

# Reversing Midnight Regulations

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**P**RESIDENT BILL CLINTON'S FINAL MONTHS IN office were marked by a flurry of regulatory activity that generated an unprecedented volume of new rules and regulations for American businesses, citizens, and state and local governments. Like Cinderella leaving the ball, many of Clinton's 7,000 presidential appointees hurried to issue last-minute "midnight" regulations before they turned back into ordinary citizens at noon on January 20th.

Clinton officials' sharp increase in regulatory output is not an anomaly; as Mercatus researcher Jay Cochran showed in his recent paper "The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters," sudden bursts of regulatory activity at the end of a presidential administration are systematic, significant, and cut across party lines. But the magnitude of Clinton's activity has set a new record. The Clinton administration published 26,542 pages of regulations in the *Federal Register* this past November, December, and January. That eclipses President Jimmy Carter's 20-year record for most pages published in the last three months of an administration, and represents a 51-percent increase over Clinton's average volume during the same period in the previous three years.

Some of these new regulations may have been developed carefully over many years, and only just now emerged from the procedural pipeline. But others were hurried into effect without the usual checks and balances, perhaps to avoid scrutiny by the incoming Bush administration. These latter regulations may cater more to special interests than the public interest.

## RECONSIDERING MIDNIGHT REGULATIONS

DEPENDING ON A RULE'S STAGE IN THE REGULATORY development process, different options are available to the Bush administration and Congress to evaluate and possibly overturn Clinton's midnight regulations.

For rules that are under development, and for which final action has not been signed by an agency head, the administration can refrain from publishing them until incoming officials have examined their merits. On January 29, 1981, for example, President Ronald Reagan issued a moratorium on Carter-initiated regulations that were still under development.

Some regulations may be signed in the final week of an outgoing administration, but due to backlogs or last minute signatures, are not published in the *Federal Register* before a new administration takes office. Clinton, when he took office on

January 20, 1993, pulled back several such regulations from the *Federal Register*. The withdrawal of these unpublished rules survived subsequent court challenge. Similarly, in a memorandum dated January 20, 2001, Bush White House Chief of Staff Andrew Card directed all agencies to withdraw Clinton-originated regulations sent to the Federal Register but not yet published.

The Card memo also directed agency heads to "postpone the effective date of [recently issued but not yet effective] regulations for 60 days to ensure that the President's appointees have the opportunity to review any new or pending regulations." Despite a delay in the effective date, once a final regulation has been published in



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the *Federal Register*, the only unilateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must first develop a factual record that supports the change in policy.

While the new administration's options for overturning final regulations are constrained, Congress can expeditiously disapprove recently issued rules under the 1996 Congressional Review Act (CRA). All rules issued after July 13, 2000, are currently eligible for congressional disapproval under expedited procedures. The

CRA defines rules broadly so as to include all final regulations, interpretive rules, statements of policy, and guidance documents issued by either independent or cabinet agencies.

Although over 20,000 rules have been submitted to Congress under the CRA since it was enacted in 1996, not one has been disapproved. Largely, this is because the president could veto any congressional move to disapprove a rule written by the president's administration. Congress would then have to muster a two-thirds majority to override the veto.

The next few months present a unique opportunity for applying the CRA. Beginning in early February, Congress has 60 legislative days (House) or session days (Senate) in which to pass a joint resolution of disapproval for midnight regulations. During this briefly open window, the veto threat is diminished, since the president whose administration issued the regulations is no longer in office.

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