living overseas to avoid prosecution for tax evasion, fraud, and illegal oil dealings with Iran. The Rich pardon was viewed as extraordinary when Clinton granted it because Rich had evaded prosecution and because his primary qualification for the pardon appeared to be that his wife had donated large sums of money to Democratic Party causes. Patty Hearst is the granddaughter of the late William Randolph Hearst, the media mogul. The Symbionese Liberation Army, a revolutionary group, kidnapped her in 1974. She subsequently participated in a bank robbery with the group, apparently of her own free will, armed with a machine gun (which she did not use to escape her kidnappers). She claimed her participation in the robbery was involuntary, but she was convicted and sentenced to seven years in federal custody. President Jimmy Carter commuted her sentence after two years and then actively participated in the effort to convince President Clinton to grant her the pardon that she ultimately won.

President Clinton’s most controversial pardon, however, occurred well before the end-of-term rush. In September 1999, President Clinton granted qualified clemency to eleven convicted and long-incarcerated Puerto Rican nationalists (members of the group Armed Forces of National Liberation or

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105 President Bush considered the possibility of revoking this pardon but decided against it “to protect that privilege, not only for me but for future presidents, as well.” John Riley, *Bush Won’t Revoke Pardon of Financier*, NEWSDAY, at A14 (Jan. 30, 2001). Apparently, there was a suggestion that the pardon might be revocable because the paperwork was not complete or served when President Clinton left office. *Id.* If officials had not delivered the pardon by the time President Clinton left office, then under some old precedent, President Bush might have had sufficient grounds to revoke the pardon. See Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1704 (2001) (discussing *In re De Puy*, 7 F. Cas. 506 (S.D.N.Y. 1869) (No. 3814), which held that a pardon is not valid until delivery).


107 *Id.* (“Jurors rejected [Hearst’s] brainwash defense and handed her seven years in prison.”).

108 See Griffin Bell, *Clinton to Wealthy: Flee the Country if Arrest Looms*, WALL ST. J., Jan. 31, 2001, at A20 (“President Carter did not pardon Ms. Hearst, but he worked hard to persuade his successors to do so . . . .”)

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“FALN”), jailed for offenses called acts of terrorism. He did not pardon them, but he offered a restoration of their freedom and civil rights if they pledged not to advocate violence to separate Puerto Rico from the United States and promised not to associate with others involved in such activity. At the time, this action provoked an uproar based on the view that the convicts did not deserve clemency and suspicions that President Clinton made the offer in an effort to help his wife’s U.S. Senatorial campaign in New York, which has a substantial Puerto Rican population.

The timing of this grant of clemency certainly supports the notion that President Clinton acted to help his wife’s election campaign. Considering that President Clinton had not been generous in granting pardons, it is interesting that he found a group of reputed terrorists more deserving of clemency than the hundreds of others who had applied for clemency and were denied. From information revealed in a (partisan) congressional investigation that occurred after Clinton granted this pardon, it appears that the FALN clemency was extraordinary both as a matter of process and as a matter of substance.

Perhaps President Clinton found that the gains from this particular grant of clemency outweighed the potential losses, unlike the bulk of his planned pardons and clemencies, which he waited until the end of his term to grant.

d. Other Presidential Actions

An outgoing President can also engage in diplomatic activity with long lasting effects on government policy. These activities can be formal and informal. For example, the President alone has the power to recognize foreign governments, and theoretically a President could recognize a foreign

109 Ellen Yan, GOP Senators Assail Clemency Justice Department Faulted in FALN Case, NEWSDAY, Oct. 21, 1999, at A18, available at 1999 WL 8193960 (“Republicans have charged that Clinton granted clemency to terrorists.”).


111 Mimi Hall, Other Clinton Clemency Cases Dodge Controversy, USA TODAY, Sept. 27, 1999, at 8A, available at 1999 WL 6855907 (“Some critics question whether [President Clinton] was trying to help first lady Hillary Rodham Clinton win Puerto Rican votes in her bid for a U.S. Senate seat in New York.”).

112 See THE FALN AND MACHETEROS CLEMENCY: MISLEADING EXPLANATIONS, A RECKLESS DECISION, A DANGEROUS MESSAGE, H.R. REP. No. 106-488, at 72-85 (1999) (explaining that the FALN members were strange candidates for clemency because they were convicted of violent crimes, their sentences were not disproportionate to the crimes, and the members did not show remorse for committing the crimes).

113 For an interesting study of the President’s foreign affairs powers, see Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 YALE L.J. 231 (2001) (presenting the allocation of foreign affairs powers in the framework of the text of the Constitution).
An outgoing President could also sign treaties and executive agreements in the waning days of an administration, and could engage in negotiations and other maneuvers that could create expectations among allies and adversaries. Treaties require Senate ratification, so the President may not act unilaterally, and the long and often difficult process of securing Senate agreement creates a strong disincentive for waiting until the end of an administration to sign treaties. Executive agreements, however, do not go through any process of ratification, so a President could sign them very late in the term and leave them to the succeeding administration to implement. However, it appears that outgoing Presidents rarely enter into international agreements of any kind at the very end of their terms without the concurrence of the incoming administration, largely because foreign leaders begin to look to the incoming President as the authoritative voice of the nation immediately after the election.

The Constitution grants the President the power to “receive Ambassadors and other public Ministers.” U.S. Const. art. II, § 3. This has been interpreted to recognize the President as the sole decisionmaker regarding recognition of foreign governments. See Goldwater v. Carter, 444 U.S. 996 (1979) (dismissing a complaint against President Carter for terminating a mutual defense treaty with Taiwan when President Carter decided to recognize the government of the People’s Republic of China).

Although the Constitution does not mention executive agreements, they are a recognized instrument of foreign relations. Executive agreements are agreements made by the President with a foreign power but not submitted to the Senate for ratification. Executive agreements therefore do not have the legal status as treaties, and their true legal status remains somewhat unclear. See Kenneth C. Randall, The Treaty Power, 51 Ohio St. L.J. 1089, 1091 (1990); John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 761-62 (2001). For a comprehensive study of executive agreements in the United States, see Franziska Helm-Busch, Executive Agreements im US-Amerikanischen Verfassungsrecht: Weite Präsidialkompetenzen in der Auswärtigen Gewalt (1995). There is also a category of executive agreements that the President negotiates under authority granted by Congress, under the condition that the President submit the agreement to both Houses of Congress for approval. This is a means for Congress, especially the House of Representatives, to assume power in the foreign relations area that the Constitution does not appear to grant.

U.S. Const. art. II, § 2, cl. 2 (requiring a two-thirds majority of Senate to ratify treaties).

See supra note 115 and accompanying text.

See Nancy Amoury Combs, Carter, Reagan, and Khomeini: Presidential Transitions and International Law, 53 Hast. L.J. 303, 305, 335 (2001). Combs’s article discusses one significant exception to the general lack of late-term presidential diplomatic activity, the Carter administration’s agreement to the Algiers Declarations that resolved the hostage crisis that arose out of the seizure of the United States embassy in Tehran and the taking of hostages by Iranian militants in 1979. The Declarations were agreed to and the hostages were released on President Carter’s last full day in office. Id. at 306. Combs reports that the Iranian government agreed to the Declarations after Ronald Reagan was elected to replace President Carter at least in part because it feared that, as President, Reagan would deal with them much more harshly than President Carter. President Reagan, for his part,
Finalized executive agreements and less formal diplomatic initiatives taken late in an administration could put an incoming President who disagrees with them in a difficult position. Even though the new President may have the raw power to renounce an executive agreement signed by his predecessor, such an action can make the negotiation of future agreements more difficult, and may in some cases violate international law. The same is true with less formal initiatives. It would harm the United States’ ability to engage in diplomatic initiatives if other countries perceived the United States as an unreliable partner or expected radical changes with each change of administration.

D. Summary

In sum, outgoing Presidents retain all of the powers of the presidency until the new President’s inauguration, and they often exercise those powers up to the very last moment. There are different explanations for why so much administrative and presidential activity occurs very late in the President’s term. Sometimes, Presidents and administrations may be hurrying to do as much as possible in the limited time remaining, and the pace naturally increases as the end draws near. Sometimes, action might occur late in the term due to delay by external forces. Sometimes, Presidents and their administrations may have reasons for waiting until very late in the term to take controversial action. Often, these phenomena combine to push action toward the end of the term. Although there are reasons to be suspicious of many late-term presidential and administrative actions, it is impossible to draw firm general conclusions regarding the propriety of late-term action. Rather, any evaluation must look at the particular action and the reasons why the President waited so long to take the action.

II. WHAT CAN THE NEW PRESIDENT DO?

I turn now to the variety of strategies available to incoming Presidents for dealing with the phenomenon of “midnight regulations,” including some used in recent years. In some cases, the incoming President will find it relatively easy to avoid the effect of late-term action by the former President. In other cases, it will be difficult for an incoming President to reverse what his predecessor did on the way out of office.

A. Legislative Rules: Delay, Rescission, Amendment, Rejection, Freeze

The simplest tactic an incoming administration can employ with regard to midnight regulations is to delay, rescind, or amend them. Procedurally, the administration cannot revoke a rule issued pursuant to notice and comment

considered repudiating the Declarations but he ultimately decided to honor them because they advanced the interests of the United States. He did, however, implement them in a manner designed to minimize the effect of those aspects of the Declarations with which he disagreed. Id. at 343-52.
rulemaking without undertaking a new notice and comment procedure.\textsuperscript{119} A brief delay in a rule's effective date, as ordered by President Bush when he took office, can probably be accomplished without notice and comment procedures, but these procedures may be required for a substantial or indefinite delay.\textsuperscript{120} While the impetus for the action would come from the President, the agency to which Congress delegated the rulemaking power at issue would conduct the actual proceeding resulting in delay, rescission, or amendment. The President might, for example, order the Administrator of the EPA to rescind a regulation that was put into effect in the weeks before the transition. At the outset of the administration, the Administrator is very likely to comply, since the President probably explored the idea of compliance with this order, or at least general agreement with the President's regulatory agenda, with the Administrator before the appointment was made. The President's involvement should not affect the validity of any subsequent rulemaking, assuming it is conducted properly and has the requisite support in the record.\textsuperscript{121}

\textsuperscript{119} Sometimes notice and comment is used to promulgate rules where notice and comment is not required. In such cases, there is a good argument that a new administration ought to be able to revoke or revise the rule without employing notice and comment. In short, an agency's choice to use more procedure than is statutorily required should not bind subsequent administrations. \textit{See supra} text accompanying notes 40-46.

