
ADMINISTRATIVE LAW & REGULATION

REGULATORY ACTIVITY IN THE BUSH ADMINISTRATION

AT THE STROKE OF MIDNIGHT

By Susan E. Dudley*

One of the first acts of the Obama administration was a January 20 memorandum from White House Chief of Staff Rahm Emanuel to federal department heads aimed at stopping the midnight regulations of the outgoing Bush administration. The memo directed agencies not to send regulations to the Federal Register until they were approved by policy officials appointed by the new president, and to retrieve from the Federal Register all regulations not yet published.

This action was expected and appropriate. In 1993 and 2001 the incoming chiefs of staff for both Presidents Clinton and Bush issued similar memos upon taking office. These moves recognize that regulation is one of the most important ways the federal government sets policy and diverts private resources to achieve social goals; indeed, regulation is one of few areas of domestic policy that an incoming president can immediately control.

These memos also reflect an awareness of the historical tendency of outgoing administrations to increase regulatory activity in their final months. The midnight regulation phenomenon is measurable. Jay Cochran examined Federal Register data going back to FDR and found a statistically significant 17% increase in regulatory activity, on average, in a president's post-election quarter (November to January). President Clinton's post-election quarter output was more than 25% higher than during his non-election years.¹

Bush's Chief of Staff Josh Bolten was also aware of the historical tendency of administrations to increase regulatory activity on their way out the door. In May 2009, he took the unprecedented step of issuing a memo to department and agency heads directing them to "continue to minimize costs and maximize benefits for each of their upcoming regulations, and ... avoid issuing regulations that are unnecessary." In "an effort to complete Administration priorities in this final year while providing for an appropriately open and transparent process," he directed that "except in extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008."

As a result of Bolten's preemptive action, Emanuel's memo applied to significantly fewer regulations than had Chief of Staff Andy Card's memo eight years earlier. On inauguration day in January 2001, there were 43 significant final regulations in the queue but not yet published in the Federal Register. In January 2009, there were only 4. During its last 3 weeks in office, when administrations have historically been rushing to issue final regulations, the Bush administration completed only 20 final regulations—less than one-third the 72 final

regulations completed by the preceding administration during its final weeks.

Does this mean the Bolten memo served to break the historical pattern of midnight regulations? It did not. As I saw firsthand, the incentives for policy officials to put their stamp on policy by issuing regulations on their way out the door is simply too strong. Though regulations require enabling legislation, Congress generally grants departments and agencies broad authority, so the executive branch has considerable control over the details of policies developed through regulation. By the last few months of an administration, it is too late to expect significant legislation from Congress, so regulations are one of the few tools available to outgoing executive branch officials wishing to leave a legacy.

When President Bush appointed me as Administrator of the Office of Information and Regulatory Affairs (OIRA) in April 2007, I had studied the midnight regulation phenomenon and was fully aware that countering these powerful incentives would be a major challenge for my office during the final 22 months of the administration. Right away, I began meeting with each regulatory agency to go over their priorities and discuss the timeline needed to complete actions. Regulations cannot be issued overnight. Even after an agency has drafted a proposed regulation and managed to get it through internal agency review, interagency review can take up to 90 days (sometimes longer), then the public has an opportunity to comment for at least another 30 days, after which the agency must evaluate public comments and revise the rule accordingly before submitting it to another round of interagency review. Once published in the Federal Register, regulations generally are not effective for at least 30 to 60 days and, under the Congressional Review Act, Congress can pass a joint resolution disapproving regulations issued within the last six or seven months of an administration. All told, it easily can take a year between an agency's decision to propose a rule and the effective date of a final rule.

I met with regulatory agencies again in 2008 after the issuance of the Bolten memo, but it was not until the November 1 deadline for issuing final rules approached that many departments and agencies faced the realization that their time was up.

I expected to face strong resistance to the Bolten memo deadlines from political appointees who were turning into pumpkins on January 20, 2009. (Cochran had dubbed the rush to regulate the "Cinderella effect," comparing political appointees to Cinderella leaving the ball.) However, I was surprised that career employees, who would live to fight another day, also chafed at the Bolten memo deadlines. They had worked hard on many of the regulations nearing the finish line, and were disappointed when they did not make it across before January 20. The fate of regulations not issued by January 20 would be determined by the incoming administration, and I expect the

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career staff knew that there would be a delay, if not a policy change, and did not relish having to break in a new crew of political appointees before completing the project.

We faced tremendous pressure to grant “extraordinary circumstance” exceptions to the memo’s deadlines, and the support of the Chief of Staff was essential. After careful consideration, Bolten settled on the following criteria for allowing an agency to issue final regulations past the November 1, 2008 deadline. Meeting these criteria did not guarantee that a regulation would be issued, but allowed it to commence interagency review. These regulations were still subject to the analytical requirements of Executive Order 12866.

