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The Lame Duck Presidency: A Case for Restraint on “Midnight” Actions During the Transition Period

By Ryan Patrick Phair*

The election of Senator Barack Obama as the 44th President of the United States marks the beginning of a unique transition period under our system of government in which an outgoing administration slowly hands over the reins of power to its successor. At his first post-election press conference, President-elect Obama, like many of his predecessors, made clear that the United States “has only one government and one President at a time.”¹ While this is unquestionably the right message to convey, the reality is not quite so clear. As soon as the election is over, the nation and the international community typically view the outgoing President as a “lame duck” who no longer represents the popular will. Consequently, they begin to look to the incoming President for leadership even though he will not officially assume power until inauguration day. As a result of this dynamic, there is often a potential clash between the prerogatives of the President-elect and the residual powers of the outgoing President, especially when the election produces a shift in control of the White House from one party to another.

The most significant potential conflict arises when a lame-duck President attempts to tie the hands of his successor by engaging in “midnight” actions. Ever since a defeated President John Adams and a Federalist majority in Congress famously unleashed a blizzard of legislation, treaties and judicial appointments during the lame-duck period before Thomas Jefferson assumed the presidency, history has offered many examples of lame-duck Presidents engaging in “midnight” actions during the transition period in order to tie their successors’ hands. Such actions by an outgoing President are typically designed to “protect his policies or accomplishments from being reversed or undermined” and to “create obstacles to prevent his successor from too quickly achieving political and policy success.”²

The last inter-party transition of this nature was the 2000 transition from President William J. Clinton to President George W. Bush. At the time, it was President-elect Bush’s view that the prerogatives of the incoming President should be respected. On the campaign trail, then-Governor Bush had warned President Clinton not to tie the hands of his successor on the Anti-Ballistic Missile Treaty with Russia.³ During the transition period, when rumors were spreading that President Clinton might travel to Pyongyang to negotiate a last-minute deal with North Korea, Republican leaders in Congress wrote to President Clinton to insist that he “respect the prerogatives of the new administration” and to urge him not to attempt “to bind [the] nation and the incoming administration to a new policy toward North Korea” in the waning days of his administration.⁴ The Bush transition team let it be known that they concurred in this sentiment.⁵ Ultimately, President Clinton deferred and did not attempt to close a deal with North Korea.

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¹ Dan Balz & Shailagh Murray, *President-Elect Meets the Press, Cautiously*, Wash. Post, Nov. 8, 2008, at A1.

² Jack M. Beerman & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. Rev. 1253, 1255 (May 2006).

³ See Naftali Bendavid, *Clinton, Putin Quickly Get Down to Business*, Chi. Trib., June 4, 2000, at 3; Transcript of News Conference by Texas Governor George W. Bush at National Press Club, 2000 WL 668092 (May 23, 2000).

⁴ See Ivo H. Daalder & James M. Lindsay, *Lame-Duck Diplomacy*, 24 Wash. Q. 15 (Summer 2001).

⁵ See David E. Sanger, *Clinton Scraps North Korea Trip, Saying Time’s Short for Deal*, N.Y. Times, Dec. 29, 2000.

The Bush administration took a similar view with respect to midnight regulations issued by the outgoing Clinton administration in its final days in office. The most controversial of these regulations was a workplace ergonomics rule finalized just four days before President-elect Bush was inaugurated. This move prompted Republican Senator Don Nickles to introduce an expedited disapproval resolution in the Senate under the Congressional Review Act of 1996, charging that “the Clinton administration showed contempt of Congress and contempt of the new administration by trying to jam through [such an] enormously complex, burdensome, and expensive regulation with 4 days left in their administration.”⁶ The disapproval resolution easily passed the Republican-controlled Congress, and President Bush signed it into law. In his very first signing statement, President Bush lauded the resolution as “a good and proper use of the Act because the different branches of our Government need to be held accountable.”⁷

This Issue Brief examines the “midnight” action phenomenon in the context of the current Bush-Obama transition. Although it might be widely assumed that a lame-duck President may fully exercise all the levers of executive power available to him until the very moment he leaves office, Part I argues that there are significant constitutional constraints upon unilateral, otherwise avoidable actions by lame-duck Presidents during the transition period that would significantly tie the hands of an incoming administration. Part II then turns to a discussion of how President Bush has attempted to tie President-elect Obama’s hands in connection with the ongoing war in Iraq and an analysis of the applicable constitutional constraints. Part III surveys the midnight regulations currently being promulgated by the Bush administration, assesses the pertinent constraints upon such actions, and suggests options that may be available to Congress to rescind them. The Issue Brief concludes by urging the Bush administration to exercise restraint and to be mindful of both its constitutional duties and its previously-stated positions on the prerogatives of the incoming President during the transition period.

I. The Constitutional Constraints on the Lame Duck Presidency

Unlike many countries, particularly in Europe, where a change in executive administration is accomplished in a very short period,⁸ the transition between U.S. Presidents in the modern era takes two and a half months. This is a product of the gap between the November election date set by Congress and the January 20th inauguration date enshrined in the Twentieth Amendment to the Constitution.⁹ By setting the election date so far in advance of the inauguration, Congress created the transition period and, with it, a constitutional conundrum:

The outgoing President retains all the formal legal powers of the presidency, yet his last electoral success is four years removed and his political capital is at low ebb. The incoming President, in

⁶ S.J. Res. 6, 107th Cong., 147 Cong. Rec. S1880-81 (Mar. 6, 2001) (statement of Sen. Nickles).

⁷ Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 Weekly Comp. Pres. Doc. 477 (Mar. 20, 2001).

⁸ Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 *Hastings L.J.* 303, 329 (2001).

⁹ The Constitution originally set March 4th as the inauguration date as a matter of tradition, but the Twentieth Amendment moved it up to the current January 20th date. *See* Beerman & Marshall, *supra* note 2 at 1260. The Constitution does not specify an election date, but rather leaves it to Congress, which mandated the nationally uniform date of the First Tuesday after the first Monday in November in 1845. 3 U.S.C. § 1 (2000).

contrast, enjoys an electoral mandate and enormous political influence but has no formal control over the reins of government. During transitions, in short, there is no relationship between power, accountability, and electoral support that are normally hallmarks of the democratic process.¹⁰

As a result, some have argued that Congress could—and should—eliminate the transition period altogether by simply setting a January election date.¹¹ While the merits of this proposal are beyond the scope of this Issue Brief, the fact that an extended transition period and a prolonged lame-duck presidency is not prescribed by the Constitution is significant insofar as it undermines the conventional wisdom—often voiced by lame-duck presidents—that the Term Clause explicitly contemplates a “Term of four Years” and, *ipso facto*, a lame-duck President is free to exercise the full panoply of executive powers until the moment he leaves office. If an extended transition period were constitutionally prescribed, it would perhaps be correct to infer that the Framers contemplated the exercise of such powers. But it is not, and there are compelling arguments that the Constitution imposes “substantial and significant obligations on Presidents during the transition between administrations.”¹²

The principal constraint on the actions of lame-duck Presidents during the transition period is imposed by the Constitution’s Oath and Take Care Clauses. The Oath Clause requires that the President solemnly swear or affirm that he “will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect, and defend the Constitution of the United States.”¹³ The Take Care Clause requires the President to “take Care that the laws be faithfully executed.”¹⁴ Both are framed not only as affirmative duties but also as constraints upon executive action.

The inclusion of a special presidential oath in the Constitution reflects the Framers’ deep sense of honor, their belief in a higher calling and greater good, and their commitment to a larger national interest above their own personal desires or political ambitions.¹⁵ The Framers expected that the President would not act solely on the basis of his subjective judgment regarding what may be in the best long-term interests of the country, but rather in accordance with some larger, objective national interest.¹⁶ This overarching presidential duty extends into the future, even beyond a President’s own term in office, and “the most obvious direction for that responsibility to be exercised is towards the next President.”¹⁷ Accordingly, when the Oath Clause is read as a whole, it imposes important duties upon lame-duck Presidents and creates a

¹⁰ Beerman & Marshall, *supra* note 2, at 1254.

¹¹ See Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 Const. Comment. 183, 184 (Summer 1995).

¹² Beerman & Marshall, *supra* note 2, at 1256.

¹³ U.S. Const. art. II, § 1.