\textsuperscript{120} As noted, section 553(b) of the APA exempts several categories and kinds of agency action from its notice and comment requirements. 5 U.S.C. § 553(b) (2000); \textit{see also supra} notes 48-50 and accompanying text. The Bush administration invoked that section's exemptions for procedural rules and for rules where there is good cause, including impracticability, for dispensing with notice and comment on its decisions to delay for sixty days the effective date of rules that had been issued but had not yet gone into effect. \textit{See infra} note 132. One commentator has concluded that a delay in the effective date of a rule can itself be a rule presumptively subject to notice and comment rulemaking. \textit{See Jack, supra} note 6, at 1505-11. However, Jack also concluded that a brief delay may be exempt from notice and comment as a procedural rule because a brief delay does not substantially affect the rights and interests of private parties. \textit{See id.} at 1505-06 nn.137-44.

The "good cause" provision of section 553 should also support the sixty day delays. An incoming administration may have genuine concerns about the quality of last-minute regulations given their quantity and the apparent urgency with which they seem to be passed. Further, the impracticability of holding notice and comment before the impending effective dates provides an additional basis for failing to provide notice and comment for the delays. \textit{But see id.} at 1509 (concluding that agencies could have held notice and comment before delaying effective dates). In addition, Jack reasoned that a lengthy or indefinite delay in the effective date of a rule should normally be subjected to a notice and comment procedure because it substantially affects parties interested in the rule. \textit{See id.} at 1506-07.

The Bush administration essentially followed this line of reasoning. It ordered sixty day delays without notice and comment, but when an agency sought to extend that delay, for example when the EPA sought an additional nine month delay to study the arsenic in drinking water rule, it conducted a brief notice and comment rulemaking before issuing the second delay. \textit{See infra} notes 145-150 and accompanying text.

\textsuperscript{121} \textit{See infra} text accompanying notes 178-189.
As a substantive matter, rules rescinding or amending other rules must meet the standard of review applicable to rules made under the particular statute involved. In the Airbags Case, it was argued that judicial review of a decision to rescind a rule should be very deferential because it resembles a decision not to regulate more than a decision to impose a new rule, but the Supreme Court rejected that argument. Rather, the Court reviewed the Reagan administration’s decision to rescind a Carter administration rule requiring cars to be equipped with airbags under the arbitrary and capricious test that applies to rules issued after notice and comment. The most important point about this case for present purposes is that the Court took the regulatory status quo as the baseline and reviewed whether the new administration had articulated a sufficient justification for making a change. This means that prior administrative action can tie a new President’s hands more than if the President had to worry only about whether administrative action complies with applicable statutes.

Another action an incoming administration can take if there is time is to urge Congress to use its power to pass legislation rejecting a rule, as Congress did with regard to the ergonomics rule issued late in the Clinton administration. The new President can promise to sign such legislation, and can also use his political clout to help get it passed. This procedure will work only with rules that were promulgated late enough in the outgoing President’s

122 See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) [hereinafter Airbags Case] (stating that the procedural and judicial review provisions of the APA apply to orders establishing, amending, or revoking standards under the National Traffic and Motor Safety Act because the Act does not suggest a “difference in the scope of judicial review depending upon the nature of the agency’s action”). An order briefly delaying the effective date of a rule is unlikely to be tested on judicial review because, unless there is an emergency, any petition for review will not be heard until after the brief delay has expired and the rule has either gone into effect or has been delayed further pursuant to a notice and comment procedure. If the delay becomes lengthy or indefinite, then it might be reviewed and the review would be similar to the review of a decision to rescind a rule.

123 See id. at 40-44 (reviewing, under the arbitrary and capricious standard, the revocation of a rule requiring cars to be equipped with airbags). While the Carter administration’s rule could not be termed a “midnight regulation” since it was issued in the first year of President Carter’s term, the Reagan administration’s unsuccessful attempt to rescind it raises many of the same issues that are involved when an administration attacks rules promulgated late in the prior administration’s term.

124 See id. at 43 (holding that the arbitrary and capricious standard applies to rescission and modifications of previously issued rules); see also Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000) (“The reviewing court shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .”).

125 See Airbags Case, 463 U.S. at 43.

term so that, by the time Congress acts on them, the new President is in office to sign the legislation. With regard to rules promulgated earlier, the former President would still be in office and could veto the legislation rejecting the rule. Later, however, Congress could still pass legislation to effectively override the rule. The expedited procedures of the Congressional Review Act would not apply, and it might be more difficult to get the legislation through both Houses of Congress. After the time allowed for quick legislative action expires, it might be easier for the new administration to employ rulemaking to revise or revoke the rule than to convince Congress to make a legislative change.

Presidents Reagan, Clinton, and George W. Bush took action aimed specifically at midnight regulations. For example, shortly after President George W. Bush took office, his Chief of Staff conveyed by memorandum an order from the President directing agencies to take, inter alia, the following steps: 1) not to send any proposed or final regulation to the Federal Register unless the proposed or final regulation has been reviewed by an agency head appointed by President Bush; 2) to withdraw any regulations that have been submitted to the Federal Register, but not yet published, so that they can be so reviewed; and 3) to postpone the effective date of published, but not yet effective, regulations for sixty days. The reason offered for these actions

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127 The memorandum, published at 66 Fed. Reg. 7702, reads as follows:

MEMORANDUM  
January 20, 2001

Memorandum for the Heads and Acting Heads of Executive Departments and Agencies

FROM: Andrew H. Card, Jr.  
Assistant to the President and Chief of Staff.

SUBJECT: Regulatory Review Plan.

The President has asked me to communicate to each of you his plan for managing the Federal regulatory process at the outset of his Administration. In order to ensure that the President’s appointees have the opportunity to review any new or pending regulations, I ask on behalf of the President that you immediately take the following steps:

1. Subject to any exceptions the Director or Acting Director of the Office of Management and Budget (the “OMB Director”) allows for emergency or other urgent situations relating to health and safety, send no proposed or final regulation to the Office of the Federal Register (the “OFR”) unless and until a department or agency head appointed by the President after noon on January 20, 2001, reviews and approves the regulatory action. The department or agency head may delegate this power of review and approval to any other person so appointed by the President, consistent with applicable law.

2. With respect to regulations that have been sent to the OFR but not published in the Federal Register, withdraw them from OFR for review and approval as described in paragraph 1, subject to exception as described in paragraph 1. This withdrawal must be
was to provide the new administration with a chance to review these regulations before putting them into effect.\textsuperscript{128}

The process of complying with the Bush administration's order and reviewing late-term actions by the Clinton administration occupied a great deal of agency officials' time and energy in the early days of the administration.\textsuperscript{129} In the weeks and months after the review memorandum was issued, agency heads complied by issuing orders postponing the effective dates of regulations that had been finalized in the weeks before the transition so that the regulations

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3. With respect to regulations that have been published in the OFR but have not taken effect, temporarily postpone the effective date of the regulations for 60 days, subject to exception as described in paragraph 1.

4. Exclude from the requested actions in paragraphs 1-3 any regulations promulgated pursuant to statutory or judicial deadlines and identify such exclusions to the OMB Director as soon as possible.

5. Notify the OMB Director promptly of any regulations that, in your view, impact critical health and safety functions of the agency and therefore should be also excluded from the directives in paragraphs 1-3. The Director will review any such notifications and determine whether exception is appropriate under the circumstances.

6. Continue in all instances to comply with Executive Order 12866, pending our review of that order, as well as any other applicable Executive Orders concerning regulatory management.

As used in this memorandum, "regulation" has the meaning set out in section 3(e) of Executive Order 12866. That is, this plan covers "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." This regulatory review will be implemented by the Director or Acting Director of the OMB. Communications regarding exceptions to the review, or questions regarding the review generally, should be addressed to that individual.

Finally, in the interest of sound regulatory practice and the avoidance of costly, burdensome, or unnecessary regulation, independent agencies are encouraged to participate voluntarily in this review.

This memorandum shall be published in the Federal Register.


\textsuperscript{128} See id. President Clinton's administration took a very similar step on January 22, 1993 in a notice issued by OMB. See Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993) (requesting that agencies not send proposed and final rules to the Federal Register for publication until approved by an agency head or other Clinton appointee). Unlike President Bush, President Clinton did not suspend the effective date of already-published regulations. Rather, he ordered agencies not to publish any new regulations until a Clinton-appointee had a chance to review and approve them. \textit{id}.

\textsuperscript{129} For information on the number of rules affected by the Bush administration order and what ultimately happened to those rules, see Jack, \textit{supra} note 6, at 1484-88 (reporting that agencies withdrew 124 regulations, 40 of them final rules, between January 21, 2001 and early February 2001 and delayed 90 rules during the same period).
could be reviewed by Bush administration officials. In at least one case, an agency mistakenly issued a rule after President Bush’s order and the agency then had to issue a notice withdrawing the rule pending administration review. The orders delaying the effective dates of regulations were all issued by the officials with authority over the particular area, all relied on the President’s memorandum, and all recited reasons why the delay order was proper without notice and comment rulemaking under the APA. One of the reasons for ordering the delay without a notice and comment period is that delaying the effectiveness of the order to accommodate notice and comment would mean that the order would not become final until after the delayed regulation had gone into effect. This rendered notice and comment, according to the relevant agencies, impractical and contrary to the public interest.

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130 In the first few months of the Bush administration, agencies issued more than seventy notices delaying the effectiveness of rules that had been published in the waning days of the Clinton administration but had not yet become effective. See, e.g., Special Regulations: Areas of the National Park System: Delay of Effective Date, 66 Fed. Reg. 8366 (Jan. 31, 2001) (to be codified at 36 C.F.R. pt. 7) (delaying for sixty days the effective date of the rule concerning the restrictions on snowmobiles and other winter activities in Yellowstone and Grand Teton National Parks and the John D. Rockefeller, Jr., Memorial Parkway); Mitigation of Impacts to Wetlands and Natural Habitat, 66 Fed. Reg. 8089 (Jan. 29, 2001) (to be codified at 23 C.F.R. pt. 777) (delaying for sixty days the effective date of the rule concerning the mitigation of impacts to wetlands and natural habitat).

131 Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Methodology for Coverage of Phase I and Phase III Clinical Trials Sponsored by the National Institutes of Health, 66 Fed. Reg. 9199 (Feb. 7, 2001) (to be codified at 32 C.F.R. pt. 199) (withdrawing the rule published by the Department of Defense, which was published contrary to the provisions of the Card Memorandum).

132 The justification for dispensing with notice and comment rulemaking in each of the notices was as follows, with some minor variations among the rules:

To the extent that 5 U.S.C. section 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Agency’s implementation of this rule without opportunity for public comment, effective immediately upon publication today in the Federal Register, is based on the good cause exceptions in 5 U.S.C. section 553(b)(B) and 553(d)(3), in that seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President’s memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations.

Special Regulations; Areas of the Nat’l Park System: Delay of Effective Date, 66 Fed. Reg. at 8367.

133 Mitigation of Impacts to Wetlands and Natural Habitat, 66 Fed. Reg. at 8089.

134 See, e.g., notice cited supra note 132. For an argument that some of the Bush
The Bush administration’s review of late-term Clinton regulations resulted in some regulations going forward as originally issued, some regulations being altered, some regulations being reviewed further, and some regulations being scrapped. In some cases, the Bush administration’s review of the regulation was finished before the end of the sixty-day period of delay, and the agency issued a notice declaring that, after review, the regulation would stand as issued and would go into effect after the sixty-day period of delay was over. Some of the delay orders provoked public comments urging the new administration to abandon or alter the rule in question. Some of these efforts were successful, while others were not.

