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A Swing and a Miss at Our Midnight Regulations Study

By Taylor Lincoln and Michael Tanglis

Public Citizen recently issued a study concluding that regulations completed during the transition periods at the end of the last two presidential administrations were longer in development than those completed at other times.

This finding is significant because a cadre of conservative scholars, activists and elected officials have repeatedly sounded alarms that rulemakings completed during presidential transition periods – which they dub “midnight regulations” – are “rushed,” “flawed,” the product of “cutting corners,” and do not include “opportunity for constructive feedback.” This alarmist rhetoric is the central premise behind deregulatory legislation that would prevent agencies from promulgating regulations in the final months of an administration.

Our [study](#) evoked a somewhat frenzied response from the regulatory policy director for the center-right policy group American Action Forum (AAF), including numerous posts to social media and a [blog](#) post. The intensity of AAF’s response was surprising because the group was not mentioned in our study.

Because AAF spoke out so loudly in an attempt to debunk our study, and because its response has been promulgated by others (e.g., George Washington University’s “Regulation Digest” on July 27), we have decided to respond.

False Claim of Dispute on Quantity of Rulemakings in Transition Periods

Much of AAF’s critique focuses on establishing that there is an increase in regulatory activity during transition periods. It inaccurately alleges that we suggested otherwise, stating that Public Citizen made the “fallacious assumption that ‘midnight regulation’ is a myth.” Calling this a straw man argument would be generous. In fact, we say in the second paragraph of our study, “During presidential transitions since 1988, OIRA has completed reviews of substantially more final rules than during the same months of non-transition years.” (The U.S. Office of Information and Regulatory Affairs, or OIRA, is a White House office that reviews rulemakings.)

Furthermore, the very first chart in our study documents the uptick of completed final stage reviews in transition periods. The adjacent text clearly states that OIRA “completed review of substantially more Economically Significant final rules during the Transition Period in 2000 and 2008 than in the same months in all other years in this analysis.” AAF nonetheless claims that “the statistics [in Public Citizen’s chart], and their implications, were never discussed in the Public Citizen report.”

This particular response to our study misses the point, as we do not question the increase in transition period rules. Instead, our study investigates the premise that these rules are “rushed” or

“flawed.” Members of the [press](#) who covered our study did not appear to have any difficulty discerning this point.

The crux of the case put forth by critics of “midnight regulation” is that rules completed during transition periods are of substandard quality. They use this claim to justify policy proposals that would do away with transition period rulemakings entirely. Our study examines three data points that refute the validity of these claims.

OIRA Review Length

Two of these data points concern the length of review times by OIRA, for which precise dates are available.

First, we looked at the cumulative days of OIRA reviews for all rulemaking stages. These typically include a proposed stage and final stage review, and sometimes other stages. We found that regulations for which OIRA completed final stage review during the transition periods in 2000 and 2008 (which we called “transition period” regulations) received a total of 130 days of review, on average. Regulations completed since 1999 for which OIRA completed final stage review at other times (i.e., “non-transition period” regulations) received a total of 115 days of OIRA review, on average. Therefore, the rules finalized in the transition period received more cumulative OIRA review than other rules.

Second, we looked at the average length of just the final stage OIRA reviews. Here, we found that rules completed during transition periods received an average of 47 days of final stage OIRA review. Those completed at other times received an average of 48 days of final stage OIRA review, a negligible difference.

These findings are significant data points because critics of “midnight regulations” have staked most of their case on allegedly insufficient OIRA review. These two findings comprise two-thirds of our study. AAF’s rebuttal did not address either one.

Overall Rulemaking Length, According to Data in the Unified Agendas

The third data point we examined was the total length of rulemakings according to the federal government’s semi-annual Unified Agenda, which lists regulations in progress. We determined that transition period rulemakings took an average of 3.6 years to complete from start to finish, whereas non-transition period rulemakings took an average of 2.8 years. Therefore, transition period rules spent significantly more time in development, on average. This finding strikes a major blow to the claim that transition period rules are rushed.

On this calculation, AAF critiqued our methodology extensively, but the criticisms do not stand up to scrutiny, nor are they particularly relevant to our study’s key finding.

Determining the exact day work began on a rulemaking is challenging because the government does not report an official start date. Every six months, agencies are required to report the

rulemakings they are working on to be listed in the Unified Agenda. This provides the nearest approximation of a start time for any rulemaking, although it leaves a six-month window.

Public Citizen consulted with numerous experts familiar with the life cycle of rulemakings to determine the most appropriate way to resolve this ambiguity in the data. We chose to deem a rulemaking's start date to be three months prior to its first listing in the Unified Agenda, the midpoint between Unified Agendas.

We believe this was a conservative estimate, in part because many rulemakings begin years before they are first listed in a Unified Agenda, as the U.S. Government Accountability Office [concluded](#) in 2009 report.¹

AAF also objects to our decision to date the Unified Agendas April 1 (spring) and October 1 (fall), correlating with the dates in the downloadable government data, 04 (April) and 10 (October). "The spring agenda has been published as early as April 4, but as late as July 3" and "there have been four fall agendas published in December, not October,"² AAF writes.

