

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-164 }

MIDNIGHT RULES RELIEF ACT OF 2017

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
WITH MINORITY VIEWS

TO ACCOMPANY

S. 34

TO AMEND CHAPTER 8 OF TITLE 5, UNITED STATES CODE, TO
PROVIDE FOR EN BLOC CONSIDERATION IN RESOLUTIONS OF
DISAPPROVAL FOR "MIDNIGHT RULES", AND FOR OTHER
PURPOSES



OCTOBER 5, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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MIDNIGHT RULES RELIEF ACT OF 2017

OCTOBER 5, 2017.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 34]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 34) to amend Chapter 8 of title 5, United States Code, to provide for en bloc consideration in resolutions of disapproval for “midnight rules”, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

The Midnight Rules Relief Act of 2017, S. 34, amends the Congressional Review Act (CRA) to allow Congress to consider multiple regulations within a single resolution of disapproval.

II. BACKGROUND AND THE NEED FOR LEGISLATION

“Midnight rulemaking” refers to a phenomenon whereby outgoing administrations, especially when the incoming administration is of a different party, engages in a significant increase in regulatory activity. In particular, this means a marked increase in last-minute regulations issued by regulatory agencies before installation of the new administration’s political appointees—“like Cinderella leaving the ball.”¹ In practice, the “midnight period” refers to the roughly two-month period between the presidential general election and subsequent inauguration day.² For example, President Barack Obama’s administration published 842 final rules (179 declared “significant”) from November 9, 2016 (the day after the election) to January 19, 2017 (the day before the inauguration), compared to 604 (79) for the same period a year prior, and 608 (51) for the comparable period after President Obama’s re-election in 2012.³ Observers first identified this pattern going back to at least the transition from President Jimmy Carter to President Ronald Reagan (1980–81), and in transitions since,⁴ though it was not until 2001 that a scholar first formally tested the hypothesis that “lame duck” administrations increase their regulatory output.⁵

One concern about midnight rulemaking is that the quality of analysis used to structure and justify the regulation suffers. A 2013 study examined regulations issued around the Bush-Obama transition and concluded this was indeed the case, and moreover that the degree to which quality suffers may be associated with the outgoing President’s policy priorities.⁶ The implication is that midnight rules can have a lasting effect on policy without the necessary evidence to justify the rules, resulting in a suboptimal policy outcome.

A related but distinct concern is that midnight regulations can lead to a stress on resources for the Office of Information and Regulatory Affairs—tasked with centralized review of Executive Branch agency rules—which shortens review times and decreases accountability.⁷ Further, an administration free of electoral or Congressional constraints “can pursue regulatory policies that, in other circumstances, might have invited retaliation.”⁸ This could be characterized as “undemocratic” if the policies themselves are contrary

¹Susan E. Dudley, *Reversing Midnight Regulations*, Mercatus Ctr. (2001), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/dudley.pdf>.

²See Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 Mich. J. of Env’tl. & Admin. L. 285, 285–384 (2013) (Beermann uses 90 days as the Midnight period).

³See U.S. Fed. Reg., <https://www.federalregister.gov/> (last visited Sept. 1, 2017).

⁴See Veronique de Rugy & Antony Davies, *Midnight Regulations and the Cinderella Effect*, 38 J. of Socio-Econ. 886, 886–890 (2009).

⁵Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Ctr., Working Paper, 2001); William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 Presidential Stud. Q. 533, 533–553 (2005) (Scholars had long observed the broader phenomenon of outgoing administrations undertaking “lame duck” policymaking; for example, John Adams’s appointment of “midnight judges”).

⁶Jerry Ellig, Patrick A. McLaughlin & John F. Morrall III, *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations*, 7 Reg. & Governance 153, 153–173 (2013).

⁷“[O]ne additional economically significant regulation submitted to OIRA decreases the mean review time for all regulations by about two thirds of a day.” See Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 Pub. Choice 395, 395–412 (2011); see also Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 Admin. L. R. 163, 163–196 (2008).

⁸McLaughlin, *supra* note 7.

to the preferences of the electorate as expressed via the prior election.⁹

The CRA set up a rolling window during which Congress can review and disapprove regulations submitted by the Executive Branch.¹⁰ If a regulatory agency submits a rule to a Congress which ends before the full review window elapses, then these procedures provide the next Congress a new period in which to review and disapprove of the rule.¹¹ In practice, treating the rule as if it is resubmitted allows Congress to review midnight rules issued by an outgoing administration, as the end of a presidential term typically occurs within a few weeks of Congress's *sine die* adjournment.