A closer look at two examples helps illustrate the process. On January 11, 2001, just over a week before the end of the Clinton administration, the Department of Labor issued an interpretation of the “Advice” exemption in section 203(c) of the Labor-Management Reporting and Disclosure Act. The new interpretation narrowed the category of information exempted from disclosure by employers. The Department found that the new interpretation was a better reading of the text and intent of the Act than the 1962 version. If an employer fails to provide required information, the Department of Labor is statutorily authorized to bring a civil suit to compel production of the information, and willful, knowing, or repeated violations are subject to criminal penalties. The previous interpretation had been in effect since administration’s actions violated APA procedural requirements and were arbitrary and capricious, see Jack, supra note 6, at 1488-1511 (arguing that the withdrawal by the Department of Defense of the final rule that had been already published in the Federal Register violated the procedural requirements of the APA and that some of the delays made pursuant to the Card Memorandum may not be considered procedural rules within the meaning of the APA).


136 See PHS Policy on Instruction in the Responsible Conduct of Research, 66 Fed. Reg. 11,032 (Feb. 21, 2001) (indefinitely suspending Clinton-era regulation to permit additional review both of the substance of the policy and the process for adoption).


138 Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting andDisclosure Act, 66 Fed. Reg. 2782 (Jan. 11, 2001) (stating that the application of the “advice” exemption depends on whether an activity can be considered giving “advice,” meaning an oral or written recommendation regarding a decision or a course of conduct, as opposed to engaging in direct or indirect persuasion of employees).

139 See id. at 2785.

140 See id. at 2782 (authorizing the Secretary of Labor to bring civil actions to enforce the
1962. The Clinton administration’s Department of Labor made this change after operating under the longstanding prior interpretation for eight years and knowing that the new interpretation would be enforced, if at all, by its Republican successor.\textsuperscript{141} This scenario appears to be an effort not to influence policy, but rather to score political points with friends and cause political problems for the new administration. Pursuant to President Bush’s order, on February 9, 2001, the Department of Labor delayed the effective date of the January 11 rule for sixty days.\textsuperscript{142} Then, on April 11, 2001, the new effective date for the 2001 interpretation, the Department rescinded the new interpretation, thereby reinstating the 1962 interpretation.\textsuperscript{143} In support of this decision, the Department stated that it was not persuaded that the new interpretation was more consistent with the text and intent of the statute than the 1962 version, and it was also troubled that the new interpretation had been issued without notice and comment.\textsuperscript{144}

The second example involves the instance of the Bush administration’s review process that achieved the most notoriety, the process surrounding the rule reducing the permissible level of arsenic in drinking water. On January 22, 2001, two days after President Bush was inaugurated, the EPA published a final rule setting the permissible level of arsenic in drinking water.\textsuperscript{145} On

\textsuperscript{141} The rule was prospective, taking effect thirty days after publication. \textit{Id.} Thus, even if the Department of Labor was inclined to institute an enforcement action in the last days of the Clinton administration, the new rule would not yet have been in effect.

\textsuperscript{142} Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. 9724 (Feb. 9, 2001) (temporarily delaying for sixty days the enforcement date of the interpretation set forth by the outgoing Clinton administration).

\textsuperscript{143} Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. 18,864 (Apr. 11, 2001) (rescinding the Clinton administration revision of the “advice” exemption of the Labor-Management Reporting and Disclosure Act).

\textsuperscript{144} See \textit{id.} (stating that the evidence provided in support of a revised interpretation was insufficient and the revision was made without consulting most affected parties). Notice and comment is not required for an interpretative rule. Interestingly, the Bush administration did not request comments on whether the new interpretation should be retained or abandoned. In its notice delaying the effective date of the rule, the Department of Labor stated that, due to the President’s order to delay the effective date, application of the new interpretation “shall instead commence on April 11, 2001.” See Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. at 9724.

\textsuperscript{145} National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976 (Jan. 22, 2001) (to be codified in 40 C.F.R. pts. 9, 141, 142) (establishing a health-based, non-enforceable maximum contaminant level goal for arsenic of zero and an enforceable maximum
March 23, 2001, the EPA, in accordance with the new President’s order, delayed the effective date of this rule for sixty days.146 This generated a great deal of public controversy. The next step taken by the new EPA Administrator was to issue a notice of proposed rulemaking to allow for a further delay of nine months in order to study the arsenic issue.147 This notice raised the possibility that the rule might be revised. Another EPA notice formally adopted a further delay of the rule’s effective date to allow for this study.148 Then something somewhat unexpected occurred. In the midst of substantial public controversy, a scientific report requested by the EPA as part of this review process concluded that even the Clinton administration had underestimated the negative health effects of arsenic.149 This study supported the Clinton administration’s regulation, and on October 31, 2001, the Bush administration’s EPA Administrator announced that the Clinton standard would go into effect as planned under the published schedule.150

There are many additional “midnight regulations,” issued across the range of administrative agencies, that were reviewed in the early days of the Bush administration. Many, like the arsenic rule discussed above, were allowed to take effect after the review was completed. In these cases, the only legal change the new administration made was to delay the rules’ effective dates, usually by sixty days. In other cases, after initial review, the Bush

contaminant level for arsenic of 0.01 mg/L).

146 National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 16,134 (Mar. 23, 2001) (to be codified in 40 C.F.R. pts. 9, 141, 142) (delaying for sixty days the effective date of the rule on the permissible level of arsenic in drinking water).

147 National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 20,580 (April 23, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) (proposing a nine month extension of the effective date of the arsenic rule to complete the reassessment process of the science and costing analyses and to provide an opportunity for further public input).

148 National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 28,342 (May 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) (extending for nine months the effective date for the arsenic rule in order to conduct the reviews of the science and costing analyses underlying the arsenic rule).


150 See Press Release, EPA, EPA Announces Arsenic Standard for Drinking Water of 10 Parts per Billion (Oct. 31, 2001), available at 2001 WL 1337226 (reporting the EPA Administrator’s announcement that the agency will lower the maximum acceptable level of arsenic in drinking water from fifty to ten parts per billion).
administration proposed a new rule to replace the previously published rule, and ordered a delay of the effective date of the Clinton-era rule until the new rulemaking could be completed. This process would then result in the adoption of a new rule in place of the Clinton administration's rule. The only controversial step here would be the additional delay in the effective date of the Clinton administration's rule without notice and comment, which is similar to actions the Clinton administration took eight years earlier.

The Bush administration's review process was designed to minimize the legal challenges that might be raised against the process. After the President ordered all agency departments to delay the effective dates of rules that had been published, the actual orders to delay effective dates were issued by the agencies themselves. These orders were all published in the Federal Register. Then, if further delay was sought, the agencies set down the proposal for a later effective date and for notice and comment. If the agency proposed revising the Clinton-era rule, it put its own proposal out for notice and comment, rather than merely re-writing or abandoning the rule based on the record produced in the notice and comment period that was held during the Clinton administration.

Compliance with some aspects of President Bush's order was less public than others. President Bush ordered agencies and departments not to publish any new rules (including proposed rules) until a Bush appointed agency head had an opportunity to review the rule, and to withdraw any rules or rulemaking proposals that had been submitted to the Federal Register but had not yet been published. It is unclear how many such rules there were, and because they had not yet been published, no sign of them appears in the Federal Register itself. Nor are there any documents in the Federal Register that reflect the withdrawal of a submitted but unpublished rule or proposal, or a decision not to publish a rule so as to comply with the order. There is at least one instance in which a final rule was published in the Federal Register and then withdrawn by the agency with the explanation that the publication of the final rule violated President Bush's regulatory review plan. This rule was published

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151 New Markets Venture Capital Program, 66 Fed. Reg. 20,531 (proposed Apr. 23, 2001) (proposing to withdraw the interim final rule before it became effective and to implement the New Market Venture Capital Program Act with a new proposed rule).


153 The best example here is the seven-year suspension, without notice and comment, of the "gag rule." See The Title X "Gag Rule", 58 Fed. Reg. 7455, 7455 (Jan. 22, 1993) (authorizing the suspension of the "gag rule," which prevented recipients of Federal funding for family planning clinics from providing their patients with information, counseling, or referrals concerning abortion).


155 Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Methodology for Coverage of Phase II and Phase III Clinical Trials Sponsored by the
on January 31, 2001, probably too late for it to have been submitted for publication before January 20, when the transition occurred.\textsuperscript{156} Other than this instance, there is no evidence in the Federal Register of final rules that had been submitted and then withdrawn for review.\textsuperscript{157} 

The points of legal doubt in this process are: first, whether an agency has the power, without notice and comment, to withdraw or delay the effective date of rules, which had been adopted pursuant to notice and comment proceedings, to allow the rules to be reconsidered;\textsuperscript{158} second, whether the withdrawal or delay was somehow more suspect because it was done under presidential order; third, whether an agency decision not to publish a rule or proposed rule is suspect if done under presidential compulsion; and fourth, whether any new rulemaking would also be suspect because it was done under apparent presidential compulsion. In my view, none of these factors are likely to result in invalidation of any of the Bush administration's review-related actions.\textsuperscript{159}

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\textsuperscript{156} National Institutes of Health, 66 Fed. Reg. 9199 (Feb. 7, 2001) (to be codified at 32 C.F.R. pt. 199) (withdrawing a final rule on Methodology for Coverage of Phase II and Phase III Clinical Trials, which was published in violation of the Card Memorandum).

\textsuperscript{157} According to one report, “agencies promptly responded to the directives of the Card Memorandum and withdrew a total of 124 regulations, forty of them final rules, from the [Office of the Federal Register's] 'publication queue' between January 21, 2001 and early February 2001.” Jack, supra note 6, at 1485-86. Jack concludes, based on the Federal Register Act and regulations promulgated under it, that it is perfectly legal for an agency to withdraw documents from the Federal Register before they have been published or made available to the public through the Office of the Federal Register, although it may be problematic once a document has been made available to the public, which occurs before actual publication in the Federal Register. See id. at 1492-97; see also Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (finding that an agency has the power to withdraw a rule from the Federal Register before it has been made public).

\textsuperscript{158} See Lars Noah, Doubts About Direct Final Rulemaking, 52 ADMIN. L. REV. 401, 416 (1999) (arguing, in another context, that an agency may not, absent good cause, withdraw or reissue a final rule without notice and comment). Professor Ronald Levin responds that in some circumstances an agency may withdraw a final rule for reconsideration without inviting public comments on the decision to reconsider. Ronald Levin, More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting, 51 ADMIN. L. REV. 757, 765 (1999).

