



November 10, 2011

**Comments on
"Midnight Rules Report Outline"
by Jack M. Beermann¹**

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COMMENTS ON GENERAL STRUCTURE

1. Introduction.

- a. Prof. Beermann makes a persuasive case that there is no clear definition of a midnight rule and that the choice of definition can be arbitrary. He does not seem to also acknowledge that the choice of definition can be strategic (i.e., determined by what conclusion is desired).
- b. Prof. Beermann's stated reasons for concern (i.e., "quality" and "undesirable political consequences") are also susceptible to arbitrary or strategic definition. They also may be too narrow insofar as they are concerned solely with substantive outcomes. He acknowledges (but as I note below, does not solve) the dilemmas of measurement and interpretation.
 - i. Prof. Beermann says "it is very difficult to measure the quality of regulations." This is easily disputed. For example, "quality" is easy to measure using a normative net benefits test. (Other quality metrics might be imagined, such as fidelity to the statutory charge, but measuring fidelity would be difficult and its interpretation inherently controversial.)
 - ii. Prof. Beermann says it is equally difficult to define "undesirable political consequences," and on that

¹ Jack M. Beermann, 2011. "Midnight Rules Report Outline," <http://www.acus.gov/wp-content/uploads/downloads/2011/11/Outline-of-Midnight-Rules-Project.pdf> (posted by ACUS on November 2, 2011).

- point I agree. Projecting an agenda on a successor is politically undesirable primarily from the perspective of the successor.
- iii. Prof. Beermann says it is hard to distinguish between some form of political mischief and “the innocuous tendency to work to deadline,” but this speaks to motives, not the quality of outcomes. (He seems to acknowledge this by pointing out that a successor administration may be aided when the outgoing administration “clears the decks” of old business.)
 - c. Prof. Beermann ignores the separate and distinct value of consistent adherence to regularized procedures, which may be a more useful metric than outcomes for defining midnight regulation. Midnight regulations can be defined as those which:
 - i. Do not adhere to regularized procedures; and
 - ii. Are promulgated at the end of a presidential administration.
 - d. This definition has several advantages over Prof. Beermann’s:
 - i. It is motive neutral.
 - ii. It is outcome neutral.
 - iii. It allows for regulations promulgated outside of regularized procedures, but not at the end of an administration, to be treated as a separate analytic category.
 - iv. It may be more amenable to solution.
 - e. The 2 x 2 table below illustrates.
 - i. I have coined a new term (“Friday Night Regulation”) for regulations promulgated using nonstandard procedures but not at the end of the Administration. I intend to capture the well-known Washington principle that the best time to disclose information in hopes that it will not attract attention is on Friday night.
 - ii. This scheme enables us to distinguish between competing motivations for midnight regulations as Prof. Beermann has defined the term (i.e., mischief v. innocuous working to deadline).

| <i>Timing</i> \ <i>Process</i> | <i>Regularized Procedures</i> | <i>Nonstandard Procedures</i> |
|--------------------------------|--|-------------------------------|
| <i>End of Administration</i> | May be suspended or rescinded by successor | "Midnight Regulations" |
| <i>All Other Times</i> | Standard Case | "Friday Night Regulations" |

- f. Much of the trouble with Prof. Beermann's outline is the result of the decision to define midnight regulations based on outcomes that frustrate, if not fatally impede, the capacity of the project to yield useful insights.
- 2. Evidence that the problem exists.
 - a. Whether there is such evidence depends on the definition.
 - b. Prof. Beermann's choice of ambiguous definition means that claims of the existence of a problem are not objectively resolvable. The "problem" definition is strictly subjective and conditional on the realization outcomes.
 - c. A normative net benefit definition for quality would overcome the ambiguity problem, but it is not a definition that is universally embraced, and in any case, Prof. Beermann does not suggest that he would adopt it.
- 3. Major empirical issues. There indeed are major empirical issues to address, but it's not clear that Prof. Beermann would actually address them.
 - a. Proposed subsection [A] is merely literature review.
 - i. At best it is philosophical rather than empirical, so it cannot contain much value-added unless the purpose is to make a break with the literature in ways that make the topic more researchable. I don't see anything like that here.

