



Testimony of
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Subcommittee on Commercial and Administrative Law

Hearing on: "Midnight Rulemaking: Shedding Some Light"

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Thank you, Mr. Chairman, Ranking Member Franks, and my fellow members of the Judiciary Committee. I appreciate the opportunity to testify before you today on this very important issue.

The problem of midnight rules is not a new one, but the practice is prone to abuse and undercuts our democratic process.

That is why, on the first day of this Congress, I reintroduced the Midnight Rule Act, H.R. 34, which would allow incoming Agency heads to prevent rules adopted within the last three months of the previous administration from going into effect.

This legislation lays out an approach to enable an incoming president to deal with midnight rules – that is, rules finalized, or which took effect, at the very end of his predecessor’s term -- without tying up the new president for months or years trying to implement his agenda.

The 22nd Amendment to the Constitution limits a president to two terms in office. Midnight rules can be abused to allow a president to reach into a third term without any accountability.

Past presidents have used the final weeks of their terms to take actions, or advance policies, that would be politically difficult prior to an election. It is a tradition going back to the earliest days of the Republic.

When a president rushes to finalize regulations in advance of an incoming administration, especially during the lame duck period, that president binds the hands of his successor for six months to as long as two years. This can be accomplished with minimal political accountability by the president – who is leaving office – or by the president’s party, whose members hope to retain their jobs.

In this way, midnight rules differ from other executive actions, such as executive orders, which a new president can change upon assuming office.

The conduct of the outgoing Bush administration really highlighted the problem in several ways.

First, the Bush administration rushed many rules through the process at an accelerated pace. This was facilitated by a memo issued by the White House Chief of Staff, Josh Bolten, on May 9th, 2008. It instructed agencies to finalize regulations by November 1st, enabling the outgoing administration to put in place regulations just prior to the swearing-in of the new President.

The results of the Bolton memo are clear. In October and November of 2008, federal agencies submitted 30 “major rules” (those with an economic impact of at least \$100 million), to the Governmental Accountability Office. During the same period in 2007, that number was only 13. This represents an increase of 130%.

Similarly, the number of “significant rules” submitted to the Office of Information and Regulatory Affairs increased by 102% between September 1, 2008 and December 31, 2008 over the same period in 2007 (190 significant final rules as opposed to 94 such rules the year before).

Second, the lack of accountability in its waning weeks enabled the Bush administration to adopt highly controversial rules that may not have passed muster in a more public debate.

These midnight rules adopted by the Bush Administration will, among other things, curtail access to family planning services, and even to information about reproductive health options; weaken enforcement of the Endangered Species Act with respect to federal projects which might threaten endangered species; allow the agencies to bypass reviews of global warming and potential ecological impacts; and allow mining companies to dump toxic waste without concern for environmental harm.

Finally, these midnight rules allow the Administration to extend its policies well into the new administration despite the fact that the voters have voted to move in a new direction.

The Midnight Rule Act would address this problem in several ways.

It would give a new agency head a limited period of time to review and act on regulations adopted in the final 90 days of a president’s term. The new agency head would have 90 days after being appointed to disapprove a midnight rule by publishing a statement of disapproval in the Federal Register, and sending a notice of disapproval to the congressional committees of jurisdiction.

In order to address emergencies, limited exceptions are provided in cases of an imminent threat to health or safety, enforcement of criminal laws, implementation of an international trade agreement and national security.

Congress could revoke some of these rules under the Congressional Review Act. However, the CRA would require individual votes on each rule. Given the sheer number of midnight rules issued by the Bush Administration, this would require more time than Congress has available while we are trying to pass an economic recovery package, finalize FY2009 appropriations bills, and prepare for a new budget for the upcoming fiscal year.

The Midnight Rule Act would give the new administration the opportunity to review carefully the last minute handiwork of its predecessor. Rulemaking is, in the first instance, a function of the executive. Congress and the courts would still retain their authority to act as a check on the executive.

Most importantly, this proposal would place a check on midnight rules. The American people have a right to hear the views of candidates for president and other offices on these very important issues and then to be governed by the choice they made in the election, and not by the dead hand of a choice they made four years earlier. The American people are entitled to alter the direction of their government based on new circumstances, or even to change their minds. That is why we have a new presidential election every four years.

I have received many helpful comments and suggestions on ways to clarify this legislation, and I hope to work with my colleagues to fine tune it.

The core policy is that the will of the electorate should not be frustrated in effectuating new policy. Voters have a right to debate critical issues in the selection of their representatives and to have those choices realized through the electoral process.

Thank you again for the opportunity to testify today, and I look forward to working with you all to comprehensively address this problem in the days ahead.