\textsuperscript{159} At least one commentator has concluded that, while many of the incoming Bush administration's actions were within the limits of the law, some of them raise serious legal questions under the APA. See Jack, supra note 6, at 1490-1511. Specifically, Jack
Some of these legal questions are unlikely to ever be resolved. With regard to a short delay, unless there is such an emergency that a court could be convinced to hear the case immediately, by the time any legal challenge to the incoming administration’s action reaches the merits, the period of delay is likely to have long expired, and the issue will have either ripened into a challenge to revocation or revision of the rule, or the rule will be in effect and any challenge to the delay will have become moot.

With regard to an order not to promulgate any rules for a short period of time to allow the new administration to assume the reins of power, assuming that administrative officials cooperate with the President, it is also seems that any challenge involving the President is likely to be moot by the time a case could be litigated. The period during which agencies were directed not to issue regulations was sixty days under both Presidents Reagan and George W. Bush. The sixty days are likely to be long over by the time a court would reach the merits of the President’s suspension order. By then, the agency would have decided either to go ahead and promulgate the rule, in which case the challenge to the delay would likely be moot, or the agency might rescind or modify the rule, in which case the only challenge would be to the rescission or revision rather than the delay. In challenging the decision, the President’s involvement is likely to be irrelevant because the actual rescission or revocation would be carried out by the person having the authority to take the action in question, usually an agency head or department head. The decision would be judged on its merits, i.e. whether all required procedures were observed and whether the record was sufficient to warrant the decision based on the applicable standard of review. Courts are likely to avoid the unsettled separation of powers questions lurking when the claim is made that an administrative decision should be invalidated because the President was too involved in taking an action that Congress had delegated to a particular official in the executive branch.

If a challenge to delay were presented in a justiciable form, and a court were inclined to reach the merits, the incoming President would have strong arguments supporting the legality of freezing the issuance of new rules and the implementation of regulations promulgated at the end of a term. The President’s primary power and duty is to “take Care that the Laws be faithfully executed.”

One need not be a believer in the unitary executive to sympathize with an incoming administration that arrives to find hundreds or

concludes that the withdrawal of a final rule before publication in the Federal Register does not violate the APA or any other statute or rule. Id. at 1494-95. However, his comment does conclude that withdrawing a final, published rule without notice and comment violates the procedural requirements of the APA and that, in some circumstances, delaying the effective date of a rule, which was done many times under the Card Memorandum, violates the APA. See id. at 1498-1511. As the discussion in text reveals, I do not believe that a court would rule against the Bush administration if any of the actions under the Card Memorandum provoked a justiciable controversy.

160 U.S. CONST. art. II, § 3.
thousands of pages of new rules that were promulgated in the last days of the prior administration. A brief delay in order to assess the rules seems to be a reasonable use of the President’s power. There would be legitimate concerns that the rush at the end of a term produced ill-considered rules that may be difficult to incorporate into the existing legal framework.

Looking at agency action apart from the Presidents’ involvement, courts are unlikely to overturn an agency’s decision to delay briefly the effective date of a new rule. Such a delay should be viewed as within an agency’s power. Doubt might increase as the suspension lengthens, however, prompting suspicion that the suspension might be a cover for repeal without notice and comment.6

The withdrawal of a final rule, which occurred in at least one case, is a bit more problematic, but ultimately I do not believe that a court should interfere with an agency decision to withdraw a rule shortly after publication but before it becomes effective unless there are independent reasons for requiring the agency to issue the rule.161 The President’s involvement also should not invalidate either the suspension or the results of any new rulemaking. As long as the agency official with legal authority actually issues the relevant orders or conducts the rulemaking, I do not see any legal basis for disallowing this degree of involvement by the President in the administrative process. Separation of powers concerns also counsel against restricting the President’s ability to guide activities within the executive branch.

B. Nonlegislative Rules and Executive Orders

As noted above, there was no surge at the end of the Clinton presidency in the issuance of interpretive rules although there appears to have been an increase in some documents, such as guidances, that do not require notice and comment proceedings.162 The reason for this may be very simple: in general, the APA requires the same process for revoking or revising a rule as is followed in its adoption. Therefore, a new administration can revoke or replace a prior administration’s interpretive rules and policy statements simply by publishing notice in the Federal Register. Because interpretive rules and policy statements are not very durable, the outgoing administration may not find it worthwhile to take the trouble to issue them just so the incoming administration can revoke them a few days or weeks later.

Executive orders are also freely revocable and revisable by a subsequent President. All an incoming President needs to do to revoke or revise an

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6 Again, the best example is President Clinton’s suspension of the “gag rule,” which, after a few years, might have been viewed as a repeal and thus may have been improper without notice and comment. See The Title X “Gag Rule”, 58 Fed. Reg. 7455, 7455 (Feb. 5, 1993) (suspending the “gag rule” that had prevented family planning clinics receiving federal funds from providing their patients with information, counseling, or referrals concerning abortion).

161 See supra note 158.

162 See supra text accompanying notes 58-59.
executive order issued by his predecessor is issue a new executive order. As noted above, President Clinton issued at least thirty-eight executive orders in the last eight months of his presidency, including twenty-one that were issued after the November election. President Bush’s earliest executive orders involved a new initiative and were not efforts to undo orders made by President Clinton.\textsuperscript{164} While several of President George W. Bush’s early executive orders revoked or revised orders issued by President Clinton, by and large these did not involve orders issued by President Clinton late in his term. The first Bush executive order that dealt with a late-term Clinton order extended the reporting date of the task force on the future of Puerto Rico.\textsuperscript{165} Another relatively early Bush order revised a 1999 executive order regarding the welfare of Asian Americans and Pacific Islanders.\textsuperscript{166} President Bush also added to the restrictions on diamond imports from Sierra Leone that President Clinton had imposed on January 18, 2001.\textsuperscript{167} Another order issued by President Bush in his first year in office formalized the discontinuance of the Commission on Improving Economic Opportunity in Communities Dependent on Tobacco Production While Protecting Public Health—created by President Clinton in September 2000—apparently on the ground that the commission had completed its work.\textsuperscript{168} In sum, although President Clinton issued more

\textsuperscript{164} See, e.g., Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 31, 2001) (establishing a White House Office of Faith-Based and Community Initiatives responsible for developing policies aimed at expanding the role and increasing the capacity of faith-based and other community programs); Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001) (establishing Executive Department Centers for Faith-Based and Community Initiatives, which is responsible for coordinating efforts to eliminate obstacles to the participation of faith-based and other community organizations in the provision of social services).

\textsuperscript{165} Exec. Order No. 13,209, 66 Fed. Reg. 22,105 (May 2, 2001) (extending by three months the time in which the President’s Task Force on Puerto Rico’s Status was to report to the President).

\textsuperscript{166} Exec. Order No. 13,216, 66 Fed. Reg. 31,373 (June 11, 2001) (changing the title of Executive Order 13,125 of June 7, 1999, and extending by two years the President’s Advisory Commission on Asian Americans and Pacific Islanders).

\textsuperscript{167} Exec. Order No. 13,213, 66 Fed. Reg. 28,829 (May 24, 2001) (prohibiting importation into the United States of all rough diamonds that originated in Liberia and authorizing the Secretary of the Treasury to take any action necessary to carry out the prohibition).

\textsuperscript{168} Exec. Order No. 13,225, 66 Fed. Reg. 50,291 (Oct. 3, 2001) (prolonging the existence of a number of listed advisory committees and revoking executive orders establishing committees that had terminated or whose work was complete). This order revoked, inter alia, Executive Order 13,168, which created the Commission on Improving Economic Opportunity in Communities Dependent on Tobacco Production While Protecting Public Health. Exec. Order No. 13,168, 65 Fed. Reg. 58,217 (Sept. 22, 2000). Executive Order 13,168 had already provided that the commission it created was to report to the President sometime in mid-2001 and that it would go out of existence thereafter. Thus, it may be that the commission had finished its work and that President Bush was merely formalizing its end.
executive orders in his last months in office than during similar periods in other years, there is no indication that the new administration found it necessary to revoke or revise the late-term Clinton executive orders.

There are probably a variety of explanations for this. First, because executive orders are freely revocable and revisable, they may not be the instrument of choice for “midnight regulation.” They are simply not durable enough to be worthwhile. Second, the subject matter of many executive orders may not be important enough for the new President to deal with, even if he never would have issued the order himself. For example, even if President Bush never would have created the various task forces and commissions that were established late in President Clinton’s term, since President Bush was free to ignore their reports and recommendations, it may not have been worth the effort involved to disestablish these bodies, especially if doing so would have created grumbling and thus entailed political costs, however small. Finally, executive orders may be too public. In many situations, Presidents might prefer to assert their authority more privately, taking the spotlight only when there is an important political reason to do so.

Although it would seem that executive orders can be a useful instrument for an administration in assuming the reins of power, they do not appear to be widely used in that way. For example, when Presidents Bush and Clinton each ordered a hold on new regulations that had been issued late in their predecessor’s terms, they did not do this via executive order. Rather, they had other officials issue memoranda that were published in the Federal Register. Further, when President Clinton ordered HHS to replace the gag rule, he did so via a memorandum directed to the Secretary of HHS, not via an executive order. Perhaps the most well known use of the executive order to assert power over the executive branch in the last few decades has been the issuance of executive orders requiring centralized review of agency regulations by OMB. About eight months after he took office, President Clinton revoked President Reagan’s precedent-setting regulatory review order and replaced it with his own version. Other than this particular order, recent Presidents have not used executive orders to establish authority early in their terms. Interestingly, the executive order does not appear to be a major instrument for midnight regulation or presidential consolidation of power over the executive branch.

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170 See The Title X “Gag Rule”, 58 Fed. Reg. 7455, 7455 (Feb. 5, 1993) (memorandum of President Clinton directing the Secretary of HHS to suspend the gag rule and propose new regulations).

171 See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (establishing a new regulatory review system aimed at reforming the regulatory process to make it more efficient).
C. National Monuments and Presidential Pardons

There is little that an incoming President can do about an outgoing President's use of authority under the Antiquities Act to designate areas of federal land as national monuments. As explained above, the Antiquities Act has been interpreted to make the President's designations final, subject only to legislation by Congress. The incoming President can, however, use the designations as a political issue against his predecessor's party, or urge Congress to pass legislation revoking or modifying the designations. The incoming President might also use whatever discretion exists regarding national monuments to shape the administration of the national monuments to conform to his policies. This may be easier when a national monument is designated very late in the prior President's term because it is unlikely that the prior administration established institutions or practices that might have created expectations for the management of the new monuments. For example, some of the designations require the relevant agency to develop a "management plan" within a specified period of time. This time period might spill over into the successor's administration, giving the new President power to influence the management of the monument.

A similar reality exists with regard to the President's use of the pardon power. It does not appear that an incoming President has the power to revoke or revise his predecessor's grants of pardons and clemencies. An incoming President could participate in an investigation of his predecessor's pardon activity, and could encourage his Justice Department to criminally prosecute anyone who is found to have violated the law in the pardon process. Some of President Clinton's pardons did spark investigations, but President Bush's

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172 See supra notes 84-85 and accompanying text.