¹⁴ U.S. Const. art. II, § 3.

¹⁵ See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 257 (1994) (“The modern mind tends to downgrade the founding generation’s high regard for oaths as solemn promises before God. The Oath Clause had a profound, almost covenantal, significance for the framers – a significance that may be difficult for some fully to understand and appreciate today.”).

¹⁶ Indeed, the Framers specifically rejected an earlier formulation of the oath that would have required the President to carry out his duties to the best of his subjective judgment. See Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. Rev. 1, 6 (2004).

¹⁷ Beerman & Marshall, *supra* note 2, at 1275-76.

significant constraint upon their actions during the transition period. As one scholar has noted, “the prescribed oath can be . . . a vital restraint on our Presidents even when, as in the case of Lincoln, they are constrained by reasons of state to apply Caesarian remedies. It is a self-restraint, to be sure, but a restraint certainly as important as impeachment or the threat of electoral defeat.”¹⁸

The inclusion of the term “faithfully” in both the Oath and Take Care Clauses also suggests an important element of good faith in the President’s exercise of power, imposing a duty to the office itself and a constraint upon any actions undertaken in bad faith that would undermine the institutional interests of the presidency or the long-term interests of the country.¹⁹ While there is room for disagreement as to what actions may be so constrained, and a lame-duck President is likely only answerable to himself and historians,²⁰ a strong argument can be made that a lame-duck President has a constitutional duty to avoid taking any unilateral, otherwise avoidable actions during the transition period that would significantly tie the hands of an incoming administration in many circumstances. The circumstances giving rise to such a duty would likely depend on consideration of five key factors:

1. Whether the proposed policy or course of action is a unilateral exercise of executive power that is unchecked or opposed by Congress;
2. The extent to which the proposed policy or course of action would bind or tie the hands of the President-elect against his wishes, including whether the President-elect could undo the action and, if so, how difficult it would be to accomplish;
3. The extent to which the proposed policy or course of action is avoidable;
4. The extent to which the proposed policy or course of action represents the popular will, taking into account the lame-duck President’s popular support; the salience of the issue in the election; and the degree to which voters can be fairly deemed to have passed judgment on it; and
5. The institutional interests of the presidency and the best interests of the country.

For any proposed course of action, if sufficient concerns are present with respect to each of these considerations, a strong argument can be made that a lame-duck President has a constitutional duty to exercise restraint and avoid taking action without the concurrence of the President-elect. This is not to say that a lame-duck President need abandon his own agenda before his term is up, or that he is required to begin implementing the policies of his successor. It is to say that there are some circumstances that give rise to a constitutional duty to avoid taking certain types of

¹⁸ Matthew A. Pauley, *I Do Solemnly Swear: The President's Constitutional Oath* 243 (1999).

¹⁹ See Beerman & Marshall, *supra* note 2, at 1254 (“Both Presidents, having achieved the highest level of public service, should be expected to act in the best long-term interests of the United States.”); Blomquist, *supra* note 16, at 52 (“The presidential oath is properly understood as the constitutional keystone of the American Republic: it commands the President of the United States to preserve, protect and defend, as well as articulate, pursue, and achieve, the legal embodiment of the American national interest.”).

²⁰ See Beerman & Marshall, *supra* note 2, at 1270 (“There are no cases addressing presidential duties and obligations with respect to transition, and even if a legal dispute developed, it is likely that a court would find it non-justiciable.”).

action during the transition period. Simply put, the American people “should be able to trust the President to behave with honor and good judgment at the end of the term.”²¹

This interpretation of the Oath and Take Care Clauses is reinforced by the structure of the Constitution. The foundation of executive power under our democratic Constitution is the Framers’ belief in the President’s accountability to the people.²² Yet, since a lame-duck President knows his term is coming to an end and that he would never have to face the judgment of the people again, he is almost entirely unaccountable to anyone but himself during the transition period.²³ Consequently, as Sanford Levinson has observed, there is “something profoundly troubling” about allowing lame-duck Presidents “to continue to exercise the prerogatives of what is usually called the ‘most powerful political office in the world’” during the transition period.²⁴

This concern is magnified where, as here, the lame-duck President’s popularity rating is at a historic low and the President-elect of an opposing party has won a decisive electoral victory by tying the policies of his opponent to those of the outgoing President. In such circumstances, the lame-duck President can no longer be said to represent the will of the people.²⁵ Any attempt by the lame-duck President to then initiate unilateral and avoidable action during the transition period in order to significantly tie the hands of his recently elected successor would, therefore, present a very serious affront to the notion of democratic government enshrined in our Constitution.²⁶ Accordingly, if the Constitution is properly interpreted in light of its underlying democratic purposes (as Justice Breyer and others have argued),²⁷ then the Oath and Take Care Clauses should be construed as constraints on the aforementioned types of actions by lame-duck Presidents.

As Justice Jackson famously recognized, a President’s executive powers “are not fixed but fluctuate” under our Constitution.²⁸ For example, under Justice Jackson’s tri-partite framework, a President’s inherent executive power depends on the degree to which Congress has expressed opposition to the executive action in question. Applying similar logic, it may be argued that a President’s executive powers also fluctuate depending on the degree to which he can be considered a representative of and accountable to the people. During the transition period, his power would thus be at its lowest ebb. Although he continues to serve out his term and retains executive authority, his powers are necessarily limited and may even be thought of as those of a quasi-caretaker responsible mainly for preparing the way for the incoming

²¹ Jack Beerman, *Presidential Power in Transitions*, 83 B.U. L. Rev. 947, 948 (2003).

²² For a sampling of the extensive literature on this point, see, e.g., Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331-37 (2001); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 58-70 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 102-03 (1994).

²³ See William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 Pres. Stud. Q. 533 (2005).

²⁴ Levinson, *supra* note 11, at 184-85.

²⁵ A similar concern underlies the Twentieth Amendment, which moved up both the date that the new Congress begins and the inauguration date in order to partially ameliorate the lame-duck problem. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. Rev. 470 (1997).

²⁶ See Combs, *supra* note 8, at 330.

²⁷ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 5 (2005) (“My thesis is that courts should take a greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.”). See also Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 246 (2002); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

²⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

administration.²⁹ If immediate action is both necessary and unavoidable, then whatever residual power he continues to retain may be fully exercised, but it may be thought to depend in most non-emergency situations on the extent to which the President-elect (and perhaps Congress) has expressed support or opposition. If he secures the President-elect's consent, as many lame-duck Presidents have done in the past, then the democratic and accountability concerns are mitigated and he may undertake action without violating his constitutional duties. If not, there is a strong argument that the Oath and Take Care Clauses, interpreted in light of the democratic principles underlying the Constitution, impose significant constitutional constraints upon his actions.

Indeed, the degree to which a President's exercise of executive power is constrained may be imagined along a continuum from the start of his term until the end. In the first 100 days, the newly elected President's power is at its apex, particularly when he is acting to implement a major campaign pledge, because this is the time when he best represents the public will. As his term goes on, he continues to exercise such power, but it may diminish ever so slightly over time until the election of his successor renders him a lame duck. At that point, with "his last electoral success ... four years removed and his political capital ... at a low ebb,"³⁰ a lame-duck President's executive powers may be like "a large balloon with a slow leak."³¹ The balloon "is ineluctably shrinking with each passing week" and, "[b]y the end of the year, he will have lost the attention of the permanent government and can accomplish very little."³²

In short, a lame-duck President's duty to carry out his constitutional responsibilities in good faith and in the best long-term interests of the nation should be interpreted to mean that he generally should not take any unilateral and avoidable action during the transition period that would significantly tie the hands of a successor without first securing the concurrence of the President-elect. By interpreting the Oath and Take Care Clauses in this manner, the democratic and accountability concerns underlying our Constitution are properly respected.

II. The Bush Administration's Negotiation of the Iraqi Accord

A. The Constitutional Constraints on a Lame Duck President's Ability to Enter into Binding International Agreements during the Transition Period

The area in which a lame-duck President is most constitutionally constrained during the transition period under the interpretation of the Oath and Take Care Clauses presented above is in the realm of international affairs.³³ Our Constitution contemplates that the President is the single authoritative voice and representative of the United States with respect to foreign and international affairs, and a lame-duck President is often confronted with such issues during the transition period. Yet, whether we like it or not, "other nations begin to look to the President-elect rather than the incumbent President for leadership" during this period, which can create significant difficulties in the conduct of foreign policy.³⁴

²⁹ See, e.g., Laurin L. Henry, *Presidential Transitions* 3 (1960) (characterizing lame-duck Presidents as "caretaker[s] of the national estate with limited ability and willingness to make commitments" during the transition period).

