Essay

Early to Bed for Federal Regulations: A New Attempt to Avoid "Midnight Regulations" and Its Effect on Political Accountability

Christopher Carlberg*

After serving either four or eight years as the most powerful person in the world, no President of the United States likes to think that his influence will suddenly vanish on his successor's Inauguration Day. History has shown that most presidential administrations exert great effort in their final three months in office to promulgate a dramatically increased number of federal regulations that reflect the President's policy objectives.[1] These "midnight regulations" have been strongly criticized on many fronts.[2] The most salient criticism of midnight regulations is that the President and the executive branch cannot be held politically accountable for the regulations they pass as they are headed out the door.[3] This lack of political accountability leads to

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1 *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557, 563 (2003); *infra* Part I.

2 One common criticism of midnight regulations this Essay will not address is that these regulations do not receive sufficient examination through the notice-and-comment rulemaking process.

3 *See* Mendelson, *supra* note 1, at 566–67.

controversial regulations and undercuts one of the rationales supporting important Supreme Court administrative law doctrine. A presidential administration can work to pass any regulation it wants until leaving office, and it is up to the next administration either to work to amend the regulation or to administer the regulation.

In June of 2008, the Bush Administration released a memorandum imposing a moratorium on federal regulation promulgation during its final three months in office.[4] The "Bolten Memo" was written by President Bush's Chief of Staff Joshua Bolten and was directed to the heads of the various federal agencies.[5] If followed, the policy behind the Bolten Memo would ensure that a presidential administration would not pass any regulation for which it would not be held politically accountable. This type of policy would increase the effectiveness of the regulatory process and support Supreme Court jurisprudence. Further, this policy would help conserve federal agency resources.

Part I of this Essay will describe the phenomenon of midnight regulations and how they are passed in the final months of a presidential administration. Part II will discuss the Bolten Memo and its effect on political accountability. Part III will examine the *Chevron* doctrine and how its deferential approach is partially supported by the rationale that the President can be held politically accountable for unfavorable policy decisions. Finally, Part IV will argue that the policy behind the Bolten Memo could be a beneficial development in administrative law.

I. The Recurrent History of Midnight Regulations Before Presidential Administration Transitions

There is a long tradition of Presidents of the United States staying up late during their final days as President and working feverishly to make their influence felt long after their successor has been inaugurated. On the night before he left office in 1801, President John Adams appointed eighty-two Federalist judges before President-elect Thomas Jefferson, a Democratic-Republican, could be sworn into office.[6] These "midnight judges" gave Jefferson quite a headache and

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4 Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments & Agencies (May 9, 2008), *available at* http://www.ombwatch.org/files/regs/PDFs/BoltenMemo050908.pdf [hereinafter Bolten Memo].

5 *Id.*

6 *See generally* Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961) (explaining the Judiciary Act of 1801 and the flurry of judicial appointments in the last two weeks of the Adams Administration).

gave constitutional law *Marbury v. Madison*.[7] In 1909, shortly before leaving the White House, President Theodore Roosevelt issued an Executive order preserving millions of acres of public lands as Olympic National Park in the State of Washington.[8] In January of 2001, President William Jefferson Clinton not only designated many new national monuments and parks like Theodore Roosevelt, but he also controversially used his pardon power 176 times to pardon and grant clemency to federal prisoners.[9]

Much like Adams's "midnight judges," a presidential administration, in its waning days, often passes a flurry of federal regulations, which have been named "midnight regulations."[10] The administrations try to rush all the regulations that cement their policies into the *Federal Register*[11] before the next administration can move in and change the executive branch's policy objectives.[12] The midnight period of regulatory activity is considered to be the period from the Presidential election in November to Inauguration Day in January.[13] During an election year, midnight regulations may present an outgoing President with her most effective tool to continue to influence government, because Congress will not be in session and no significant legislation will be voted upon.[14]

Studies have shown that regulatory activity has increased dramatically at the end of every presidential administration since at least as far back as 1948.[15] One common measurement of the production rate of federal regulations is the number of pages produced in the *Federal Register* over a given time period.[16] Every rule proposed by a federal agency, with a few minor exceptions, must go through notice-and-comment rulemaking and be published in the *Federal Register*.[17] More pages printed in the *Federal Register* is an indication that there are an

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7 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

8 Mendelson, *supra* note 1, at 560.

9 Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. Rev. 947, 973–78 (2003).

10 *See* Jerry Brito & Veronique de Rugy, *Midnight Regulations & Regulatory Review*, 61 Admin. L. Rev. (forthcoming 2009) (manuscript at 2–6, on file with author).