173 As noted above, President Bush's Justice Department studied whether a pardon could be revoked if some of the procedural steps in the pardon process were not complete when the new President took office. See supra note 105. A new President might also be able to tinker with conditional pardons, for example, by ruling that the requisite conditions had not been met. See Krent, supra note 105, at 1704 (suggesting that a new President might be able to undo the conditions on a pardon). If the executive branch has to determine whether or not a condition has been met, a new President could take a different view of the condition from the President who granted the pardon, and might be able to influence the pardoned criminal's actual enjoyment of the pardon. Interestingly, the House attempted to address the whole pardon issue by proposing a constitutional amendment that would restrict the President's pardon power at the end of a term. See H.R.J. Res. 22, 107th Cong. (2001); see also Gregory C. Sisk, Suspending the Pardon Power During the Twilight of a Presidential Term, 67 Mo. L. Rev. 13, 26-27 (2002) (discussing the increased risk of abuse of the pardon power that exists in the transitional period between administrations).

174 Both Congress and the incoming administration investigated some of President Clinton's uses of the pardon power. See COMMITTEE ON GOVERNMENT REFORM, JUSTICE UNDONE: CLEMENCY DECISIONS IN THE CLINTON WHITE HOUSE, H.R. REP. NO. 107-454 (2002); Karen Gullo, Ashcroft: Pardon Study Will Continue, AP ONLINE, Mar. 27, 2001, available at 2001 WL 17988350 (discussing Ashcroft's decision to allow Mary Jo White, a
administration asserted executive privilege, denying investigators access to documents surrounding the pardons. This executive privilege appears to have been asserted to avoid setting the precedent of permitting access to documents related to the President's use of the pardon power.

In sum, there are many tools that incoming Presidents can use to undermine late-term actions by their predecessors. The effectiveness of the tools varies depending on the particular action taken by the predecessors. In general, final regulations issued by agencies have substantial durability, and the new administration must replicate the notice and comment process to revise or revoke them. Interpretive rules, policy statements, and other agency action for which notice and comment is not required can be much more freely revised and revoked. Executive orders are completely revisable and revocable by the new President. Designations of national monuments are probably subject to revision or revocation only via a statute passed by Congress. Presidential uses of the pardon power are final and cannot be altered by an incoming administration or by Congress. Even in those areas in which the new President has power, political considerations may moderate the incoming President's ability to alter the late-term actions of his predecessor.

III. POSSIBLE LEGAL REACTIONS AND REFORMS IN REACTION TO “MIDNIGHT REGULATIONS”

The final question I address in this article, assuming that late-term presidential and administrative action is viewed as problematic, is whether effective legal reforms in reaction to “midnight regulation” can be crafted. Reforms could take one of two general forms. Measures could be adopted to make it harder for an outgoing President and his administration to act late in the President's term, or measures could be adopted to make it easier for a new administration to revise or revoke actions taken late in the outgoing President's term. Before addressing possible reforms, however, it is useful to look at whether the law currently places significant impediments on either the federal prosecutor for the Southern District of New York, to continue and expand her study of Clinton's last-minute pardons).

175 George Lardner, Jr., Secrecy Sought for Clinton Pardons, MILWAUKEE J. & SENTINEL, Aug. 27, 2002, at 7A (reporting on the Bush administration's attempts to expand the scope of executive privilege to cover officials anywhere in the government who are asked to discuss or produce pardon records).

176 Possible reactions to late-term diplomatic activity are discussed above, supra notes 113-118 and accompanying text. As noted, “midnight” diplomatic activity is rare because a lame-duck President ceases to be viewed as the authoritative voice of the United States in international relations. If, however, an outgoing President does engage in diplomatic activity, international law and other diplomatic considerations may make it more difficult for an incoming President to repudiate the prior President's late-term output than in the domestic sphere. See Combs, supra note 118, at 340-50 (discussing international law and international relations implications of possible repudiation of Algiers Declarations entered into on the last day of President Carter's presidency).
President’s direct involvement in late-term action or the incoming administration’s reactions to that late-term action.\footnote{177}

A. **Presidential Administration and Administrative Law**

At the point of transition, either as an old administration is ending or a new one is just beginning, the President appears to be more involved in managing the executive branch than at most other times during the President’s term. Outgoing Presidents appear to lead the charge to get as much done as possible in the administration’s remaining time. Incoming Presidents tend to assert leadership over the executive branch and, at the same time, attempt to deal with the mountain of last-minute actions that outgoing Presidents sometimes leave behind. As a result, the President’s role in the management of the administrative state may come under special legal and political scrutiny in controversies arising out of action taken at or near the point of transition. It is thus useful ask whether this enhanced role that the President plays in the administrative state during this time period is in and of itself likely to raise legal concerns.

As Dean Elena Kagan has so thoroughly and eloquently explained in her recent article *Presidential Administration*,\footnote{Kagan, *supra* note 63, at 2284-2303.} the President of the United States increasingly has become the focus of the administrative state even beyond the transition. Administrative action has become identified with presidential action. As Dean Kagan explains, this has happened in two separate ways. First, Presidents have worked hard to take more control of the administrative state. This supervision has formal elements, such as centralized review, executive orders and directives ordering administrators to take particular action, and appointment and removal of administrators.\footnote{Id. at 2246 (asserting that the Presidency has taken a leading role in setting the direction and influencing the outcome of the administrative process).} It also has less formal elements in which the President and his close advisors work with agencies to shape agency action to fit within the President’s overall policy agenda. Second, Presidents (most notably President Clinton) have stage-managed the administrative process to produce the appearance of control, taking credit for the initiation and culmination of administrative action even

\footnote{177 Professor Mendelson advocates the use of more transparent and regular procedures as a way to avoid the pitfalls of “burrowing.” She sees, in the transition between administrations, a potential for increased public attention to the work of the administration, and thus the potential for enhancing the actualization of democratic values in the administrative process. See Mendelson, *supra* note 8, at 660-62. Mendelson thus argues against burrowing when it is done out of the public eye or in a way likely to obstruct the proper functioning of the administrative process, for example, by allowing bureaucrats loyal to the outgoing President to sabotage the work of the incoming administration. See *id.* at 662-63 (discussing the role that individual motivations play in personnel burrowing).}
when, in reality, the President was not very much involved.\textsuperscript{180} Even if the President did not have much to do with making the decision to take an administrative action or with formulating its substance, the President participates in the announcement of the plan and the announcement of the final decision. This contributes to the President's appearance as an active leader in administrative action throughout the executive branch.

Many of the legal issues that may arise in reaction to enhanced presidential involvement in administration, whether at the point of transition or at other times, boil down to questions regarding whether the unitary executive theory represents the best understanding of the allocation of government power to the executive branch. While Congress sometimes delegates power directly to the President, more often it delegates power to a particular governmental department, or to a particular agency, either within the executive branch or outside of it. Presidents have, for the most part, respected the targeted delegation of authority to entities other than the President, despite the Constitution's arguable concentration of all executive power in the President. For example, when President Clinton wanted to liberalize the "gag rule," he did not take the action himself, but rather ordered HHS to engage in rulemaking to revise the rule. The question arises as to whether the President's involvement creates grounds for successfully challenging the resulting rule on judicial review. For a believer in the unitary executive, the answer is an easy "no," since under the unitary executive theory, the President has the absolute right to control all activity within the executive branch. For a non-believer, the answer is not so clear-cut. If the agency follows all procedural requirements contained in the APA and any other applicable statutes and regulations, and if the record before the agency is adequate to support the rule under the applicable standard of review, then the only issue is whether the President's influence is enough to taint the rule.

Imagine that, absent the President's influence, the agency would have promulgated a different rule or no rule at all. A challenger could argue that the President's involvement violates procedural requirements and that such involvement is inconsistent with the delegation of authority to the agency. One procedural argument might be that, as a result of presidential pressure, the agency officials making the decision did not actually consider any comments inconsistent with the President's wishes, thus violating the standard for open-mindedness in rulemaking formulated by the D.C. Circuit.\textsuperscript{181} Also, if the President communicates his preferences outside the rulemaking process, a

\textsuperscript{180} Id. at 2277-99 (reviewing President Reagan's increased use of presidential administration and discussing the formal techniques that President Clinton used to gain a larger role in administration).

\textsuperscript{181} Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1154 (D.C. Cir. 1979) (holding that, when there is clear and convincing evidence showing that an agency member has an "unalterably closed mind" in a matter critical to a rulemaking, that member can be disqualified from the rulemaking proceeding).
challenge might be based on the agency’s consideration of comments or documents from the President or his staff that were not placed on the record. A more substantive challenge could be based on the locus of the authority delegated by Congress to execute the statute involved. The argument would be that while Congress delegated authority to a particular agency official, the President or some member of his staff has, in effect if not as a formal matter, exercised that authority.

It is unlikely that a court would invalidate a rule in response to any of these arguments. The most promising challenge would be the claim that, in light of presidential pressure, the decisionmaker lacked an open mind. While the D.C. Circuit was not very clear about the basis for this standard, it is at least arguable that the APA requires decisionmakers in rulemaking proceedings to "consider[] the relevant matter presented" during the comment period.\footnote{See Administrative Procedure Act, 5 U.S.C. § 553(c) (2000) (laying out the procedure for rulemaking and requiring an agency to adopt a general statement of purpose after "consideration of the relevant matter presented").} A decisionmaker who has made up his mind based on a presidential directive, whether formal or informal, arguably does not fulfill this obligation.\footnote{At least one court has stated that there is no statutory basis for disqualifying a decisionmaker in a rulemaking. See Lead Indus. Ass’n v. EPA, 647 F.2d 1130, 1179 n.151 (D.C. Cir. 1980) (stating that the required separation between an agency’s investigative and decisionmaking functions does not apply to informal rulemaking proceedings). If this is correct, then it would appear that, absent a due process violation, application of this standard would violate the Vermont Yankee doctrine, which prohibits courts from adding to the procedural requirements contained in applicable statutes and rules. See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 520 (1978) (holding that the formulation of procedural requirements for rulemaking beyond those explicitly required by the APA should be left to the discretion of federal agencies).}

Despite this argument, it does not appear that the “unalterably closed mind standard” places a substantial constraint on agency rulemaking. Most fundamentally, the APA does not contain any explicit requirement of open-mindedness on the part of decisionmakers in rulemaking proceedings. While it may be that the APA implicitly requires all decisionmakers to “consider[] the relevant matter presented,”\footnote{See 5 U.S.C. § 553(c).} given the Supreme Court’s reluctance to add to those procedures required by the APA, the Court is unlikely to countenance the imposition of a strong requirement that is only implicit in the APA.