³⁰ Beerman & Marshall, *supra* note 2, at 1254.

³¹ James P. Pfiffner, *The Strategic Presidency: Hitting the Ground Running* 5-6 (1996)

³² *Id.*

³³ See, e.g., Beerman & Marshall, *supra* note 2, at 1280-84; Combs, *supra* note 8, at 329-335. *But see* Daalder & Lindsay, *supra* note 4, at 26-30.

³⁴ See Beerman & Marshall, *supra* note 2, at 1281.

A lame-duck President who enters into a binding international agreement obligates the United States as a matter of international law to fulfill the duties contained therein, which are binding on subsequent administrations.³⁵ If an incoming President subsequently ignores or attempts to undermine the agreement, he may render the United States in breach of international law. Alternatively, if the incoming President is placed in the awkward position of having to work with, or perhaps around, a policy that he opposed and campaigned against, it may prove embarrassing to the United States in the international community.³⁶ Such abrupt changes in foreign policy “do great damage to the country’s ability to advance its interests internationally.”³⁷ For this reason, with very few and limited exceptions, the Oath and Take Care Clauses impose a significant constitutional constraint on a lame-duck President’s authority to bind his successor to international agreements.³⁸

Consequently, a lame-duck President should exercise restraint and act with great caution when contemplating any unilateral, otherwise avoidable action that would bind the United States to an international agreement. Indeed, as a matter of historical practice, lame-duck Presidents “usually steer clear of significant or controversial international issues; or, at the least, they seek their successors’ concurrence or commitment as to the course to pursue.”³⁹ For example, President Clinton ultimately chose not to pursue a potential arms deal with North Korea when it became clear that incoming President George W. Bush did not concur. If action is nonetheless deemed necessary and unavoidable, then a lame-duck President often attempts to seek the President-elect’s concurrence before acting in order to ensure legitimacy, continuity, and accountability. For example, a lame-duck President George H.W. Bush signed the Strategic Arms Reduction Talks (START) II agreement and bombed Iraq in retaliation for Saddam Hussein’s violations of the 1991 U.N. cease-fire resolutions, but he did so only with President-elect Clinton’s concurrence.⁴⁰ This historical practice of either avoiding unnecessary international entanglements or seeking the President-elect’s concurrence is reinforced by the age-old American adage that “politics stops at the water’s edge.”⁴¹

There are nonetheless several examples in recent American history of lame-duck Presidents binding the United States to significant international commitments during the final hours of their presidency without the concurrence of the President-elect. The most well known example is President Carter’s decision on his last day in office to bind the United States to the Algiers Declaration, an international treaty containing a number of significant U.S. political and financial commitments arising out of the Iranian hostage crisis, against the wishes of President Reagan. Similarly, despite incoming President Clinton’s reservations, President George H.W. Bush sent 30,000 U.S. troops to Somalia and tried to seal the Uruguay round trade negotiations in the waning hours of his presidency. Finally, during the last inter-party transition, President Clinton signed the Rome Statute of the International Criminal Court a few weeks before the end

³⁵ See Combs, *supra* note 8, at 333.

³⁶ *Id.* at 333-34; Beerman & Marshall, *supra* note 2, at 1282. The Bush administration’s “unsigned” of the Rome Statute of the International Criminal Court, previously signed by President Clinton, illustrates this problem.

³⁷ Beerman & Marshall, *supra* note 2, at 1281.

³⁸ *Id.* at 1280-83. See also John Copeland Nagle, *The Lame Ducks of Marbury*, 20 Const. Comment. 317, 340 (Summer 2003). (“My proposal, then, is that lame ducks should be denied the power to take any irrevocable acts. The... signing of binding international obligations fall within this category.”).

³⁹ See Combs, *supra* note 8, at 334-35.

⁴⁰ See Daalder & Lindsay, *supra* note 4, at 23-24.

⁴¹ See Combs, *supra* note 8, at 334-35.

of his term over the objections of President-elect George W. Bush, prompting then-Senate Foreign Relations Chairman Jesse Helms to decry the action as “a blatant attempt by a lame-duck president to tie the hands of his successor.”⁴²

B. The Status of Forces and Strategic Framework Agreements with Iraq

A significant source of controversy in the current transition period is the Bush administration’s attempt to secure a comprehensive bilateral accord with the government of Iraq that would govern U.S. policy in Iraq going forward. On November 26, 2007, President Bush and Iraqi Prime Minister Nouri al Maliki signed a Declaration of Principles, which envisioned a long-term relationship and mutual cooperation between the two countries on political, economic, cultural, and security issues for “coming generations.”⁴³ As part of the agreement, the Iraqi government undertook to request the extension of the United Nations mandate authorizing the use of multi-national and U.S. forces in Iraq in exchange for the removal of the U.N. designation of Iraq as a threat to international peace and security, thereby restoring full sovereignty to Iraq under international law. With this change in sovereign status, the parties began negotiations on a bilateral agreement implementing the general principles outlined in the Declaration.

As negotiations progressed, the Bush administration announced that there would be two agreements: (1) a Status of Forces Agreement (SOFA) providing the legal basis for the continued presence and operation of U.S. forces in Iraq once the final U.N. mandate expired on December 31, 2008, and (2) a comprehensive Strategic Framework Agreement governing nearly every aspect of future U.S. policy in Iraq. Despite repeated requests from Congress, however, the Bush administration refused to share its negotiating draft with congressional committees, even on a confidential basis, and flatly dismissed the need for any “formal input” from Congress.⁴⁴

As a result, the Bush Administration’s secretive negotiation of these comprehensive, long-term agreements regarding the future of U.S. policy in Iraq has been criticized as an unconstitutional attempt to avoid congressional review in order to tie the hands of the incoming President. Indeed, Representative Bill Delahunt, the Chairman of the House Subcommittee on International Organizations, Human Rights and Oversight of the Foreign Affairs Committee, held no fewer than eight hearings in which extensive testimony was offered by prominent scholars regarding the Bush administration’s unilateral approach.⁴⁵ In these hearings, Congressman Delahunt reported that the Iraqi foreign minister had advised him that the Bush administration was deliberately attempting to craft language to avoid congressional review.⁴⁶ As a result, he repeatedly condemned the Bush administration’s unilateral actions and urged the administration to explore the Iraqi-supported option of temporarily extending the U.N. mandate out of respect for the prerogatives of the incoming President.

⁴² See Combs, *supra* note 8, at 429.

⁴³ See Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of American (Nov. 26, 2007) (*available at* <http://www.whitehouse.gov/infocus/iraq/>).

⁴⁴ See Harold Myerson, *Bush’s Next Preemptive Strike*, Wash. Post, Nov. 29, 2007.

⁴⁵ See Background Memorandum from Chairman Bill Delahunt to Committee Members, Renewing the United Nations Mandate for Iraq: Plans and Prospects: Hearing Before the H. Subcomm. on Int’l Orgs., Human Rights, and Oversight of H. Comm. on Foreign Affairs, 110th Cong. (*available at* http://foreignaffairs.house.gov/sub_oversight.asp) [hereinafter Nov. 19, 2008 House Hearings on Iraq Accord].

⁴⁶ See Nov. 19, 2008 House Hearings on Iraq Accord, *supra* note 45, at 39 (statement of Rep. Delahunt).