The CRA's disapproval mechanism requires Congress to introduce, pass, and the president to sign a unique joint resolution for every rule. The Midnight Rules Relief Act of 2017 would amend the CRA to allow for disapproval of more than one rule within a single joint resolution under a particular circumstance. For rules promulgated at the end of a Congressional session—those rules that effectively must be resubmitted to Congress—that occurs within a president's final year of a term, the Midnight Rules Relief Act of 2017 would provide the option for Congress to group multiple rules for consideration *en bloc* and outlines the specific form such a resolution must take.

Under this proposed legislation, a new Congress is afforded an expedited means to prevent persistent and potentially costly policies via regulations pursued by an outgoing administration in its waning days. By grouping multiple rules together, it reduces the time and resources that Congress must spend, to reverse the prior administration's last minute regulatory policy grab. Moreover, the legislation makes it more likely Congress can prevent avoidable fixed costs of compliance with such regulations. It does not, however, change the overall review and disapproval procedure or application for rules that do not fall within this narrow set of circumstances.

At the end of the Obama Administration, Chairman Ron Johnson sent letters to both outgoing and incoming officials urging a concerted effort to prevent “a last-minute deluge to promulgate so-called ‘midnight rules.’”¹² This effort focused on both specific rules¹³ as well as the overall midnight rules phenomenon. Nevertheless, the outgoing administration persisted in pushing through a significant increase in last-minute rulemaking, resulting in Chairman Johnson introducing the Midnight Rule Relief Act of 2017 as a means to address future attempts to do the same.

⁹*Id.* Also consider that regulations (including midnight regulations), once issued, tend to be highly persistent. *E.g.* Jason M. Loring & Liam R. Roth, *Empirical Study: After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 Wake Forest L. Rev. 1441 (2005).

¹⁰See Subtitle E (“Congressional Review”) of the Small Business Regulatory Enforcement Fairness Act of 1996 § 251, 5 U.S.C. §§ 801–808 (enacted as 104 P.L. 104–121, codified at 5 U.S.C. §§ 801–808) (the congressional disapproval procedure is contained in Section 802).

¹¹5 U.S.C. § 801(d) (2012).

¹²Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs, to Dr. Howard Shelanski, Administrator, Office of Info. & Regulatory Affairs, Dec. 7, 2016.

¹³See letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs, and Sen. James Lankford, to Sally Jewell, Secretary, Dep’t. of Int., Dec. 13, 2016; Shelanski, *supra* note 11; *see also* letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs, to Vice President-Elect Mike Pence, Dec. 12, 2016.

III. LEGISLATIVE HISTORY

Chairman Johnson (R–WI) introduced S. 34 on January 5, 2017. The bill was referred to the Committee on Homeland Security and Governmental Affairs. Senators Rand Paul (R–KY), Michael B. Enzi (R–WY), Marco Rubio (R–FL), Steve Daines (R–MT), and Roy Blunt (R–MO) later joined as co-sponsors of the bill. The Committee considered S. 34 at a May 17, 2017 business meeting.

The Committee ordered S. 34 reported favorably on May 17, 2017, by a roll call vote of 8 yeas to 6 nays. Senators voting in the affirmative were Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, and Daines. Senators voting in the negative were McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris. For the record only, Senator Carper voted nay by proxy.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section provides the bill’s short title, the “Midnight Rules Relief Act of 2017.”

Section 2. En bloc consideration of resolutions of disapproval pertaining to “Midnight Rules”

Paragraph (a) amends Section 801(d) of the CRA so that of the rules eligible for disapproval under the CRA, those “submitted during the final year of a President’s term” can be considered for disapproval in a single resolution.

Paragraph (b) amends Section 802(a) to describe how the text of such a resolution must be structured.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MAY 30, 2017.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 34, the Midnight Rules Relief Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

S. 34—Midnight Rules Relief Act of 2017

S. 34 would amend the Congressional Review Act (CRA) to allow en bloc disapproval of multiple regulations issued during a President's final year in office. Under the CRA, the Congress can only disapprove one regulation at a time.

Although the bill could affect how the Congress uses the CRA and thus affect which regulations are disapproved, enacting the bill would have no effect on the budget. Regulations can affect the cost of entitlement programs as well as the collection of fees, and changes to those regulations could either increase or decrease federal spending or revenues. However, any budgetary effects would result from future legislation that disapproved the regulations.

Enacting the legislation would not affect direct spending and revenues; therefore, pay-as-you-go procedures apply. CBO estimates that enacting S. 34 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 34 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. MINORITY VIEWS

MINORITY VIEWS OF SENATORS CLAIRE McCASKILL, THOMAS R. CARPER, AND MAGGIE HASSAN

The Congressional Review Act (CRA),¹ lays out the process by which Congress may disapprove an executive agency rule finalized within the last 60 legislative days of the House or Senate session during the final year of an Administration. Under current law, a joint resolution for each rule must be considered separately. S. 34 amends section 801(d) of the CRA to allow Congress to consider a joint resolution to disapprove an unlimited number of regulations all at the same time.