1. For draft final regulations submitted to OIRA for interagency review before mid-October (two weeks before the deadline to issue a final rule), OIRA and the agencies worked expeditiously to conclude review. Once OIRA concluded review, agencies were allowed to publish these regulations, even if publication occurred after November 1. This exception accounted for 46 of the regulations issued after November 1, including a few that proved controversial, such as the Department of Interior’s “mountain top mining” rules, the Treasury Department’s restrictions on internet gambling, the Environmental Protection Agency’s oil spill prevention and control regulations, and the Department of Housing and Urban Development’s Real Estate Settlement Procedures Act regulations.

2. Final regulations that an agency identified as a high priority *and* had provided adequate public notice and opportunity for comment (generally defined as having met the June 1 deadline for publication of the proposed rule) were allowed to commence interagency review. The rationalization for this exception was that one of the primary problems with last-minute regulations is that they can be hurried, with inadequate public notice and opportunity for public comment. By insisting that interested members of the public were aware a regulation was underway and had an opportunity to comment on it, Bolten hoped to ensure better transparency. This category included a couple of controversial Department of the Interior regulations—changing the criteria for allowing guns in national parks and the ground rules for consulting with other agencies under the Endangered Species Act, among others.

3. Regulations that faced statutory or judicial deadlines were also granted exceptions, even if they did not meet the first two criteria, because the memo was not intended to avoid meeting obligations set by other branches of government. Twenty regulations meeting this criterion were published, and nine of those faced deadlines established by the 2008 Farm Bill.

4. The final extraordinary circumstance exception was for regulations that were considered presidential priorities. This category included several regulations designed to address the housing and financial market crises, as well as the controversial Department of Health and Human Services (HHS) “conscience protection” rule allowing medical practitioners not to perform services that violated their beliefs, HHS’s new electronic coding scheme for medical diagnoses, and the Department of Justice’s Americans with Disabilities Act (ADA) regulations. The ADA

regulations commenced the OIRA-led interagency review, but due to its sweeping effects (estimated to cost private firms and municipalities over \$1 billion per year), its complexity, and its overlap with other agency programs, DOJ was unable to complete the rule before the end of the administration.

With all these exceptions, was the memo successful? Well, my promises to staff that we would have a quiet holiday season after completing all regulatory activity by November proved to be wildly optimistic. All told, we would complete review of one-hundred significant final regulations between November 2008 and January 20, 2009. Nevertheless, I believe our efforts, and the Bolten memo in particular, had an important effect. It instilled needed discipline and forced regulatory agencies to make hard decisions about priorities. Without the memo, and OIRA’s enforcement of it, dozens if not hundreds more regulations might have been issued in those final weeks. Caught by the memo’s deadlines were high profile agency priorities such as the Department of Labor’s risk assessment rule, EPA’s new source review rule for electric utility generators, DOI’s alternative energy rule, DOT’s Corporate Average Fuel Economy rule, and the Treasury Department’s alcohol labeling rule, just to highlight a few.

By any objective measure, the Bush 43 administration issued fewer regulations during the November to January post-election quarter (PEQ) than the previous administration.

Measure	PEQ 2008	PEQ 2000
Final regulations issued in PEQ	100	143
Final regulations during last three weeks	20	72
Final economically significant regulations in PEQ ²	27	31
Federal Register Pages	21,000	27,000

However, the same cannot be said if we examine a longer time horizon, say the last 6 or 12 months. During the June to January period, slightly more regulations were issued by Bush 43 than by Clinton (212 vs. 209). From January 1, 2008 through January 20, 2009, the Federal Register printed 86,500 pages, a 7% increase over the same 13 month period a year earlier, but slightly less than the Clinton Administration’s 91,800 pages during the same period (which in turn was 14% higher than the previous 13 month window).

Bottom line, I believe we did address some of the problems with midnight regulations. The early efforts to counteract the midnight regulation tendency did spread out the completion of regulations over a longer period, providing more time for constructive interagency review. Knowing how busy the 50-person OIRA staff was during the last three months, it is hard for me to imagine how they could have provided a thorough review of one and a half times as many rules, and impossible to fathom doing a constructive evaluation of 72 regulations in just 20 days. For the most part, the criteria for receiving an extraordinary circumstance exemption also ensured an opportunity for public comment.

I learned from my experience during the midnight hours of the Bush administration that midnight regulation is inevitable. The incentives and pressures to complete priorities is simply too great to abolish the phenomenon altogether. But there are actions that each branch of government can take to make sure regulations issued in the final months, which will have lasting impacts on the American public, are as accountable as possible.