This emerging chorus of criticism made the Bush administration's negotiation of the Iraqi accord a prominent issue in the presidential campaign. On December 6, 2007, Senator Hillary Rodham Clinton introduced the Congressional Oversight of Iraq Agreements Act of 2007, which prohibited the use of funds to carry out any accord that was "not a treaty approved by two-thirds of the Senate under Article II of the Constitution or authorized by legislation passed by both houses of Congress."⁴⁷ Then-Senator Obama signed on as a co-sponsor and expressed concern that the Bush administration "in a weakened state politically – ends up trying to rush an agreement that in some ways might be binding on the next administration."⁴⁸ To address this concern, Senator Obama insisted that the Bush administration "submit the agreement to Congress or allow the next administration to negotiate an agreement that has bipartisan support here at home[.]"⁴⁹ Since even the nascent Iraqi government believed it necessary to present the agreement to the Iraqi parliament for approval pursuant to the Iraqi constitution, the Obama campaign repeatedly noted the irony of the Bush administration's refusal to do the same.⁵⁰

As the U.S. presidential election drew near, the Bush administration stepped up pressure on the Iraqis to sign the accord before the expiration of the U.N. mandate on December 31, 2008, prompting senior congressional leaders, including the Chairmen and Ranking Members of the Foreign Relations and Armed Services Committees, to express concern that President Bush was rushing the negotiations to try to tie his successor's hands.⁵¹ Indeed, the Bush administration warned the Iraqi government of "real consequences" if they did not agree to its demands,⁵² including immediate withdrawal of all U.S. troops from Iraq; the suspension of U.S. efforts to protect Iraqi borders, shipping and waterways, and air traffic control systems; the end of all vital services provided to the Iraqi people by U.S. forces; and the loss of \$6.3 billion in aid for construction, security forces and economic activity and another \$10 billion per year in foreign military sales.⁵³ Although Prime Minister Maliki advocated the alternative of seeking a temporary extension of the U.N. mandate, the Bush administration threatened to veto any Iraqi extension request in the U.N. Security Council.⁵⁴ As a result, the Iraqi Vice-President and other senior Iraqi officials complained that the Bush administration's threats were tantamount to political blackmail.⁵⁵

Ultimately, however, the Iraqis bowed to the pressure. The Iraqi Cabinet approved the accord on November 16, 2008, and U.S. Ambassador Ryan Crocker and Iraqi Foreign Minister Hoshiyar Zebari signed it the next day. After ten days of tense and often bitter negotiation, the

⁴⁷ S.2426, 110th Cong. (2007). For a summary of other Congressional actions, see Matthew C. Weed, Congressional Research Service, *U.S.-Iraq Strategic Framework and Status of Forces Agreement: Congressional Response* (July 11, 2008).

⁴⁸ Jeff Zeleny, *War Zones on the Itinerary*, N.Y. Times, June 17, 2008.

⁴⁹ See www.barackobama.com/issues/iraq/.

⁵⁰ *Id.*

⁵¹ Leila Fadel & Warren P. Strobel, *Obama Joins Critics of U.S. Security Talks with Iraq*, McClatchy Newspapers, June 10, 2008. See also Editorial, *Don't Tie the Next President's Hands*, N.Y. Times, Jan. 17, 2008 ("Mr. Bush must not be allowed to tie the hands of his successor and ensure the country's continued involvement in an open-ended war.")

⁵² Steven R. Hurst, *Next President Faces Unknowns on Iraq*, Associated Press, Oct. 29, 2008.

⁵³ See Leila Fadel, *U.S. Lists Services It'll Cut Off If Iraq Rejects Pact on Troops*, McClatchy Newspapers, Oct. 27, 2008; Roy Gutman & Leila Fadel, *U.S. Threatens to Halt Services to Iraq Without Troop Accord*, McClatchy Newspapers, Oct. 27, 2008.

⁵⁴ See Prepared Statement of Chairman Bill Delahunt, Nov. 19, 2008 House Hearings on Iraq Accord, *supra* note 45, at 3-5 [hereinafter Delahunt Prepared Statement].

⁵⁵ See Fadel, *supra* note 53.

Iraqi parliament narrowly approved the accord on November 27, 2008, although 77 members were not even present for the vote. To secure Sunni support, the Iraqi government was forced to agree to hold a national referendum on the accord by July 30, 2009. Nonetheless, the U.S. and Iraqi governments have maintained that the accord will enter into force on January 1, 2009 without regard to the referendum or other lingering questions.

C. The Constitutional Constraints on the Bush Administration's Actions

The Bush administration's negotiation and signing of the Iraqi accord is a classic case of when a lame-duck President should have exercised restraint. Instead of recognizing the prerogative of President-elect Obama to set the future of Iraq policy on his own terms, the Bush administration brought extraordinary pressure to bear on the Iraqis to sign the accord before President-elect Obama's inauguration in order to declare "mission accomplished" and significantly tie President Obama's hands going forward. If the Bush administration had been mindful of its previously-stated positions and given due consideration to each of the factors outlined in Part I above, however, it would have been clear that it had a constitutional duty to avoid taking this type of unilateral action during the transition period against the wishes of the President-elect, Congress, and the American people.

First, the Bush administration's actions were a unilateral exercise of executive power that was unchecked by Congress. Indeed, as Professors Oona Hathaway and Bruce Ackerman have persuasively argued, the accord is independently unconstitutional insofar as the Bush administration has refused to submit it for approval by the Congress either as a congressional-executive agreement (requiring the approval of a majority of both houses of Congress) or as an Article II treaty (requiring the approval of two-thirds of the Senate).⁵⁶ While the Bush administration maintains that it has inherent executive power to conclude the agreement as a "sole executive agreement," the Iraqi accord goes far beyond the limited nature of previous SOFAs and historic limits on the President's authority to make such commitments without congressional approval.⁵⁷ For example, the accord appears to transfer operational control over U.S. forces in Iraq to a joint U.S.-Iraq military committee and require advance notification and permission from the Iraqis for all U.S. military operations.⁵⁸ Although the U.S. has occasionally subjected its forces to foreign control for peacekeeping operations, the Iraqi accord marks the first time that a President has ever unilaterally handed over control of U.S. troops in this manner without congressional approval.⁵⁹

The consequences of the Bush administration's evasion of congressional review will be borne by President-elect Obama as soon as he assumes office. Pursuant to Article 30, the Bush administration must exchange diplomatic notes with the Iraqis confirming that all necessary legal

⁵⁶ See Prepared Statement of Professor Oona A. Hathaway, Nov. 19, 2008 House Hearings on Iraq Accord, *supra* note 45 [hereinafter Hathaway Prepared Statement]; Bruce Ackerman & Oona A. Hathaway, *Bush's Final Illusion: The President's Agreement with Iraq Bypasses Congress. Again.*, Slate, Oct. 21, 2008; Bruce Ackerman & Oona Hathaway, *What Bush Will Surrender in Iraq*, Time, Sept. 11, 2008; Bruce Ackerman & Oona Hathaway, *An Agreement Without Agreement*, Wash. Post, Feb. 15, 2008.

⁵⁷ Hathaway Prepared Statement, *supra* note 56, at 2; Nov. 19, 2008 House Hearings on Iraq Accord, *supra* note 45 at 10 (statement of Prof. Oona Hathaway)[hereinafter Hathaway Testimony]. See also R. Chuck Mason, Congressional Research Service, *Status of Forces Agreement (SOFA): What Is It, and How Might One Be Utilized in Iraq?* (June 16, 2008).

⁵⁸ See Hathaway Prepared Statement, *supra* note 56, at 1; Hathaway Testimony, *supra* note 57 at 10.

⁵⁹ *Id.*

steps have been undertaken to bring the accord into force under the U.S. Constitution. The legislation President-elect Obama co-sponsored as a Senator, however, explicitly states that any Iraqi accord that was not subject to congressional review “does not have the force of law.”⁶⁰ In addition, without congressional approval, there will no longer be any domestic legal authority to engage in military operations in Iraq after December 31, 2008.⁶¹ The Bush administration relies principally on H.J. Res. 114 as the grant of such authority,⁶² but this authorization will expire with the termination of the U.N. mandate and the express recognition in the Preamble that Iraq no longer poses a threat to international peace and security.⁶³ As a result, on January 1, 2009, Chairman Delahunt has observed that we will be in “legal limbo, with our troops dependent on an invalid agreement . . . as they undertake combat missions with no constitutional authority,”⁶⁴ which only serves to underscore why the Bush administration should have exercised restraint.