AAF's fixation with the date that the Unified Agenda is actually published is off base for several reasons.

First, the date the Unified Agenda is released not a reliable indicator of when an agency begins work on a rule. It's not as if agency officials are sitting in their offices with all work on hold, refreshing OIRA's website, just waiting for the Unified Agenda to be published so they can begin work on a rule.

Second, focusing on the actual date of publication would ignore the fact that agencies are required to submit their information to OIRA by April or October at the latest (and often significantly earlier), irrespective of whether the publication itself is delayed. A Unified Agenda intended for April publication may not appear until early July, for instance, but its contents would have been submitted months earlier.

AAF cites the later-than-normal publication dates of the fall 2011 and spring 2013 agendas, but makes no mention of the fact that agencies were required to submit information by September 9 for the fall 2011 agenda (102 days prior to publication) and by April 24 for the spring 2013 agenda (68 days prior to publication), as shown in a [study](#) on this topic published by the Administrative Conference of the United States (ACUS).

Of the five fall Unified Agendas analyzed by ACUS, agencies were required to submit data prior to October 1 in every case (four in September and one in August). Of the four spring Unified Agendas

¹ See, e.g., GOVERNMENT ACCOUNTABILITY OFFICE (GAO), FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (April 2009), <http://1.usa.gov/28NMaPa>.

² In fact, the spring agenda in 2007 was published on March 29. <http://bit.ly/2azlemi>

analyzed by ACUS, agencies were required to submit data in April for two of them and in February for the other two. [See table, below]

**Table 1: Dates of OIRA Memoranda, Required Submission, and Agenda Publication:
Fall 2010 through Fall 2014**

Unified Agenda Edition	Date of OIRA Memo	Date Info Required to RISC	Days Between Memo and Submission	Date Agenda Published	Days Between Submission and Published
Fall 2010	07/23/2010	09/10/2010	49	11/29/2010	80
Spring 2011	01/21/2011	02/25/2011	35	06/01/2011	97
Fall 2011	06/30/2011	09/09/2011	71	12/19/2011	102
Spring 2012	03/12/2012	04/13/2012	32	Not published	--
Fall 2012	06/13/2012	09/07/2012	86	12/21/2012	105
Spring 2013	03/28/2013	04/24/2013	27	07/01/2013	68
Fall 2013	08/07/2013	08/29/2013	22	11/26/2013	89
Spring 2014	02/04/2014	02/28/2014	24	05/23/2014	110
Fall 2014	08/25/2014	09/19/2014	25	11/21/2014	63

Source: OIRA website for OIRA memo dates and date required to RISC, and Unified Agenda at Reginfo.gov for dates of the agendas.

Using the submission deadline (as opposed to publication date) as the start date for a rulemaking would not make sense, either.

It would be impossible for an agency to complete the detailed work included with each rule's submission – extensive background research, data collection, legal research and justification – the same day the rule is submitted. The submission process itself requires substantial preparatory work, a fact made clear in the government's [user manual](#) for submitting data to the Unified Agenda.

Further, there is no reason to believe that agencies would begin work on a rulemaking particularly close to the Unified Agenda submission deadline. Approximately six months separate submission deadlines, on average. Work on new rulemakings may have begun at any time in those windows, in many cases long before OIRA's final deadline.

It would have been perfectly reasonable for us to deem the starting points of rulemakings to be three months prior to the submission date. Had we done so, this would have resulted in *longer* rulemaking lengths than our study found. But we chose to backdate from April 1 and October 1, the more conservative choice.

Notably, none of these issues affect our study's central finding, which is that rulemakings completed in transition periods took longer than those completed at other times. In its critique of our study, AAF stated that "because Unified Agendas are published after April 1 and October 1, all of the rulemaking lives are arbitrarily extended in the paper." In fact, the opposite is likely true, as noted

above. But if we applied AAF's suggested methodology to all rulemakings (those completed in transition periods and non-transition periods), our study's conclusion would remain unchanged.

Finally, AAF criticized us for omitting from our dataset rulemakings for which we arrived at negative rulemaking lengths. These negative results occurred because some rules were published as "Final" in the Federal Register before their initial listing in the Unified Agenda. Negative time rulemakings are impossible as a real world matter, which is why we omitted them.

As we mentioned in our study (and AAF failed to acknowledge), fewer than 1 percent of all rulemakings fell into this category. This methodological decision did not have a significant effect on our results.

Conclusion

In attacking our study, AAF makes two overarching claims. The first is that there are more regulations completed during transition periods than at other times. We are in agreement on this, as we state at the top of our study, although that was not the topic we set out to investigate.

The second is that our methodology overstates the lengths of rulemakings. On this point, we believe that AAF's quibbles about how we calculate rulemaking lengths are off-base, and there is convincing evidence that the rulemaking lengths in our analysis represent a conservative estimate.

Even if we followed AAF's recommended methodologies, doing so would affect all rulemaking lengths – both transition period and non-transition period rules. As a result, *the conclusions of the study would be the same*: that rulemakings finalized in presidential transition periods took longer, on average, than those completed at other times.

We stand by our study's methods, findings and conclusions.

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