The case law bears out this prediction. There is no reported case in which a decisionmaker has been disqualified in a rulemaking proceeding based on a lack of open-mindedness. There have been cases in which courts have been asked to invalidate a rule, or disqualify a decisionmaker in advance of the promulgation of a rule, based on arguments that the decisionmaker’s mind was made up in advance of receiving the comments. In such cases, the courts recite the possibility of disqualification or invalidation based on the “unalterably closed mind” standard and then reject the argument while revealing very little
about what set of facts might actually violate the rule.\textsuperscript{185} It thus seems that the "unalterably closed mind" standard lacks real bite.

In addition to the doubtful legality of judicial imposition of the "unalterably closed mind" standard, the courts have recognized that application of the standard could conflict with the realities of the political aspects of the administrative process. Agency heads are often chosen, at least in part, based on their previously expressed policy commitments. They make speeches, publish articles, and engage in other forms of communication in which they advocate for government action to deal with particular problems in particular ways. Courts have resisted efforts to disqualify politicians such as these from participating in rulemaking proceedings because disqualification would require a significant transformation in the administrative process.\textsuperscript{186} If such a rule were adopted, Presidents would be, at a minimum, seriously hampered in their ability to appoint activists to important agency positions.

Courts might also be reluctant to cast doubt on the legality of rules in other situations in which agencies promulgate rules under external compulsion. For example, agencies sometimes engage in rulemaking under judicial compulsion or at least the threat of judicial compulsion, as when a lawsuit against an agency is settled with an agreement to promulgate legally required rules.\textsuperscript{187} Under the influence of a court decree, an agency may issue a rule that deviates

\textsuperscript{185} See, e.g., C&W Fish Co. v. Fox, 931 F.2d 1556, 1557 (D.C. Cir. 1991) (determining that a fish wholesaler's challenge to an amendment to the fishery management plan failed to make a clear and convincing showing that the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration had an unalterably closed mind in adopting the ban, even though there was evidence of his earlier advocacy of the ban and his policy view favoring the ban); Ass'n of Nat'l Advertisers, 627 F.2d at 1152 (reversing the lower court's decision to prohibit the Chairman of the FTC from participating in a pending rulemaking proceeding concerning children's advertising because the plaintiffs could not make a clear and convincing showing that the chairman had an unalterably closed mind).

\textsuperscript{186} See, e.g., C&W Fish Co., 931 F.2d at 1564 (finding that neither Fox's earlier advocacy nor his publicly expressed policy views demonstrated an unalterably closed mind that would disqualify him as an impartial decisionmaker); Ass'n of Nat'l Advertisers, 627 F.2d at 1174 (rejecting a formulation of the disqualification standard that impinges on the political process by disallowing administrators to state policy views before participating in a rulemaking proceeding); Colao v. County Council of Prince George's County, 675 A.2d 148, 166 (Md. App. 1996) (stating that "bias or prejudice of an agency decisionmaker related to issues of law or policy are not disqualifying").

\textsuperscript{187} Cf. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1401 (D.C. Cir. 1998) (holding that the "Tulloch Rule," which regulates dredging operations and was promulgated based on the settlement of claims against the EPA, was invalid as beyond the EPA's powers). In United Steelworkers of Am. v. Auchter, 763 F.2d 728, 729 (3d Cir. 1985), the court virtually required OSHA to extend the application of a previously promulgated rule to industries not covered by the original rule. This rule was later upheld against a challenge, where the challenger argued that the rule was invalid because it had been rejected by OMB. See United Steelworkers of Am. v. Pendergrass, 855 F.2d 108, 109 (3d Cir. 1988), aff'd sub nom. Dole v. United Steelworkers of Am., 494 U.S. 26, 26 (1990).
from actual administrative preferences. One could argue that the agency did not seriously consider comments that were contrary to the push or pull of the external force such as the judicial order. Of course, if a court finds that an agency is legally required to issue a particular rule (or at least issue a rule in a legally-prescribed range) then the agency should not be faulted for not considering comments urging the agency to violate its legal duties. However, things are rarely so clear-cut, and agencies could be credibly charged with failing to properly consider comments when they issue rules under external compulsion. Courts are unlikely to accept these arguments, which in effect would hamper courts' ability to enforce their judgments regarding proper administrative conduct.

A challenge based on presidential communication with agency officials "off the record" is also unlikely to succeed. Whether ex parte comments are prohibited in rulemaking proceedings is uncertain. The APA contains no such prohibition, except in "formal" proceedings, and neither do the majority of particular agency statutes. Given this lack of statutory authority, it is doubtful that the courts have the authority to ban ex parte comments in rulemaking. There are creative arguments based on the fairness of the rulemaking process, the right to participate, and the agency's obligation to consider only material that is on the record. However, arguments of this form may ultimately conflict with the Vermont Yankee rule, which, as noted above, prohibits courts from adding procedural requirements beyond those contained in applicable statutes and rules.188 Efforts to restrict the President or his close aides from communicating "off the record" with agency officials also implicate separation of powers concerns.189

There are two situations in which courts might, on their own, impose a rule requiring communications from the President to be made on the record. The first is when an agency admits that its rule is based on a communication from the President. The second is when the President intervenes in a judicial or quasi-judicial procedure in which the rights and duties of particular individuals are being decided. In the usual rulemaking procedure, however, as long as the public record adequately supports the rule, it is unlikely that "off the record" presidential communications would lead a court to invalidate the rule.

A more substantive claim is that presidential involvement in the rulemaking illegally fails to respect the locus of Congress's delegation of administrative authority. This claim is a bit trickier but still unlikely to result in the invalidation of any rule. This is mainly because Presidents are likely to respect the form of congressional delegation even as they work to undercut it by ordering or informally pressuring agencies to act. Going back to the

188 Vt. Yankee Nuclear Power Corp., 435 U.S. 519; see supra note 183 and accompanying text.

189 See generally Sierra Club v. Costle, 657 F.2d 298, 407 (D.C. Cir. 1981) (warning that, where the President is involved in communications with executive branch officials, courts should be cautious about mandating disclosure so as to not offend Article II considerations).
previously noted example of the gag rule, President Clinton did not himself suspend the operation of the gag rule, issue a notice of proposed rulemaking, or adopt the final rule amending the gag rule. Rather, he ordered HHS to suspend it and to propose and consider new rules. The actual suspension and rulemaking were conducted by the Secretary of HHS within the terms of Congress’s delegation.

The only problematic element of this chain of events is the President’s initial order to suspend the gag rule and promulgate new rules. The President’s involvement should probably be ignored because all of the required legal steps were taken by the appropriate officials in the administrative chain of command. The Secretary of HHS was free to ignore the President’s order, in which case the President would have had to decide whether to replace the Secretary. Of course, this was very unlikely in the first week of a new administration. Given the political importance of the abortion issue, it is unlikely that the President-elect was unaware of his nominee’s views on the gag rule. Because the Secretary would likely have moved on the gag rule even without a formal order from the President, the President’s involvement should be treated as part of the public relations aspect of presidential administration. Given the Democratic Party’s views on abortion rights, the new administration was very likely to return to a less-restrictive gag rule, and President Clinton took the opportunity to showcase his views on abortion by taking part in the alteration process.

The gag rule example is not unique in its salient respects, at least insofar as executive branch agencies are concerned. Presidents are unlikely to formally assume the roles in the administrative process assigned by Congress to particular agency officials. The only reason a President would do so is to provoke a confrontation, perhaps hoping that the separation of powers issues involved would be resolved in favor of complete presidential control over the administrative process. Given the President’s appointment and removal power over officials within the executive branch, Presidents are unlikely to find it necessary to formally seize power over administrative matters that Congress has delegated to a particular official. Thus, it seems that presidential involvement in efforts to accomplish more at the last minute or to undo a prior administration’s last minute actions are unlikely to raise significant special legal concerns.

B. Reforms Directed at Outgoing Presidents

Assuming that existing law does not provide an effective set of tools directed at “midnight regulations,” reforms might be adopted to hinder the ability of outgoing Presidents to act. It is easy to imagine this sort of reform. Congress could amend the APA to prohibit the publication of final rules, interpretive rules, notices of proposed rulemakings, or other important documents for some specific period of time at the end of a presidential term. Congress might statutorily prohibit the President from creating any new commissions or advisory committees for some period of time before the end of
Congress could amend the Antiquities Act to prohibit designations of national monuments for a certain period of time before the end of the President's term. A constitutional amendment could restrict the President's pardon power in the lame-duck period. Instead of prohibitions, Congress might require that late-term action be held to a higher standard of justification, requiring, for example, that any rules issued within ninety days of the end of the term be accompanied by a finding that certain exigencies prevent waiting until the new administration takes office. While these reforms and others are possible, there are a variety of reasons why I do not think they are as attractive as reforms aimed at making it easier for the new President to get out from under "midnight regulations."

In general, it may be very difficult to differentiate between those actions taken late in a term that are desirable and those that are undesirable. As discussed above, it is often unclear why a particular action was taken in the waning days of an administration. As we have seen, sometimes late-term action is the result of waiting so that the political heat does not matter, sometimes it is due to hurrying to finish more work in the waning days of power, and sometimes it is the result of external delay, often attributable to Congress. When late-term action is the result of congressional obstruction, restricting the executive, for example by forbidding new regulations for some period before Inauguration Day, would shift power to Congress by making it easier for Congress to prevent executive action.

Even in cases in which late-term actions raise substantial concerns, it may not be desirable to place restrictions on presidential action. An outgoing President might wait until late in the term to take important action due to fear of that action's political consequences. While this waiting may be problematic in many circumstances, in other situations it may be the only way a President is able to take important, socially desirable action. As noted above, perhaps only in the period after the election, just prior to the end of the President's term, is the President able to rise above narrow interests and act out of a broader notion of social good. With regard to late-term action that appears to be an administration hurrying to do more late in its term, deadlines can inspire good work, and thus restrictions run the risk of preventing much good in the name of preventing a little bad.

Restrictions on executive power may also cripple the government by creating a power vacuum that no one could fill. Presidents often act in emergencies or near-emergencies, and it is important not to overly restrict the President's ability to react to exigencies when quick and decisive action is in the national interest. Even if restrictions in reforms contained exceptions for emergencies, uncertainty over whether a particular situation meets the requirements for an exception, along with other factors, might overly restrict an outgoing administration's ability to take desirable action.

It might be, however, that on balance some restrictions would be desirable. For example, with regard to national monument designations under the Antiquities Act, perhaps a ninety day notice and comment process should be
instituted so that the President must at least serve notice of what is being considered before the very end of the term. It is difficult to imagine a situation in which a designation must be made immediately to resolve an emergency. While such designations are important and may be controversial, their importance does not appear to rise to the level that would make it desirable for the President to be able to avoid the political costs of making them.\textsuperscript{190} There may be other examples in which a requirement of some notice before the November election would ameliorate some of the problems associated with “midnight regulations.”