Second, the Iraqi accord, by its very nature, will significantly tie President-elect Obama’s hands going forward. If it was properly enacted, the U.S. would be bound as a matter of international law to a comprehensive, long-term agreement governing nearly every aspect of future U.S. policy in Iraq and containing numerous military, political, diplomatic, economic and cultural commitments. Moreover, it would be very difficult, if not politically impossible, for the President-elect Obama to undo. The accord may not be terminated for one year and cannot be amended without securing the official written agreement of the Iraqi government. For this and other reasons, Professor Hathaway has testified that the accord “undermines the constitutional powers of President-elect Obama.”⁶⁵

The Bush administration’s frantic attempt to secure final approval of the accord before President-elect Obama assumes office will also saddle the incoming President with “a messy, complicated, and unstable situation in Iraq.”⁶⁶ The most significant source of potential difficulty is the national referendum, which interjected “a potentially dangerous political wild card” into U.S.-Iraqi relations, especially since it would occur around the time of next year’s national elections in Iraq.⁶⁷ In addition, Rep. Ike Skelton, the Chairman of the House Armed Services Committee, has said that he is “troubled by vague language in the agreement that will likely cause misunderstandings and conflict between the U.S. and Iraq in the future.”⁶⁸ For example, there are significant discrepancies between the English and Arabic versions of the accord on several key issues.⁶⁹ The two parties also have drastically different interpretations of several key provisions, such as those requiring advance notification of U.S. military operations, prohibiting the U.S. from launching an attack on another country from Iraq, and providing for Iraqi legal jurisdiction over American troops and military contractors, all of which were left deliberately

⁶⁰ S.2426, 110th Cong. § 3(b) (2007).

⁶¹ See Hathaway Prepared Statement, *supra* note 56, at 2.

⁶² See H.J. Res. 114, 107th Cong. (Oct. 16, 2002) (authorizing the President to use force “as he determines to be necessary and appropriate in order to: (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”).

⁶³ See Hathaway Prepared Statement, *supra* note 56, at 1; Hathaway Testimony, *supra* note 57 at 10.

⁶⁴ See Delahunt Prepared Statement, *supra* note 54, at 1.

⁶⁵ See Hathaway Prepared Statement, *supra* note 56, at 1-2.

⁶⁶ See National Security Network, *Negotiations on Security Agreement Present New Pitfalls and Opportunities* (Nov. 26, 2008) (available at <http://www.nsnetwork.org/node/1156>).

⁶⁷ *Id.*

⁶⁸ See Press Release, *Skelton Cautious on U.S.-Iraq Status of Forces Agreement* (Nov. 17, 2008).

⁶⁹ See Hathaway Prepared Statement, *supra* note 56, at 1, 4.

ambiguous to avoid media scrutiny and the exposure of such disputes before the parliamentary vote.⁷⁰

Third, the Bush administration's aggressive push to finalize the Iraqi accord was unnecessary and avoidable. The U.S. could have requested a temporary extension of the U.N. mandate, as many senior Iraqi leaders urged. Former interim President of Iraq Dr. Ayad Allawi even wrote to Chairman Delahunt after the election to express dismay with the Bush administration's inappropriate "acceleration" of the process of finalizing the accord during the transition period and his support for this alternative.⁷¹ Although President-elect Obama has not taken an official position on the issue, he reportedly supported the extension of the U.N. mandate during the campaign,⁷² and Chairman Delahunt and others have advocated for it as well.⁷³

Fourth, the Bush administration's actions do not reflect—and, in fact, run contrary to—the will of the American people. President Bush's disapproval ratings are the lowest in the history of the Gallup poll and he has the unwelcome distinction of being the first President to ever break the 70% disapproval barrier.⁷⁴ The war in Iraq is the single greatest contributor to his historic disapproval ratings,⁷⁵ with public disapproval of his handling of the war at 65% around election day.⁷⁶ Indeed, President-elect Obama probably would not have been elected President but for his early repudiation of President Bush's policies in Iraq and his call for a responsible, phased withdrawal of U.S. combat troops from Iraq by May 2010. He now enjoys a historic popularity rating and public perceptions of the war in Iraq "largely dovetail" with his views.⁷⁷ Over 70% of the American people believe that he should fulfill his campaign pledge to withdraw U.S. forces from Iraq by the promised date.⁷⁸ The Iraqi accord, however, contemplates a withdrawal timeframe that is more than twice as long, which may commit the U.S. to stay in Iraq until one week before the Iowa caucuses in the next presidential cycle.⁷⁹ In short, the Bush administration's unilateral negotiation and signing of the Iraqi accord during the transition period subverts the popular will.

⁷⁰ Adam Ashton, Jonathan S. Landay, & Nancy A. Youssef, *U.S. Staying Silent on its View of Iraq Pact Until After Vote*, McClatchy Newspapers, Nov. 25, 2008 (quoting a U.S. official as saying: "There are a number of areas in here where they have agreement on the same wording but different understandings about what the words mean.").

⁷¹ See Delahunt Background Memorandum, *supra* note 45, at 5-6.

⁷² See Barbara Slavin, *Obama Sought to Sway Iraqis on Bush Deal*, Wash. Times, Oct. 10, 2008, at A1.

⁷³ See Bill Delahunt & Oona Hathaway, *Bush Should Include Congress*, Boston Globe, Nov. 26, 2008; Prepared Statement of Prof. Michael J. Matheson, Nov. 19, 2008 House Hearings on Iraq Accord, *supra* note 45.

⁷⁴ See Lydia Saad, *Obama and Bush: A Contrast in Popularity*, Gallup, Nov. 10, 2008; Paul Steinhauser, *Poll: More Disapprove of Bush Than Any Other President*, CNN.com, May 1, 2008.

⁷⁵ See Michael A. Fletcher & Jon Cohen, *Polls Finds Support for Obama's War Views*, Wash. Post, Dec. 16, 2008, at A1.

⁷⁶ For a summary of polling on President Bush's handling of the war in Iraq, see www.pollingreport.com/iraq.

⁷⁷ Fletcher & Cohen, *supra* note 77.

⁷⁸ *Id.*

⁷⁹ The U.S. agreed to withdraw all American forces from Iraq by no later than Dec. 31, 2011, and all American forces must withdraw from Iraqi cities and villages by June 30, 2009. It is unclear whether President-elect Obama may withdraw U.S. forces on an earlier timetable if he so desires. Article 24 of the English version of the SOFA contains a provision wherein the Iraqi government "recognizes the sovereign right of the United States to withdraw the United States Forces from Iraq at any time." However, the Arabic version seems to suggest that the U.S. may only *request* the right to withdraw earlier and that the decision would be one made by the Iraqis, which is obviously quite different. See Hathaway Prepared Statement, *supra* note 56, at 1; Hathaway Testimony, *supra* note 57 at 10. Indeed, after reviewing the Arabic version, Professors Ackerman and Hathaway have alleged that the accord is "intended to make it harder for a[n] ... Obama administration to carry through on its pledge to end combat operations within 16 months, not three years." See Ackerman & Hathaway, *Bush's Final Illusion*, *supra* note 56.

Fifth, and finally, the Bush administration's actions failed to properly respect the institutional interests of the presidency or to serve the best interests of the country. Even if one views the Iraqi accord as a significant victory for U.S. interests in Iraq, or even as a victory for President-elect Obama,⁸⁰ the manner in which the Bush administration achieved that result will do great damage to the presidency going forward. It continues an unfortunate trend and sets an important precedent that future lame-duck Presidents will cite to justify similar failures to respect the prerogatives of an incoming President. The country, moreover, is not well served in the long term by the Bush administration's unilateral actions. While some aspects of the accord may be laudable, there is little doubt that it would have looked much different if the incoming Obama administration had been afforded the opportunity to set future U.S. policy in Iraq for itself, with the input and imprimatur of Congress. Now President-elect Obama is left to clean up a messy legal and political situation created by his predecessor without his concurrence. This is precisely the type of situation that called for restraint by the outgoing administration.