11 The Federal Register is the official recorder of the U.S. Government. It publishes proposed regulations and final regulations promulgated by the federal agencies. *See* The Federal Register (FR): Main Page, http://www.gpoaccess.gov/fr/index.html (last visited May 18, 2009).

12 *See* Brito & de Rugby, *supra* note 10 (manuscript at 7).

13 *Id.* (manuscript at 1).

14 *See, e.g.*, David M. Herszenhorn, *Lame-Duck Session Winds Down With Little to Show*, N.Y. Times, Nov. 20, 2008, at A23.

15 Mendelson, *supra* note 1, at 563.

16 Brito & de Rugby, *supra* note 10 (manuscript at 3–4).

17 5 U.S.C. § 553 (2006).

increased number of rules being promulgated.[18] In recent decades, the Carter Administration escalated this trend by astonishingly publishing over 24,000 pages in the *Federal Register* during the midnight period after the 1980 election.[19] It was this flurry of regulations that gave rise to the name "midnight regulations."[20] Similarly, President George H. W. Bush's Administration promulgated approximately "one hundred 'eleventh hour'" regulations at the end of its term,[21] even though the President had earlier claimed he was imposing a moratorium on regulation.[22] Next, the Clinton Administration was even able to outdo the Carter Administration by creating regulations in its last three months in office that led to over 26,000 pages published in the *Federal Register*.[23]

The number of federal regulations passed at the end of a presidential administration is shocking in how much it statistically outpaces the regulation of the previous years. Scholar Jay Cochran of the Mercatus Center at George Mason University has called the phenomenon of midnight regulations the "Cinderella constraint," because administration officials have to act up until the last minute that they leave their offices.[24] Cochran states: "Simply put, as the clock runs out on an administration's term in office, would-be Cinderellas—including the President, Cabinet officers, and agency heads—work assiduously to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight."[25]

While these outgoing Presidents have acted quickly to turn their policy objectives into regulations at the last minute, often the first act of the next President is to try to keep these regulations from ever taking effect.[26] Shortly after taking office, President Reagan issued a

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18 *But see* Mendelson, *supra* note 1, at 563 n.24 ("Federal Register pages are far from a perfect measure of regulatory activity since those pages can include not only new rule notices but a variety of other notices, such as rule repeals, public meetings, or proposed litigation settlements.").

19 Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1443 (2005).

20 Brito & de Rugy, *supra* note 10 (manuscript at 2).

21 Mendelson, *supra* note 1, at 562.

22 Brito & de Rugy, *supra* note 10 (manuscript at 3).

23 Loring & Roth, *supra* note 19, at 1445.

24 Jay Cochran, III, The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters 4 (Mar. 8, 2001) (working paper), *available at* http://www.mercatus.org/PublicationDetails.aspx?id=17546.

25 *Id.*

26 *See* Brito & de Rugy, *supra* note 10 (manuscript at 9). *See generally* B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78

memorandum to all agency heads to delay the effective dates of all regulations recently passed by the outgoing Carter Administration, with an exemption for rules that had to meet judicial or statutory enactment deadlines.[27] Similarly, on the first day of the new Administration in 2001, President George W. Bush's new Chief of Staff, Andrew Card, froze all the regulations that had been passed at the end of the Clinton Administration.[28] Most recently, President Obama's Chief of Staff, Rahm Emanuel, issued a similar memorandum on the first day of the Obama Administration.[29] New administrations have generally tried to roll back as many of the midnight regulations as possible by delaying the regulatory approval process.[30] One commentator has named these suspensions of recently promulgated regulations "crack-of-dawn" regulations, because of way the incoming administration starts battling the midnight regulations of the preceding administration as soon as they step foot into their new executive branch offices.[31] One of the many criticisms that has been made of midnight regulations is that it creates this resource-wasting tug-of-war between outgoing and incoming administrations.[32]

II. The Bolten Memo of May of 2008

On May 9, 2008, Joshua Bolten, President Bush's Chief of Staff, issued a memorandum to the heads of executive departments and agencies entitled "Issuance of Agency Regulations at the End of the Administration."[33] The memo essentially informed federal agencies

N.Y.U. L. REV. 782, 793–98 (2003) (arguing that the presidential directives that have been passed by a new administration to delay the promulgation of midnight regulations of the old administration are illegal).

27 Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981); *see* Sanford, *supra* note 26, at 793–94.

28 Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (instructing agency heads to "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").

29 Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009).

30 *See, e.g.*, David E. Rosenbaum, *Bush Rules! It's Good to Be the President*, N.Y. TIMES, Jan. 28, 2001, § 4, at 16 (noting that immediately following President Bush's inauguration, lobbyists for special interests were "leaning on the Bush administration to move quickly to overturn policies put in place under Mr. Clinton," and listing "some of the most important rules, called midnight regulations, adopted in the final days of the Clinton presidency").