Another problem is that there are some presidential powers that might be very difficult to restrict. First and most fundamentally, Congress may simply lack the power to restrict the President’s exercise of those powers enumerated in Article II of the Constitution or those powers considered inherently part of the executive power. An example of a power in the former category is the pardon power. The Constitution grants the President the pardon power, and any effort by Congress to restrict it would be constitutionally suspect.\textsuperscript{191} As we have seen with regard to the Clinton administration’s use of the pardon power, although an incoming administration might want to investigate criminality on the part of those involved in the prior administration’s pardon process, the new administration may not want to release executive branch documents to outside investigators for fear that its own pardon process might be subjected to a similar investigation later. Among those powers that could be viewed as part of the executive power might be the President’s power to conduct foreign relations. Although some aspects of this power (such as the power to receive ambassadors) are enumerated in the Constitution, other aspects of this power are not, but any effort to restrict the exercise of inherent executive power might raise constitutional questions.

\textsuperscript{190} I may be wrong about this. Perhaps the Antiquities Act was designed to allow unilateral presidential action to avoid the political mess that could occur if notice and comment procedures were employed. Nothing in the legislative history, however, suggests anything more than a desire to protect archaeological and scientific sites, and from the beginning there has been an outcry that Presidents have gone far beyond the purposes of the Act in designating monuments. See Klein, \textit{supra} note 80, at 1343-44 (stating that designations have been unsuccessfully challenged on the grounds that Presidents have exceeded their authority under the Act by preserving much more land than Congress intended); see also Squillace, \textit{supra} note 80, at 534-36.

\textsuperscript{191} There was some discussion of restricting the President’s pardon power after President Clinton’s grant of clemency to the members of FALN. See \textit{supra} text accompanying notes 109-111. Any significant restriction might require a constitutional amendment, like that which was proposed in reaction to President Clinton’s pardons. See H.R.J. Res. 22, 107th Cong. (2001) (suggesting that, with exceptions, the power to grant pardons should not be exercised between October 1st of a year in which a Presidential election occurs and January 21st of the following year).
C. Reforms Aimed at Incoming Administrations

Reforms aimed at making it easier for an incoming administration to deal with "midnight regulations" may be more workable for a variety of reasons. The first reason is simply that the incoming administration can readily identify which late-term actions by the prior administration are problematic and focus on those matters. This should be more efficient than potentially costly broad-based reforms directed at everything an administration might be doing near the end of the term. This proposition is in some tension with the notion that one problem with "midnight regulation" is that it puts the incoming administration to the task of sorting through and cleaning up everything that the prior administration did late in its term. If there were an easy way to force outgoing administrations to behave better, it might be preferable to putting the onus on the incoming administration. If, however, the reforms discussed below give the incoming administration more effective tools with which to deal with "midnight regulation," perhaps the incentive for outgoing administrations to engage in "midnight regulation" will be reduced enough to lessen the incoming administration's need to use those tools.

In thinking about possible reforms to facilitate the incoming administration in dealing with the late-term actions of the prior administration, we need to conclude, or at least assume, that for some reason the new administration ought to have the power to do so. If it turns out that there is nothing really wrong with "midnight regulation," then there is obviously no need for reform. Proceeding on the assumption that "midnight regulation" is problematic, what possible reforms might ameliorate or eliminate some of the negative consequences of the "midnight regulation" phenomenon?

One possible reform, realizable either through judicial decision or by an amendment to the APA, is to dispense with the notice and comment requirement for agencies when they rescind or amend final rules that have yet to actually become effective.192 This would allow an incoming administration to deal with one of the most egregious examples of "midnight regulation," a rule that is promulgated by the prior administration but does not take effect until after the new administration is already in office. Note that this reform would not be confined to the period of transition, but rather would allow agencies to freely reconsider rules after promulgation for reasons unrelated to the "midnight regulation" problem. The power is less likely to be used by an administration on its own rules, but it could happen in instances where a rule provokes a negative reaction greater than the agency expected, or perhaps where the President or a department head was unaware of the rule or all of its implications until it was promulgated and then finds it unacceptable in whole or in part.

There are a few complications that would have to be worked out to grant an agency the power to rescind regulations up to their effective dates. One

192 See Levin, supra note 158, at 765 (arguing that agencies may reconsider recently promulgated rules without notice and comment).
problem is that the effective date of some rules might be years away, which would give an agency unilateral power to rescind or revise rules for a long period of time. Under current law, a rule is generally considered “final” upon promulgation even though it may not yet have become effective. Agencies often announce new standards long before they take effect in order to give affected interests time to meet the standard. For example, the Carter administration’s rule requiring airbags in new automobiles was issued in 1977 with a stated effective date of September 1, 1981, when the first airbags would actually be required. The stated effective date is a misnomer, since the rule established a legally binding schedule immediately upon promulgation, with a minimum thirty day delay as required by the APA. In cases such as this, an agency should not have the power to rescind or revise the rule for the entire period before it becomes effective. Rather, it should only be able to do so for a brief period, and if no effective date in the reasonably near future is specified, an arbitrary cutoff for the rescission power, perhaps ninety days after publication, could be adopted. The airbags rule had, as a practical matter, become final in the sense that it was on the books (in the Code of Federal Regulations) even though it had not yet required manufacturers to equip cars with airbags. Many rules share this attribute, becoming final long before compliance is expected.

193 See Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 802-03 (D.C. Cir. 1983) (ruling that EPA’s deferral of a promulgated permit process amounted to a suspension of a regulation without notice or comment in violation of the APA); Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 753 (3d Cir. 1982) (holding that the EPA, which violated the provisions of the APA by indefinitely postponing the effective date of final amendments to regulations, was required to reinstate all amendments to their originally designated effective dates); Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n, 673 F.2d 425, 426 (D.C. Cir. 1982) (stating that the fact that the House of Representatives disapproved of a rule issued by the Federal Energy Regulatory Commission did not make the rule any less final).


195 See Administrative Procedure Act, 5 U.S.C. § 553(d) (2000) (requiring the publication of a rule to be made not less than thirty days before its effective date).

196 Without a statute specifying a period of easy rescission or revision, it may be that the only time period a court could adopt in the absence of an effective date in the reasonably near future would be the thirty days specified in the APA as the minimum period between publication of a rule and its effective date. See id. This would give the President power over the most egregious cases of “midnight regulation,” but would not address administrative action late in the outgoing President’s term but before approximately December 20th of the last year of the President’s term. For major rules, perhaps the sixty day period specified in the Congressional Review Act might be used. See 5 U.S.C. § 801(a)(3) (stating that no major rule shall take effect sooner than sixty days after it is submitted to Congress for review).

197 For example, the effective date of the final rule promulgated in the last week of President Clinton’s administration entitled Energy Conservation Program for Consumer Products; Energy Conservation Standards for Water Heaters is January 20, 2004. Energy
Another set of issues involves judicial review of the rescission or revision of a rule in the pre-effective date period. The *Airbags Case* stands for the proposition that, once a rule has become final, rescission or amendment is subject to review under the same standard as a newly promulgated rule.\textsuperscript{198} Putting aside the fact of transition in administrations, this proposition still raises the interesting question of what substantive standard of review applies when an agency promulgates a rule and then changes its mind before the rule has gone into effect. For example, assume that an agency publishes a notice of proposed rulemaking, receives comments, and then issues a final rule to take effect sixty days after publication. Then, thirty days later, the agency decides for some reason not to go forward, or to make changes to the rule, and issues a notice rescinding or amending the published, but not yet effective, final rule. Assume further that the rulemaking record provides adequate support for the original rule (so the rule would have been upheld on judicial review) and also for the rule as amended or for an agency decision not to go forward with the proposed rule at all.

Should review be available (and if so on what standard) if at the time of rescission or amendment the rule rescinded or amended had not yet reached its effective date? In my view, review should not focus on the fact of rescission or revision, but rather should focus on the agency's ultimate decision. In a case where a rule is rescinded, review should be available if an agency decision not to promulgate a rule in the first place would have been reviewable.\textsuperscript{199} Note that in neither case is this review of agency inaction: rather, it is review of an agency decision, after notice and comment, to refrain from issuing a rule. The decision would be judged on the record created in the original notice and comment process.\textsuperscript{200} Courts have reviewed decisions not to

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\textsuperscript{198} *Airbags Case*, 463 U.S. 29, 41 (1983).

\textsuperscript{199} I recognize that this is probably contrary to current law under which rules are considered final upon promulgation even if they have not yet gone into effect. See Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983) (ruling that EPA's deferral of a promulgated permit process amounted to a suspension of a regulation without notice or comment in violation of the APA); Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752 (3d Cir. 1982) (holding that the EPA, which violated the provisions of the APA by indefinitely postponing the effective date of final amendments to regulations, was required to reinstate all amendments to their originally designated effective dates); Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d at 446 (D.C. Cir. 1982) (stating that the fact that the House of Representatives disapproved of a rule issued by the Federal Energy Regulatory Commission did not make the rule any less final).

\textsuperscript{200} One interesting suggestion, made by my colleague Jay Wexler, is that the incoming President, through his transition office, could monitor the rulemaking process conducted by the outgoing administration and submit comments urging his predecessor not to take actions...
promulgate any rule after a notice and comment process under a very deferential standard, but have rejected arguments that such decisions are not reviewable at all.201 In the case of a revision, the revised rule should be reviewed based on the record created in the notice and comment process. In both cases the promulgation of the initial rule should be irrelevant on judicial review so that the power to rescind or revise rules shortly after promulgation is not overly restricted.202

Ignoring the original rule on judicial review of a rescission or revision may be contrary to the Airbags Case.203 In that case, the Supreme Court held that, absent contrary statutory provisions, judicial review of the rescission of a rule should be conducted under the same standard as judicial review of the issuance of a rule.204 Nothing in the Court’s decision, however, would prevent Congress from statutorily providing for a different standard, either generally or applicable only to rescissions and revisions that occur shortly after promulgation.205 Further, the Airbags Case involved a rescission that was ordered almost four years after the initial rule was issued. It is unclear whether the courts would or should treat a rescission or revision shortly after issuance the same. It may be that, even without an amendment to the APA, agencies already have the power to revise or rescind regulations for a short time after they are issued, with judicial review focusing on the final product and ignoring revision or rescission.

This whole discussion points toward ignoring existing rules generally on judicial review of rules that are contrary to a prior administration’s rules under the same statute and on the same subject. Focusing only on the “midnight regulation” problem, a new administration might argue that it should be able to

that are either inconsistent with the views of the incoming administration or that would unduly hamper the incoming administration’s performance. If the outgoing administration nevertheless issued regulations inconsistent with the comments submitted by the new administration, those comments would be part of the rulemaking record and might help convince a court to overturn regulations promulgated at the last minute by the previous administration. This would be helpful but is not a complete cure for “midnight regulation,” assuming it is viewed as a problem.

201 See Weight Watchers Int’l, Inc. v. RTC, 47 F.3d 990 (9th Cir. 1995) (denial of petition for rulemaking is final agency action subject to judicial review).