III. The Bush Administration's Midnight Regulations

A. The Midnight Regulation Tradition

At the close of every modern presidential administration, there is a statistically significant increase in executive branch and agency rulemaking. Indeed, according to one study, regulatory activity has increased significantly in the last quarter of the presidential term in every presidency since at least 1948.⁸¹ The turnover of a whole administration is, on average, associated with a 29% jump in the measure of regulatory activity during the post-election period.⁸² This phenomenon has been whimsically referred to as the Cinderella constraint: "Simply put, as the clock runs out on an administration's term in office, would-be Cinderellas – including the President, Cabinet officers, and agency heads – work assiduously to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight."⁸³ It is seen as "a way for an administration to have life after death."⁸⁴

⁸⁰ To some extent, the Iraqi accord does represent a victory for President-elect Obama in the overarching debate regarding the need for a withdrawal timetable. Initially, the Bush administration pushed for an indefinite, long-term commitment of U.S. forces in Iraq and the construction of over 50 permanent military bases. See Ned Parker & Peter Spiegel, *U.S., Iraqi Officials Near Deal on Troop Withdrawals*, L.A. Times, Aug. 1, 2008. Negotiations got back on track only after the Bush administration was forced to agree in concept to a conditional withdrawal timetable as both then-Senator Obama and the Iraqi government had been advocating, but with conditions and on a longer timetable than either desired. As a result, it is perhaps unsurprising that President-elect Obama has recently stated that the accord "points us in the right direction" (see Transcript of Meet the Press Appearance by President-elect Barack Obama (Dec. 7, 2008)) and that "we are now on a glide path to reduce our forces in Iraq" (see Transcript of Press Conference with President-elect Barack Obama (Dec. 1, 2008)). Yet, it is unclear whether these statements represent a reversal of his prior position during the campaign or an example of an incoming President being forced to bow to political reality in light of his predecessor's success in trying his hands.

⁸¹ See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557 (May 2003).

⁸² *Id.* See also Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time*, Mercatus Center Working Paper (Sept. 2008); Jerry Brito & Veronique de Rugy, *Midnight Regulations & Regulatory Review*, Mercatus Center Working Paper (Sept. 2008); Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update*, Mercatus Center Working Paper (2008).

⁸³ Jay Cochran, II, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters*, Mercatus Center Working Paper at 4 (Mar. 8, 2001).

⁸⁴ John M. Broder, *A Legacy Bush Can Control*, N.Y. Times, Sept. 9, 2007.

Although the practice dates back many years, it has been said that the term “midnight regulation” was coined following the regulatory outburst in the final days of President Carter’s presidency,⁸⁵ which resulted in over 150 new rules comprising a then-record 24,000 pages in the Federal Register. To date, however, the leading midnight regulator of the modern era is President George H.W. Bush.⁸⁶ In 1989, President Bush formed the Council on Competitiveness to review all new rules issued by federal agencies and, in his final State of the Union speech in 1992, he announced a moratorium on any new regulations, which was ultimately extended for the remainder of his term. Despite this moratorium, however, the first Bush administration actually initiated nearly 50% more notice-and-comment rulemakings in the final quarter of his term than the Clinton administration and nearly 40% more than the Reagan administration.⁸⁷

The midnight regulation tradition also has given rise to a separate tradition of incoming Presidents taking immediate steps upon assuming office to counteract such actions. This tradition began when incoming President Reagan immediately issued an executive order upon assuming office (1) postponing any regulations that had not yet become effective, (2) authorizing the suspension of existing regulations for reconsideration, and (3) creating a Task Force on Regulatory Relief to conduct a thorough review of all midnight regulations.⁸⁸ Although there is some debate about its legality,⁸⁹ every subsequent incoming President following an inter-party transition, upon assuming office, has continued the tradition of immediately suspending, delaying or otherwise blocking the effectiveness of midnight regulations.⁹⁰

B. The Current Bush Administration’s Midnight Regulations

Over the past year, there has been an “unusually intense” buzz on K Street as lobbyists have raced to secure final approval of a wide range of health, safety, labor and economic rules “in the belief that they can get better deals from the Bush administration than from its successor.”⁹¹ The current Bush administration, however, has ostensibly taken steps to prevent midnight rulemaking. On May 9, 2008, White House Chief of Staff Joshua Bolten issued a memorandum to the heads of executive departments and agencies stating that the administration needed to “resist the historical tendency of administrations to increase regulatory activity in their final months.”⁹² Except in “extraordinary circumstances,” the Bolten memorandum stated, “regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.” Bolten appointed Susan Dudley, the controversial Administrator of the Office of Information and Regulatory Affairs

⁸⁵ Brito & de Rugy, *supra* note 82, at 2.

⁸⁶ See Mendelson, *supra* note 81, at 563.

⁸⁷ Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Va. L. Rev. 889, 896 (2008).

⁸⁸ See Exec. Order No. 12,291, 3 C.F.R. § 131-32 (1982).

⁸⁹ See B.J. Sanford, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. Rev. 782 (2003); William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration’s Card Memorandum*, 54 Admin. L. Rev. 1479 (2002). *But see* Beerman & Marshall, *supra* note 2, at 1288-89.

⁹⁰ See Beerman, *supra* note 21, at 982-995.

⁹¹ Robert Pear, *Business Lobby Presses Agenda Before ’08 Vote*, N.Y. Times, Dec. 2, 2007, at 11.

⁹² Joshua B. Bolten, *Memorandum re: Issuance of Agency Regulations at the End of Administration* (May 9, 2008) (available at www.ombwatch.org).

(OIRA) within the Office of Management and Budget (OMB),⁹³ to “coordinate an effort to complete Administration priorities in this final year” and “report on a regular basis regarding agency compliance[.]” Subsequently, the White House pledged that there would be “no surprises.”⁹⁴

Despite the deadline set forth in the Bolten memorandum, however, federal agencies sent more than 40 proposed rules to OMB for review after the self-imposed June 1st deadline.⁹⁵ In total, by some estimates, at least 90 new rules are currently in the works,⁹⁶ and over 70 of them are considered “major” or “economically significant” under applicable law because they impose costs or promote societal benefits that exceed \$100 million annually.⁹⁷ At this pace, the Bush administration will “produce more last-minute rules than any other president,” surpassing even the first Bush administration.⁹⁸ By some estimates, these rules will have a collective economic impact exceeding \$1.9 billion annually.⁹⁹

The new rules are “among the most controversial deregulatory steps of the Bush era,”¹⁰⁰ including many that “look like favors to Bush allies in energy, mining or other industries” and others that “track his ideology on guns or abortion.”¹⁰¹ For example, OMB Watch, a non-profit watchdog, reports that the Bush midnight regulations include rules that would weaken the Endangered Species Act, the Clean Water Act, and other environmental protections; restrict access to family and medical leave for workers; revoke the 25-year-old ban on carrying loaded weapons in national parks; allow truck drivers to work longer hours without taking breaks; ease restrictions on mountain-top mining; authorize local law enforcement to engage in domestic spying without cause; limit the scope of outpatient medical services provided to the poor under Medicaid, and reduce women’s access to federally funded reproductive health services.¹⁰² President-elect Obama has publicly signaled his opposition to many of these rules,¹⁰³ and pledged to take steps to prevent them from going into effect.¹⁰⁴

The Bush administration’s midnight rulemaking has been criticized for procedural irregularities. On September 5, 2008, two leading academics sent OMB Director Jim Nussle and OIRA Administrator Susan Dudley a letter expressing their concern that federal agencies were

⁹³ President Bush made a recess appointment of Susan Dudley on April 4, 2008 over the objections of myriad public interest groups. See, e.g., OMB Watch and Public Citizen, *The Cost is Too High: How Susan Dudley Threatens Public Protections* (2006). She is the first OIRA Administrator to hold the position without Senate confirmation.

⁹⁴ See Tony Fratto, *Opposing View: Regulations Aren’t Rushed*, USA Today, Dec. 8, 2008.

⁹⁵ Ralph Lindeman, *Agencies Continue to Propose New Rules After White House-Imposed June Deadline*, BNA Daily Report for Executives, Aug. 11, 2008.

⁹⁶ R. Jeffrey Smith, *A Last Push to Deregulate: White House to Ease Many Rules*, Wash. Post, Oct. 31, 2008, at A1.

⁹⁷ See USA Today, Editorial, *Our View on the Presidency in Transition: ‘Midnight Regulations’ Return as Bush Term Runs Out*, Dec. 8, 2008.

⁹⁸ *Id.*

⁹⁹ R. Jeffrey Smith, *Lame-Duck White House Issues Host of New Rules*, Wash. Post, Dec. 1, 2008.

¹⁰⁰ *Id.* See also Emma Schwartz, *The Bush Administration’s Midnight Regulations*, ABC News, Oct. 30, 2008; Dan Fromkin, *Bush and Cheney’s Last Shot*, Wash. Post, Oct. 31, 2008.