31 Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 891 (2008).

32 *See* Brito & de Rugy, *supra* note 10 (manuscript at 12).

33 Bolten Memo, *supra* note 4, at 1.

that they had until June 1, 2008, to propose any new regulations and that, absent "extraordinary circumstances," no agencies would be permitted to issue final regulations after November 1, 2008.[34] The memo stated:

> Over the last seven years, . . . [t]he President has emphasized that the American people deserve a regulatory system that protects and improves their health, safety and environment, secures their rights, and ensures a fair and competitive economic system, while respecting their prerogative to make their own decisions and not imposing unnecessary costs. We need to continue this principled approach to regulation as we sprint to the finish, and resist the historical tendency of administrations to increase regulatory activity in their final months. We must recognize that the burden imposed by new regulations is cumulative and has a significant effect on all Americans.[35]

The November 1, 2008, deadline was just days before President Bush officially became a "lame duck" president, demonstrating that the Bush Administration was attempting to limit its own passage of midnight regulations. The memo has a necessary exemption for regulations that have judicial or statutory deadlines for their promulgation as it states that this early moratorium on regulations will control "[t]o the extent permitted by law."[36] If followed, this policy avoids the midnight regulation phenomenon except in the few circumstances where regulations have mandatory deadlines.

Some legal specialists have suggested that the policy behind the Bolten Memo reflects an intention within the Bush Administration to control its own legacy.[37] Most regulations do not take effect until sixty days after they have been passed.[38] New Presidents often come into office before the sixty-day period has passed for midnight regulations, which allows Presidents to roll back and delay these regulations, such as when President Bush delayed many of President Clinton's midnight

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34 *Id.*; *see also* Charlie Savage & Robert Pear, *Administration Moves to Avert Late Rules Rush*, N.Y. Times, May 31, 2008, at A1.

35 Bolten Memo, *supra* note 4, at 1.

36 *Id.*

37 Savage & Pear, *supra* note 34, at A1; *see also* R. Jeffrey Smith, *A Last Push to Deregulate: White House to Ease Many Rules*, Wash. Post, Oct. 31, 2008, at A1 (quoting White House spokesman Tony Fratto: "This administration has taken extraordinary measures to avoid rushing regulations at the end of the term. And yes, we'd prefer our regulations stand for a very long time—they're well reasoned and are being considered with the best interests of the nation in mind.").

38 Savage & Pear, *supra* note 34, at A1.

regulations.[39] By requiring that regulations be passed more than sixty days before the end of his Administration, President Bush may have ensured that most of the regulations passed under his watch will not be easily overturned.[40]

III. The Political Accountability Problem Presented by Midnight Regulations

In the landmark administrative law opinion *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[41] the U.S. Supreme Court established a deferential two-step test for federal courts to apply when reviewing an agency's interpretation of a statute it administers.[42] Statutory interpretation can be an important part of an agency's rulemaking activities. Under the *Chevron* test, the court first determines if the statutory language is clear as to what Congress intended.[43] If the statute is clear and unambiguous, then the clear intent of Congress provides the necessary interpretation.[44] If the statute is ambiguous, the court next looks at the interpretation made by the agency itself to determine if it is "permissible" or reasonable.[45] The *Chevron* standard is very deferential to the interpretation provided by the agency. After a court has determined that Congress's intent was ambiguous, the agency's interpretation is most often determined to be permissible.[46]

One of the major rationales the Supreme Court gave in deferring to the federal agency's interpretation was the political accountability of the President as overseer of the agencies.[47] The Court asserted that

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39 *Id.*

40 *Id.*; *see also* Mendelson, *supra* note 1, at 592–93 (discussing the time and costs involved in a new administration overturning a prior-passed rule).

41 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

42 *Id.* at 842–43 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnotes omitted)).

43 *Id.* at 842.

44 *Id.* at 842–43.

45 *Id.* at 843.

46 *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2104–05 (1990).

47 An additional rationale the Court gave for *Chevron* deference is that Congress delegated power to the agencies to fill in the holes in statutory schemes and the courts should not

federal agency interpretations are influenced by the policy of the President who is held accountable by the electorate, and therefore, agency interpretations of federal statutes are deserving of some deference from the undemocratically appointed federal judiciary.[48] Justice Stevens, in his majority opinion for the Court, wrote:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[49]

This important administrative law doctrine was partially based on the idea that agency decisions are due deference because the President, the "Chief Executive" of the agencies, will be held politically accountable for the policy decisions that influence the regulations promulgated under her watch. The President would theoretically be held accountable for these actions through public opinion, the media, and the ballot box. This idea assumes that the President is always in a position of being held politically accountable by the electorate when federal agencies are issuing rules and regulations. If there were a situation in which a presidential administration was actually not held accountable for the rules it passed, this rationale for *Chevron* deference would not hold up. Midnight regulations create such a loophole in this idea of political accountability.