First, the legislative branch can overturn regulations issued during the last six or seven months through a “joint resolution of disapproval” under the Congressional Review Act (CRA), although this is a blunt tool, and has only been used once, to overturn the Clinton Occupational Safety and Health Administration’s midnight ergonomics rule. A resolution of disapproval is most likely to be effective during a transition from one political party to another, when the risk of a presidential veto is diminished. Though simpler than passing *de novo* legislation to address its concern, Congress may hesitate to use the CRA because, once disapproved, an agency cannot legally issue a “substantially similar” regulation.

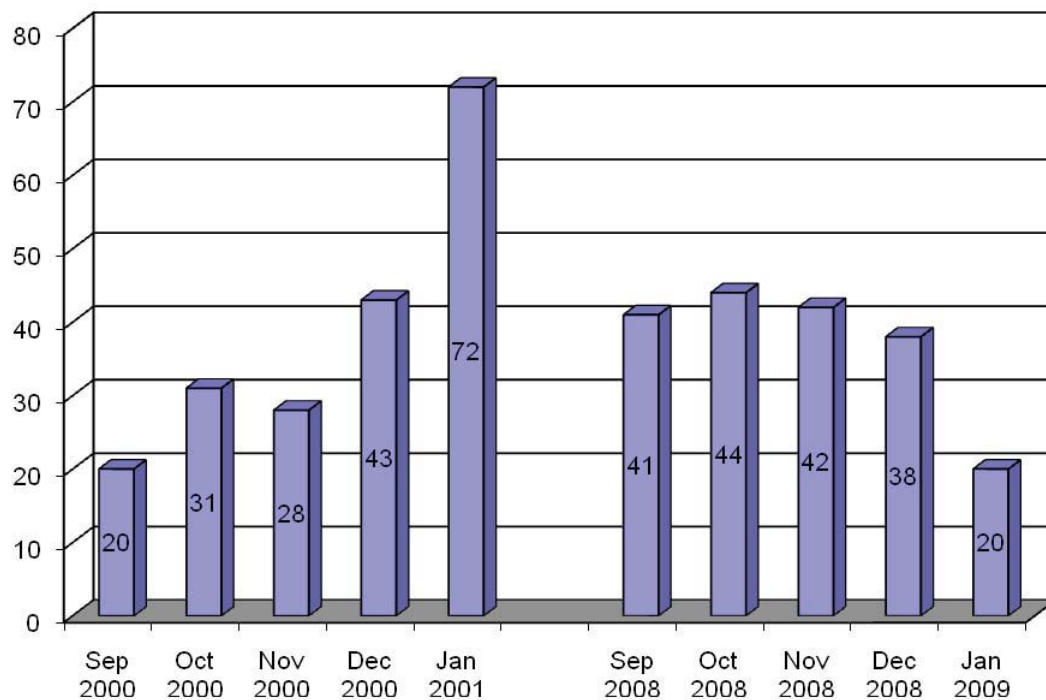
The judicial branch may also have a role to play. Since regulations rushed at midnight may be more susceptible to challenge under the Administrative Procedure Act, the judicial branch may have an opportunity to weigh in and overturn poorly supported regulations, particularly if notice-and-comment procedures were shortchanged.

But the branch most likely to be effective at reigning in excessive midnight regulatory activity is the executive branch, through actions taken not only by the incoming but by the outgoing administration. As noted earlier, it has become a tradition for the incoming Chief of Staff to issue a memo on inauguration day halting the publication of any remaining regulatory actions and pulling back recent regulations not yet effective. I hope an outgoing Chief of Staff memo, like the one initiated by Josh Bolten, also becomes a tradition. It managed to head off the crush of regulatory activity in the final months and left key regulations for the incoming administration to imprint with its own policy stamp. The result was similar to what we saw in other aspects of the Bush-Obama transition: a gracious, respectful and orderly transfer of the President’s authority over government regulation.

Endnotes

- 1 Jay Cochran III, “The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters,” Mercatus Center at George Mason University, March 2001. [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint\(1\).pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint(1).pdf).
- 2 Economically significant regulations are roughly defined as those with impacts greater than \$100 million. The cutoff has not been adjusted for inflation. Because the definition of “significant regulation” changed in 1993, this is the only metric on which we can compare prior to 1993. Bush 41 issued 36 economically significant final regulations in PEQ 1992.

REGULATIONS COMPLETED IN THE FINAL MONTHS OF THE LAST TWO ADMINISTRATIONS



Source: www. Reginfo.gov.