202 See Levin, supra note 158, at 765 (suggesting that agencies may reconsider rules they have recently promulgated without notice and comment). But see Universal Camera Corp. v. NLRB, 340 U.S. 474, 474 (1951) (holding that, when an agency overrules an initial decision by an Administrative Law Judge (“ALJ”), the ALJ’s decision is part of the record and, on judicial review, should be considered as evidence against the agency’s decision).

203 463 U.S. 29.

204 Id. at 41.

205 The decision in the Airbags Case was based on the Court’s reading of the statute governing the administrative decision in that case, which “equates orders ‘revoking’ and ‘establishing’ safety standards.” Id. at 30. Nothing in the Court’s opinion suggests that Congress could not specify a different standard for revocations.
freely rescind rules issued in the last few months of the prior administration, especially rules that had not yet gone into effect at the time of the transition, because the lateness of the promulgation of the "midnight regulations" means that they are unlikely to be the product of a genuine policy judgment. Instead, they are likely to be motivated by politics, and a desire to make life difficult for the new administration without much hope of actually affecting policy. The problem lies in the potential difficulties of distinguishing between "midnight regulations" and other rules. Even regulations issued at the very end of an administration usually have had a relatively long period of incubation, with at least several months of internal review and notice and comment, and sometimes there are very good reasons behind the lateness of the prior administration's rules.

It might be worthwhile to consider adjusting standards of judicial review generally to deal with the problem of "midnight regulations" and, more importantly, to take better account of the role that policy plays in the administrative process. Perhaps the Airbags Case Court was wrong in its choice of the prior regulatory regime as the baseline for evaluating new rules. There are good arguments in favor of using the statute as the only baseline and determining the validity of a rule without regard to rules promulgated by prior administrations.

When there is little or no indication that Congress intended for regulations to be made largely or purely on technical grounds, policy plays a larger role in an administration's decisionmaking on regulations.\(^{206}\) Consider once again the varying rules on abortion counseling in federally funded family planning clinics. The differences among the various administrations' rules were much less about a search for statutory meaning or maximization of social welfare than about political disagreement on abortion rights. When the Reagan

\(^{206}\) Professor Charles Koch has recently defined policymaking as "those government decisions that promote and protect societal values." Charles H. Koch, Jr., Judicial Review of Administrative Policymaking, 44 WM. & MARY L. REV. 375, 378 (2002) (distinguishing between agency policy decisions and decisions involving agency statutory interpretation). He urges that standards of judicial review should reflect the degree to which an agency has exercised delegated policymaking power, and that the *Chevron* standard of review should not be used in such cases. *See id.* at 392-95. The proper standard of judicial review of agency policymaking, according to Professor Koch, is the abuse of discretion or arbitrary and capricious test under which the Court reviewed the rescission in the *Airbags Case*. *Id.* at 393-94, 395.

My argument is similar to Professor Koch's, although I find that where an agency decision is heavily laden with policy considerations, the "arbitrary, capricious or abuse of discretion" standard should be somewhat more deferential than the standard applied in the *Airbags Case*. 463 U.S. at 41-44 (explaining that, under an "arbitrary, capricious or abuse of discretion" standard, an agency must "articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and the choice made,'" but clarifying that a reviewing court can "'uphold a decision of less than ideal clarity if the agency's path may reasonably be determined'" (citations omitted)).
administration adopted what became known as the gag rule, it was reversing the prior interpretation of the statute as embodied in rules adopted by the Carter administration. The Supreme Court upheld the gag rule on judicial review, holding that the Reagan administration had offered sufficient reasons for reversing the prior interpretation:

We find that the Secretary amply justified his change of interpretation with a "reasoned analysis." The Secretary explained that the regulations are a result of his determination, in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), that prior policy failed to implement properly the statute and that it was necessary to provide "clear and operational guidance" to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." He also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the "elimination of unborn children by abortion." We believe that these justifications are sufficient to support the Secretary's revised approach. Having concluded that the plain language and legislative history are ambiguous as to Congress' intent in enacting Title X, we must defer to the Secretary's permissible construction of the statute.207

Under this analysis, the prior administration's interpretation is relatively unimportant to the determination of whether to approve the new rules. Although the Court cites the Airbags Case's requirement that changes in rules be supported by "reasoned analysis," and argues that the new rules will improve administration of the program, most of the reasons for change had more to do with fidelity to the statute and current policy than with improving the workability of the rule. The two most important reasons offered by the Court are better consistency with the "original intent of the statute" and "a shift in attitude against the 'elimination of unborn children by abortion.'"208 The "shift in attitude" is between administrations209. There is no suggestion that the Reagan administration was relying on public opinion research.

The gag rule case may be an easy one for allowing revision because it is a pure question of statutory interpretation. Requiring a high level of justification for alterations in administrative statutory construction may be inconsistent with the Chevron doctrine's strong emphasis on administrative power to construe ambiguous statutes.210 What about situations in which technical considerations

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208 Id. (citing Airbags Case, 463 U.S. at 42).
209 Airbags Case, 463 U.S. at 59 (Rehnquist, C.J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").
have greater relevance? For example, technical factors are likely to be very important to any administration's decision of what sort of automobile safety mechanisms to require. Does this mean that the Court was correct in the Airbags Case to require a substantially higher degree of justification for rescinding the airbag requirement, since the issue was more technical than the simple question of statutory interpretation involving the gag rule?

I am not so sure that the distinction between the two kinds of cases holds up. Of course, in a rule involving the imposition of safety requirements for the manufacture or operation of a machine like an automobile, more technical factors will be present than in a case involving the meaning of an enforcement provision like the gag rule. But Chevron itself, even though it involved controversial policy matters, was characterized by the Court as a pure case of statutory construction, and it also involved technical questions concerning the best way to reduce air pollution. Even administrative decisions that involve some technical questions can be dominated by political considerations such as the administration's taste for regulation, preference for market solutions, views on whether states should be the primary regulators, and preference for freedom as opposed to paternalism.

In my view, there are strong arguments in favor of ignoring prior regulatory action in many situations in which an administration might move to reverse or modify its predecessor's rules. Consider what might have happened had the administrative actions at issue in the Airbags Case come in the reverse order. Suppose the Reagan administration had received a petition to require airbags in automobiles, had conducted a rulemaking on the subject, and had decided not to require airbags. The rulemaking record would very likely contain credible comments on both sides. Automobile manufacturers would likely have submitted credible information showing that airbags were very expensive, that they might be dangerous in some circumstances, that they were an unproven technology, that they would be very difficult to install (especially in small cars), and that the market will take care of people's demand for safer cars. Comments from the other side would have contained credible information pointing against these contentions. The Reagan administration would have had ample justification in the record for denying the petition, and the denial would likely have been upheld on judicial review under the very deferential standard applied to decisions not to regulate. The administration might have written an explanation for its denial, finding the information submitted against the requirement more trustworthy than the information submitted by the other side, but the decision would certainly have been informed by the administration's general distaste for regulation and preference for market decisions.

(rejecting the argument that changes in statutory interpretation are not entitled to deference); accord Rust, 500 U.S. at 186-87.

211 Chevron U.S.A., Inc., 467 U.S. at 840 (stating that the question before the Court was whether the EPA's plant-wide definition was a reasonable construction of the statutory term "stationary source").
Now suppose a subsequent administration comes into office with a greater appetite for regulation, less trust in market solutions, and more concern for automobile safety. If this subsequent administration conducts a new rule-making and assembles a record that, absent the Reagan administration’s prior rule, would justify the imposition of a rule requiring airbags, the fact that the Reagan administration had already declined to make such a rule on a very similar record should have little if any bearing on the propriety of the new rule. Going back to the actual sequence of events, the Carter administration undoubtedly received plenty of comments opposing the imposition of its airbags requirement. If the original record would have supported a decision either way, it does not make sense to create, with the first administration’s politically motivated decision, a barrier against change.

The problem of “midnight regulations” would be ameliorated if the standards for judicial review took greater account of pure political-type policy considerations. A new administration sifting through what the prior administration left behind could take a fresh look at the rulemaking record in a recently minted rule and rescind or revise the rule based on its differing policy views, much as the Reagan administration did with regard to both the gag rule and the airbags rule. While the new administration might be required to conduct a new notice and comment rulemaking to make its changes, there are good arguments that it should not have to meet a higher level of justification than if no action had been taken by a prior administration.

In some areas, it may be very difficult to enact reforms aimed at making it easier for a new administration to overcome actions taken at the end of its predecessor’s term. If the President presents a treaty to the Senate or nominates a judge at the very end of his term, the treaty will go into effect or the judge will assume office upon Senate approval.212 (The new President may

212 Late term judgeships, called “midnight judgeships,” were at issue in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Although the Court ultimately held it was without jurisdiction to issue a writ of mandamus requiring the Secretary of State to issue Marbury his commission, the Court commented on the finality of the appointment actions taken at the end of the prior President’s term:

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If by law the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question, whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been
be able to revoke or renounce a treaty, but the fact of transition is irrelevant to that power or process.) Once the Senate approves, the process is over and the new President cannot simply undo it. The same holds true for legislation presented to the President at the very end of his term—once he signs it or vetoes it, the process is over and the new President cannot unilaterally change it. The fact that these actions require the cooperation of the Senate or Congress as a whole provides a safeguard against late-term presidential action, but if both the Senate leadership and the presidency are changing parties as a result of an election, there may be “midnight judgeships, statutes and treaties” as well as “midnight regulations.”

CONCLUSION

The phenomenon of “midnight regulation” at the end of every President’s term appears to be a fact of life, especially when a new President of a different party is elected. In fact, because it appears that an outgoing administration realizes that some of its late-term actions have no hope of actually being carried into fruition, some late-term action may be merely symbolic at best, or at worst designed to make life difficult for the incoming administration, including the infliction of political costs. Late-term administrative action takes many forms, some of which are easy for the new President to deal with and some of which are more difficult. Because of the high volume of late-term regulatory action, new administrations feel compelled to devote substantial time and effort to sorting through the last minute actions of their predecessors. In a significant number of cases, the new administration attempts to undo late-term actions taken by the previous administration. Because the incumbent President retains all of the powers of the presidency until the transition actually occurs, it may be difficult to restrict an outgoing administration’s ability to engage in “midnight regulation.” It may be more feasible to make it easier for an incoming administration to undo actions taken late in the previous administration’s term. Whether this is desirable depends on whether “midnight regulation” is seen as improper behavior on the way out of office, or as desirable behavior on the part of an administration finally freed from the political constraints that operate when reelection and other political needs still exist. The one thing that seems certain is that the “midnight regulation”

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instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives, that by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

Id. at 167.

213 The Senate’s rules mean that the outgoing President’s party, if it were inclined to cooperate with the President and approve last-minute appointments, would need a substantial majority in the Senate to push through judgeships at the last moment. See supra note 10 (noting that debate in the Senate may be ended only by a three-fifths majority vote).
phenomenon is unlikely to disappear any time soon.