- ii. This is where Prof. Beermann telegraphs his intent to use “durability” as a proxy for quality, a proxy he later admits is “weak.” Really, it’s not a “weak” proxy so much as one lacking a clear interpretation. Why should it be assumed that midnight rules surviving judicial review are higher in “quality”?
 - 1. Is surviving judicial review that important?
 - 2. We could significantly increase the likelihood of surviving judicial review by making standing more difficult or by raising the petitioner’s burden of proof. Would either action improve “quality”?
- b. Proposed subsection [B] is similarly introductory and philosophical. Empirical content appears to be limited to easy-to-collect ,low-resolution data (e.g., numbers of rules promulgated when). Value-added isn't clear.
- c. Proposed subsection [C] is yet more literature review. Value-added isn't clear.
- d. Proposed subsection [D] finally gets to the new data and analysis that would be collected and analyzed for this project. The value-added of this effort also isn't clear.
 - i. “Durability” (i.e., not “suspended, rescinded, amended or rejected (in whole or in part) on judicial review”) is worse than a “weak” proxy for quality; it’s at best contextually defined and thus contextually interpreted.
 - ii. Incoming administrations traditionally suspend all potentially midnight regulations to reconsider them, but they have extraordinary constraints, including:
 - 1. Delays in the nomination of PAS officials
 - 2. Delays in the confirmation of PAS officials.
 - 3. Steep learning curves for all new officials.
 - 4. Resistance (occasionally? routinely?) from the permanent bureaucracy.
 - 5. Competing presidential agenda items, and pressure to achieve extraordinary things “in the first 100 days”.
 - 6. Budget battles.
 - 7. Congressional agenda(s).

- iii. This leads to an inevitable triage such that only a few midnight regulations are ever “suspended, rescinded, [or] amended.”
- iv. Regulations that may be “rejected (in whole or in part) on judicial review” are limited to those which have been challenged. This is a form of selection bias and it extends beyond midnight regulations.
 - 1. The incoming administration’s lawyers face similar constraints as those listed above for PAS officials, affecting its capacity for and interest in defending such regulations.
 - 2. Losing a case may be the least-cost path to rescinding a rule, so it may choose to mount a poor defense (e.g., DOMA, ACA). Is that evidence of “high” quality or “low” quality?
 - 3. The April 2008 ozone NAAQS was not a midnight regulation; the incoming administration treated it as if it were one; it obtained an indefinite delay in judicial review for the purpose of “reconsideration,” which it proposed in January 2010 and abandoned in September 2011. This regulation has been durable primarily because of the incoming administration’s seemingly dilatory litigation strategy. Is it a “high” or “low” quality midnight regulation? Is it even within Prof. Beermann’s definition?
- v. It is unclear how to interpret the results of Prof. Beermann’s proposed data analysis (“compare[] the durability of non-midnight rules to the durability of midnight rules”), even if the results were statistically significant.
 - 1. They won’t be statistically significant because of non-representativeness of the sample and inadequate sample size.
 - 2. Because of non-representativeness, results also will not be generalizable to any known population.
- vi. Prof. Beermann says “the immediate suspensions that occur during the transition periods for rules that

have not yet gone into effect cannot be counted in the study because they will seriously skew the results.”

1. Why? Skewness is bad only if it’s the result of bias.
 2. What is the purported bias justifying exclusion?
4. Reactions of incoming administration.
- a. This appears to be mostly descriptive of what is already known. What is its value-added?
 - b. The proposed review of the Bush 43 administration’s precedential effort to halt midnight rulemaking is worth serious study.
 - i. It is hard to imagine a stronger presidential commitment.
 - ii. If it was not effective, then it means even the president cannot fix it
 - iii. If it was only partially effective, then it’s useful to distinguish the parts that worked from those that didn’t.
 - iv. Such an analysis begs the definitional question once again. The Bolten memo was almost exclusively focused on process, implying a process (not outcome) based definition. It’s not clear how Prof. Beermann can perform an analysis of this given his definition is based on outcomes in general and “durability” in particular.
5. Normative Issues Surrounding Midnight Rulemaking.
- a. Subsection [A] appears to be a recycling of past work.
 - b. Section [B] identifies several reasons why people may dislike midnight rulemaking.
 - i. First on the list is “because the process is rushed,” an approximation to the model I propose above (nonstandard procedures) but not one that Prof. Beermann includes in his project.
 - ii. The other three reasons given are more outcome- than process-oriented even though they superficially look like process (project a rejected policy agenda into the future; abuse of the power of the presidency to reward friends or impede the successor’s agenda; enacting regulations that will only apply to the new

administration). Interestingly, none of these outcome-based objections appear to figure into Prof. Beermann's study.

- c. Use of interviews.
 - i. Cheap but poor research method.
 - ii. Even if respondents give honest and candid answers, results are useless because they suffer a fatal sampling bias or inadequate sample size.
 - iii. Surveys and interviews are too easily biased by researchers, wittingly or unwittingly.
 - iv. Subjects, especially in a scenario such as this, are highly susceptible to strategic behavior.

6. Recommendations.

- a. It is seriously premature to even contemplate recommendations at this stage. Doing so undermines the credibility of the project and makes it appear as if the purpose of the research is to support a predetermined conclusion.
- b. I do not believe that this project as currently structured is capable of informing recommendations.
 - i. We can imagine an array of outcomes from the proposed analysis:
 - 1. Midnight rules strongly "less durable"
 - 2. Midnight rules weakly "less durable"
 - 3. Midnight rules no different
 - 4. Midnight rules weakly "more durable"
 - 5. Midnight rules strongly "more durable"
 - ii. We have no idea how to interpret any of these outcomes.