¹⁰¹ See USA Today, Editorial, *supra* note 97.

¹⁰² For an extensive list of Bush midnight regulations, see www.ombwatch.org/regs and <http://www.propublica.org/special/midnight-regulations>.

¹⁰³ See, e.g., Robert Pear, *New U.S. Rule Pares Outpatient Medicaid Services*, N.Y. Times, Nov. 8, 2008 (Medicaid); Associated Press, *Obama Blasts Species Plan*, Aug. 14, 2008 (Endangered Species Act); Editorial, *More Sadness for Appalachia*, N.Y. Times, Oct. 20, 2008 (mountaintop removal).

¹⁰⁴ See *Bush’s Final Assault on America’s Environment*, Concord Monitor, Dec. 3, 2008.

violating the Bolten memorandum; failing to subject late regulations to cost-benefit analysis as required by Executive Order 12,866; and deviating from the traditional rulemaking process by, for example, refusing to hold public hearings or accept electronic public comments, acting with extreme secrecy and haste, failing to consult with experts, and affording insufficient time for public comment. The USA Today recently reported that the Interior Department “was in such a rush to finalize a controversial change to the Endangered Species Act that it allowed just 32 hours to compile, review and categorize 200,000 public comments,”¹⁰⁵ which essentially required each staff member to read through comments at a rate of seven per minute.¹⁰⁶

C. The Case for Restraint

Midnight regulations possess many of the most significant characteristics of lame-duck actions that are constitutionally troubling for the reasons outlined in Part I above. They are issued unilaterally by the executive branch, in its discretion, and are typically motivated by a desire to tie the incoming President’s hands. As a practical matter, a rule that becomes effective before the incoming President takes office is exceedingly difficult, time consuming, and politically costly to repeal or amend. As the U.S. Supreme Court made clear in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,¹⁰⁷ an incoming President cannot simply revoke a midnight regulation if it has already become effective, but must instead initiate a brand new rulemaking to cancel it out,¹⁰⁸ which would be costly and take years to complete. Even if repeal is sufficiently important to justify the time and cost entailed, it would unnecessarily distract the incoming President from focusing on his own, affirmative agenda and instead force him to use his finite political capital to undo his predecessor’s mischief.¹⁰⁹ Accordingly, in many ways, a midnight regulation may tie an incoming President’s hands and be almost as difficult to revoke as a binding international agreement, which perhaps explains why midnight regulations have proved to be so enduring.¹¹⁰

Midnight regulations also raise significant accountability and normative concerns. Indeed, midnight regulatory mischief comes at precisely the time when the President is least accountable, if not entirely unaccountable, to voters. Similarly, congressional oversight and other political constraints on agency heads are typically weak during the transition period.¹¹¹ As a result, midnight regulations often result in bad policy. The haste with which they are promulgated typically leads to regulatory sloppiness and an increased risk that statutory safeguards may be given short shrift. An agency’s harried action may even raise due process concerns or violate the Administrative Procedures Act if it is characterized by extreme deviations from the traditional rulemaking process. Even if midnight regulations are ultimately repealed or struck down by a court, they can do irreparable harm in the interim, such as environmental damage or injuries to health that cannot be fully undone. On a broader scale, they may also undermine the administrative state’s legitimacy and contribute to public cynicism regarding

¹⁰⁵ See USA Today, Editorial, *supra* note 97.

¹⁰⁶ See Elizabeth Kolbert, *Midnight Hour*, New Yorker, Nov. 24, 2008; OMB Watch, *To Gut Species Protection, Interior Calls “All Hands on Deck”* (Oct. 22, 2008).

¹⁰⁷ 463 U.S. 29, 42 (1983).

¹⁰⁸ See, e.g., Susan Dudley, *Reversing Midnight Regulations*, 3 Regulation 9 (Spring 2001).

¹⁰⁹ See Beerman & Marshall, *supra* note 2, at 1286

¹¹⁰ See generally Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the Midnight Regulations Passed by the Two Previous Outgoing Administrations*, 40 Wake Forest L. Rev. 1441 (2005).

¹¹¹ See generally William S. Morrow, Jr., *Midnight Regulations: Natural Order or Disorderly Governance*, Admin & Reg. L. News, at 3 (Spring 2001).

government, which may threaten “the expressive and constitutive value” of voter participation in presidential elections.¹¹² These concerns hold no matter whether the midnight activity is the result of simply “working to deadline” or deliberate political mischief.

It may go too far to state categorically that a lame-duck President is violating the Constitution if he fails to respect such considerations and exercise restraint when it comes to midnight regulations.¹¹³ But a lame-duck President who takes seriously his “good faith” responsibilities under the Oath and Take Care Clauses and the principles of democracy and accountability that underlie our Constitution should nonetheless refrain from engaging in midnight rulemaking during the transition period.¹¹⁴ Such restraint ensures accountability, yields better policy, respects the institutional interests of the presidency, and best serves the long-term interests of the country.

D. The Congressional Review Act

The Bush administration’s refusal to exercise restraint has raised many questions about what President-elect Obama and Congress may be able to do to countermand its actions. Fortunately, Congress has several options available to it, including the ability to legislatively overrule a midnight regulation at any time. Indeed, senior congressional leaders have already introduced anticipatory legislation to repeal one or more of the Bush midnight regulations.¹¹⁵ But the best and most efficient option for quickly rescinding the majority of the Bush midnight regulations is an obscure law known as the Congressional Review Act of 1996 (“CRA”).

The CRA requires all federal agencies to submit their final rules to Congress before they can become effective and delays the effective dates of certain types of rules.¹¹⁶ Pursuant to the Administrative Procedures Act, any proposed rule typically becomes effective 30 days after its promulgation in the *Federal Register*.¹¹⁷ For any rules designated as “major” by OMB,¹¹⁸ however, the CRA provides that the effective date of the rule is delayed, subject to certain exceptions,¹¹⁹ for a 60 day waiting period after the rule is submitted to Congress and published in the *Federal Register*.¹²⁰ By delaying the effective date of “major” rules, the CRA makes it easier for an incoming President to exercise the option of immediately suspending, delaying, or otherwise blocking midnight regulations upon assuming office. The Bolten memorandum, however, is considered by many to be an attempt to ensure that the Bush midnight regulations are finalized and become effective under the CRA before President-elect Obama takes office,

¹¹² Mendelson, *supra* note 81, at 565.

¹¹³ The principal reason is that Congress has the power to regulate or even eliminate midnight regulations altogether under Article I of the Constitution. *See* Beerman & Marshall, *supra* note 2, at 1285-90.

¹¹⁴ *See generally* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin L. Rev. 1303, 1315 (2000) (“[A] President prepared to interpret and apply the Constitution without regard for its best construction and application, but rather based on the expediency of the day, could hardly be said to be preserving the Constitution to the best of his ability.”).

¹¹⁵ *See, e.g.*, Rob Stein, *New Rule Protects Health-Care Workers’ Right of Conscience*, Wash Post (Dec. 18, 2008).

¹¹⁶ 5 U.S.C. § 801.

¹¹⁷ *Id.* § 801(a)(4).

¹¹⁸ A “major” rule under the CRA is defined as any rule that would, *inter alia*, likely result in “an annual effect on the economy of \$100,000,000 or more,” as exclusively determined by OMB. *Id.* § 804.

¹¹⁹ *Id.* §§ 801(c), 808.

¹²⁰ *Id.* § 801(a)(3).

thereby depriving him of the option.¹²¹ To produce that result, the Bush administration generally would have needed to finalize “major” rules before November 20, 2008 and any other rules before December 20, 2008.¹²² Undoubtedly aware of these dates, the administration has finalized many midnight regulations just before the pertinent deadlines.