This bill is a solution in search of a problem and is built on the misguided premise that the majority of rules promulgated at the end of an Administration lack the rigorous analysis and review that is required in the regulatory process. To the contrary, most rules finalized in the last months of an Administration have gone through rigorous review and taken years to move through the regulatory process. The nonpartisan Administrative Conference of the United States (ACUS) found that “a dispassionate look at midnight rules issue by past Administrations of both political parties reveals that most were under active consideration long before the November election” and that many others were routine rules such as “finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside of the agency’s control (such as year-end statutory or court-ordered deadlines).”² In fact, a report last year found that rules finalized during a transition period were usually proposed several years prior to their adoption.³

While the committee report asserts that the “midnight period” refers to a two month period between the general election and the subsequent inauguration, we would note that 60 legislative days can in fact be many months. For example, during the most recent transition, 60 legislative days captured all regulations finalized in the last 6 months of the Obama Administration.⁴ This bill would institutionalize one party’s ability to remove the last 6 months of the other party’s policies without giving proper consideration to each policy or giving Members the ability to weigh the merits of each rule included in the resolution.

There is no good policy rationale for Congress to take a single vote on a potentially wide variety of rules affecting a broad range of potentially unrelated issues. For example, if this bill had applied to CRA votes taken this year, Senators could have been forced to

¹ 5 U.S.C. §§ 801–808.

² Administrative Office of the United States, *Administrative Conference Recommendation 2012-2: Midnight Rules 1-2* (June 14, 2012).

³ Public Citizen, *Shining a Light on the “Midnight Rule” Boogeyman* (July 18, 2016).

⁴ Congressional Research Service, *Agency Final Rules Submitted on or after June 13, 2016, May be Subject to Disapproval by the 115th Congress* (IN10437) (2016).

take a single vote on rules affecting a Securities and Exchange Commission rule relating to disclosure of payments by resource extraction issuers and a Department of Labor rule relating to drug testing of unemployment compensation applicants. Members of Congress deserve the right to take separate votes on issues this disparate and unrelated. If this process is to be taken seriously, Congress should have a robust debate and a separate vote on each rule they wish to reconsider.

While the CRA had previously only been used successfully one time to overturn a rule,⁵ this year it was successfully used to overturn 14 rules issued in the last months of the previous Administration, many with votes largely along party lines.⁶ The lasting impact of overturning rules with the CRA, which would be amplified by the expansion proposed in this bill, is that agencies are prohibited from ever issuing replacement regulations that are substantially the same as the rule that was invalidated, absent additional Congressional action.⁷

Rather than working to refine rules with which one party disagrees, the current CRA serves as a blunt tool that a majority party can use to permanently invalidate policies of a previous Administration absent further Congressional action. This bill exacerbates the limitations of the CRA by allowing one vote to essentially erase any or all of the executive actions taken in last 6 months of a President's term. While this change would undoubtedly simplify the CRA process for Congress at the start of a new President's term, it does so by ensuring less consideration is given to each rule and by inserting more partisanship into a process that is already highly partisan.

In their recommendation, ACUS advised that reforms to target rules late in a President's term "should be aimed as precisely as possible at the activities that raise the greatest causes for concern" and at rules where there appears to be "political illegitimacy" or where rules "appear to be rushed through the regulatory process."⁸ This bill is anything but the precise tool ACUS suggests to target rules that raise real concerns. For these reasons, we urge our colleagues to join us in opposition.

⁵ Congressional Research Service, *The Congressional Review Act (CRA)* (IF10023) (2016).

⁶ See https://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_115_1.htm.

⁷ 5 U.S.C. § 801(b)(2).

⁸ Administrative Office of the United States, *Administrative Conference Recommendation 2012-2; Midnight Rules 1-2* (June 14, 2012).

VIII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 34 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

* * * * *

SEC. 801. CONGRESSIONAL REVIEW.

(a) * * *

* * * * *

(d) * * *

(1) * * *

* * * * *

(4) *In applying section 802 to rules described under paragraph (1), a joint resolution of disapproval may contain one or more such rules if described if the report under subsection (a)(1)(A) for each such rule was submitted during the final year of a President's term.*

SEC. 802. CONGRESSIONAL DISAPPROVAL PROCEDURE.

(a) For purposes of this section, the term “joint resolution” means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is (*except as otherwise provided in this subsection*) as follows: “That Congress disapproves the rule submitted by the ___ relating to __, and such rule shall have no force or effect.” (The blank spaces being appropriately filled in). *In the case of a joint resolution under section 801(d)(4), the matter after the resolving clause of such resolution shall be as follows: “That Congress disapproves the following rules: the rule submitted by the ___ relating to __; and the rule submitted by the ___ relating to __. Such rules shall have no force or effect.” (The blank spaces being appropriately filled in and*

additional clauses describing additional rules to be included as necessary).