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interfere with this delegation. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989) ("Deference is necessary, *Chevron* argues, to avoid judicial usurpation of functions Congress wished to entrust to the agency."). Further, *Chevron* deference is supported by the idea that courts should defer to the expertise federal agencies have in their subject area. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) ("The cases, old and new, that accept administrative interpretations, often refer to the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes.").

48 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1086 (2008) (stating that one of the reasons given by the Court for *Chevron* deference was that "agencies are relatively more legitimate policy-balancers than courts, because the executive branch is more 'directly accountable to the people'"); Sunstein, *supra* note 46, at 2087 (arguing that *Chevron* deference is rooted in part in the idea that agencies are better suited for interpreting statutory ambiguities than courts because of their relative policy expertise and that they can be held politically accountable). Sunstein has also noted that "[t]he fact-finding capacity and electoral accountability of the administrators are far greater than those of courts." Sunstein, *supra* note 46, at 2087.

49 *Chevron*, 467 U.S. at 865–66.

During the midnight period, the President is a "lame duck" whose successor is already preparing to move into the White House. The President will never stand for election again and can take advantage of her position to influence policy without having to answer to anyone. She can no longer be held politically accountable at the ballot box for the policy initiatives she pursues through regulation.[50] With no political accountability, the President is free to take more controversial policy stances through federal regulation.[51] As two scholars have commented, "[b]ecause the president knows that she will not face voters again, the president and her agencies will be less hesitant to pursue a controversial regulatory course."[52] This is a problem with midnight regulations, and it undercuts an important aspect of *Chevron*.

IV. The Bush Administration's Regulation Moratorium and Its Effect on Political Accountability

The Bush Administration's moratorium on federal regulations during its final months in office, as encompassed in the Bolten Memo, is a positive development in administrative law because it appropriately maintains the political accountability of the Executive for the regulations her administration promulgates. The Bush Administration sought to avoid the impulse to pass a rush of federal regulations that are not constrained by political accountability. This political accountability is essential to maintaining the logic supporting the judicial deference given to agency interpretations and regulations as described in *Chevron*. Further, the policy reflected in the Bolten Memo can help avoid regulations that will be quickly undone by the incoming presidential administration.

It could be argued that placing a moratorium on passing regulations during the midnight period of an outgoing presidency would do nothing other than move up the timetable for the agencies' last rush to promulgate regulations.[53] According to this argument, the agencies would still have the same lack of political accountability and the same reason to rush to pass regulations, but this rush would just occur a few months earlier, shortly before the moratorium goes into effect. This

[50] *See* Loring & Roth, *supra* note 19, at 1446 ("Agencies are largely unaccountable to the public during midnight periods, and thus have little incentive to avoid costly measures. Gone are the traditional political constraints of an administration subject to voter satisfaction, even in terms of a successor administration." (footnote omitted)).

[51] *See* Brito & de Rugy, *supra* note 10 (manuscript at 11).

[52] *Id.*

[53] *See, e.g.*, Smith, *supra* note 37, at A1.

argument is incorrect, however, because there are political accountability pressures on the President in the summer before she leaves office that are not present during the midnight period. For instance, the outgoing President will try to avoid controversial regulations that would shed a bad light on her party, which will be supporting its candidates for President and Congress. While the President herself may not stand for election in the fall of her last year in office, her political party will. The President will not want to damage her party's likelihood of success in the November elections by passing controversial regulations. Additionally, the media will likely be more focused on the President during this period before a new President is elected and takes over the spotlight. Even though a President cannot be held accountable at the ballot box as she leaves office, placing a moratorium on federal regulations during the midnight period increases political accountability for the President's regulatory activity by prohibiting regulation promulgation during the period the outgoing President is least politically accountable.

Conclusion

Outgoing U.S. Presidents take advantage of the lack of political accountability before they leave office to pass an immense amount of federal regulations in an effort to preserve their influence after they leave the White House. This practice of passing midnight regulations subverts one of the important rationales for why courts give great deference to agencies' statutory interpretations under the *Chevron* doctrine. After observing the final months of the Bush Administration as a test run, it would be wise for Congress to consider passing a law that requires a mandatory limit on regulation at the end of a presidential term, putting the regulations to bed early before they can cause mischief at midnight.