While the Bush administration may have successfully limited some of President-elect Obama’s potential options, Congress may be able to use the CRA’s “fast track” procedures to rescind some midnight regulations, even if they have already become effective. The CRA generally allows any member of Congress to introduce a joint disapproval resolution within 60 days of the regulation’s initial submission to Congress.¹²³ Once introduced, the House considers the resolution under its general procedures, but the CRA’s special “fast track” procedures authorize expedited consideration in the Senate during a 60-day “action” period in which consideration of the resolution is privileged, debate is limited, amendments are disallowed, filibusters are banned, and other dilatory tactics are prohibited.¹²⁴ These procedures ensure that the resolution will be taken up and considered by the Senate in an expedited fashion. If the disapproval resolution passes both Houses of Congress by a majority vote, and the President signs it into law, the CRA provides that the regulation “shall not take effect” or, if it has already taken effect, that it “shall be treated as though [it] had never taken effect.”¹²⁵ Once this occurs, the agency may not reissue the rule “in substantially the same form” without first securing congressional authorization.¹²⁶

The utility of this fast-track procedure is bolstered by the CRA’s so-called “carryover” provision, which affords the incoming Congress sufficient time to consider and act upon midnight regulations issued by the previous administration in the waning days of the last Congress. If a regulation is not submitted to Congress sufficiently in advance of its adjournment date,¹²⁷ as is almost always the case with midnight regulations, then the clock is re-set. A midnight regulation is treated as if had been submitted to Congress and published in the *Federal Register* on the 15th legislative day (House) or session day (Senate) after Congress reconvenes.¹²⁸ At that point, any member of Congress may then introduce a disapproval resolution within the next 60 days of continuous session, and the Senate may act upon it using the CRA’s fast-track procedure within the next 60 session days.

¹²¹ See OMB Watch, *Midnight at the White House: Bush Using Rules to Cement Legacy* (Nov. 4, 2008); L. Elaine Halchin, Congressional Research Service, *Presidential Transitions: Issues Involving Outgoing and Incoming Administrations* (Nov. 25, 2008).

¹²² See Michael Livermore, *Did Bush Miss His Deadline for 11th-Hour Meddling*, TNR.com (Nov. 21, 2008).

¹²³ 5 U.S.C. § 802(a). This 60-day “initiation” period excludes “days either House of Congress is adjourned for more than 3 days during a session of Congress.” *Id.*

¹²⁴ For an extensive analysis of the CRA’s procedural details, see Richard S. Beth, Congressional Research Service, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act* (Oct. 10, 2001). See also Curtis W. Copeland, Congressional Research Service, *Midnight Rulemaking: Considerations for Congress and a New Administration* (Nov. 24, 2008); Curtis W. Copeland & Richard S. Beth, Congressional Research Service, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress* (Sept. 3, 2008).

¹²⁵ *Id.* §§ 801(b)(1), (f)

¹²⁶ *Id.* § 801(b)(2).

¹²⁷ Specifically, in any given year, the carryover period begins after the 60th legislative day in the House or session day in the Senate before Congress adjourns *sine die*, whichever date is earlier. *Id.* § 801(d)(1).

¹²⁸ *Id.*

The one significant limitation of the CRA, of course, is that it is typically only useful in rescinding midnight regulations if the incoming President replaces an outgoing President of the other party, and the incoming President is of the same party as the incoming Congress. Otherwise, any disapproval regulation passed by Congress could simply be vetoed by the outgoing President who issued it. For this reason, of the nearly 50,000 final rules that have been submitted to Congress since the CRA was enacted, it has been used only once. Indeed, the only time that the CRA has been successfully deployed to rescind a midnight regulation of the previous administration was when a Republican-controlled Congress passed, and President George W. Bush signed into law, a resolution rescinding a regulation issued by the Clinton Administration's Occupational Safety and Health Administration (OSHA) addressing ergonomic injuries in the workplace.¹²⁹ Although the battle over the ergonomics rule had been raging for years, and Congress had passed several appropriations riders prohibiting OSHA from finalizing it, Congress failed to muster enough votes to pass either a legislative prohibition or another appropriations rider in 2000.¹³⁰ As a result, on November 14, 2000, just ten days after the election of President Bush, OSHA issued its final ergonomics standard.¹³¹ After the CRA waiting period passed without action, the rule became effective on January 16, 2001, just four days before President Bush assumed office.

The Republican response was coordinated and furious. On January 3, 2001, the first day of the 107th Congress, Senator Don Nickles led a meeting of Republicans and business lobbyists to develop a strategy for using the CRA to fight the ergonomics standard.¹³² Since the ergonomics rule had not been sent up to Congress sufficiently in advance of the adjournment of the 106th Congress, the CRA's carryover provisions applied, which meant that the Republican-controlled Congress could act after President Clinton had left office. On March 1, 2001, Senator Nickles introduced Senate Joint Resolution 6, arguing on the Senate floor:

Who is the legislator in OSHA who wrote this legislation? Who is going to hold them accountable? They are gone. As a matter of fact, the Clinton administration showed contempt of Congress and contempt of the new administration by trying to jam through this enormously complex, burdensome, and expensive regulation with 4 days left in their administration.¹³³

The Senate and House both passed the disapproval resolution, and on March 20, 2001, President Bush signed it into law, thereby marking the first successful use of the CRA to repeal a midnight regulation. In his very first signing statement, President Bush asserted that the disapproval resolution was “a good and proper use of the Act because the different branches of our Government need to be held accountable.”¹³⁴

¹²⁹ See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001).

¹³⁰ See Morton Rosenberg, Congressional Research Service, *Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA's Ergonomics Standard*, at 7 (Jan. 6, 2003).

¹³¹ See 65 Fed. Reg. 68,262 (Nov. 14, 2000)

¹³² For more background, see generally Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 Admin. L. Rev. 187, 197 (2003).

¹³³ See *supra* note 6.

¹³⁴ See *supra* note 7.

Since many of the current Bush administration's midnight regulations may become effective before President Obama takes office, the CRA could become very important in the coming months. As it happens, with Democrats controlling both the White House and Congress, the stars are aligned for rescission of the Bush midnight regulations in the same manner that the Clinton ergonomics rule was rescinded – that is, a new President of the party in control of Congress would be in position to sign one or more disapproval resolutions into law. The Obama transition team and senior Democratic leaders in Congress are reportedly aware of this important precedent and are actively considering their options.¹³⁵ House Speaker Nancy Pelosi has even publicly released a list of the top 11 “ghoulish” midnight regulations and urged Democratic committee chairs to explore ways to stop or reverse them.¹³⁶ By some accounts, depending on a complex set of timing considerations, the 111th Congress could potentially use this option to rescind Bush regulations going as far back as May or June 2008,¹³⁷ and they will likely have several months to do so after Congress reconvenes in January 2009.¹³⁸

IV. Conclusion

Lame-duck Presidents often engage in a flurry of eleventh-hour actions during the transition period in an attempt to tie their successors' hands. During the last transition, then-President-elect Bush and Republicans in Congress argued that a lame-duck President Clinton should respect the prerogatives of the incoming administration and refrain from any type of “midnight” actions that would tie their hands going forward. Now that the situation is reversed, however, the Bush administration seems to be engaging in highly suspect “midnight” actions of its own.

The Bush administration should be mindful of its previously stated positions on the prerogatives of the incoming President and pay heed to the constitutional constraints on a lame duck President's actions. An outgoing President, including President Bush, has a duty to carry out his constitutional responsibilities in good faith and in the best long-term interests of the nation, which means that he should exercise restraint and avoid taking any unilateral, otherwise avoidable action during the transition period that would significantly tie the hands of his successor. The Bush Administration's attempts to tie President Obama's hands on Iraq are not consistent with this duty. Nor is the issuance of midnight regulations during the transition period. Fortunately, Congress may be able to use the Congressional Review Act and other devices to rescind such rules when President-elect Obama assumes office, and thereby ensure the accountability that is due the American people.

¹³⁵ See Kolbert, *supra* note 106; Erika Lovley & Ryan Grim, *Dems Eye Midnight Regulations Reversal*, Politico, Nov. 12, 2008; Avery Palmer, *As Bush Lines Up Late Regulations, Congress Has Choice About Intervening*, C.Q. Today, Nov. 6, 2008.

¹³⁶ See Cindy Skrzycki, *Democrats Eye Bush Midnight Regulations*, Wash. Post, Nov. 11, 2008.

¹³⁷ See OMB Watch, *Advancing the Public Interest Through Regulatory Reform: Recommendations for President-Elect Obama and the 111th Congress* at 19 (Nov. 2008); OMB Watch, *Midnight at the White House*, *supra* note 121, Ryan Grim, *Midnight Regulations in Jeopardy*, Politico.com, Nov. 12, 2008.

¹³⁸ Grim, *supra* note 137.