

The Last One Hundred Days

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A lame duck President might look at his authority to govern in the transition period as if it were a large balloon with a slow leak. . . . The balloon is ineluctably shrinking with each passing week. . . . By the end of the year, he will have lost the attention of the permanent government and can accomplish very little.

—James Pfiffner (1996, 5)

As his “long goodbye” in 2000–2001, Clinton was “a whirling dervish of a President who appointed judges, signed treaties, gave campaign-style speeches, issued scads of executive orders, rescinded ethics regulations he had penned in his first term, raised political money, gave dozens of interviews, granted 234 pardons and clemencies, fired an enemy from her government job, negotiated his own plea-bargain agreement, cast aspersions on his successor, installed a crony as head of the Democratic Party, and gave an entire series of farewell addresses in which he essentially said he wasn’t leaving at all.”

—Carl Cannon (2001, 274)

A curious thing happens during the last one hundred days of a presidential administration: political uncertainty shifts to political certitude. The president knows exactly who will succeed him—his policy positions, his legislative priorities, and the level of partisan support he will enjoy within the new Congress. And if the sitting president (or his party) lost the election, he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor’s hands.

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Can he succeed? If James Pfiffner's quote above is any indication, prospects are dim. Defeated at the polls in November and guaranteed political retirement in January, an outgoing president has little ground upon which to advocate for his (someday her) policy agenda. During his final months in office, his public prestige and professional reputation—the ingredients of persuasion, and the purported foundations of presidential power—run empty. Members of Congress have little cause to do a defeated president's bidding; and without them, presidents cannot hope to accomplish anything of consequence. As such, outgoing presidents have little choice but to recognize their plight, gather their belongings, and close the door on their administration.

In our estimation, this misconstrues things. By ignoring important policy options outside of the legislative process, scholars have exaggerated the frailty of outgoing presidents and underestimated the influence they continue to wield. Presidential power does not reduce to bargaining, negotiating, and convincing members of Congress to do things that the president cannot accomplish on his own. Presidents can (and regularly do) act alone, setting public policy without having to rally Congress's attention, nor even its support (Cooper 2002; Howell 2003; Mayer 2001). With executive orders, proclamations, executive agreements, national security directives, and memoranda, presidents have ample resources to effectuate policy changes that stand little chance of overcoming the collective action problems and multiple veto points that plague the legislative process. And having "lost the attention of the permanent government," outgoing presidents have every reason to strike out on their own, set new policy, and leave it to the incoming administration to try and steer an alternative course.

Examples of last-minute presidential actions abound. It was President John Adams's "Midnight" appointments, which Jefferson refused to honor, that prompted the landmark *Marbury v. Madison* Supreme Court decision. Grover Cleveland created a twenty-one-million-acre forest reserve to prevent logging, an act that led to an unsuccessful impeachment attempt and the passage of legislation annulling the action. Then, in response to the congressional uprising, "Cleveland issued a pocket veto and left office" (Combs 2001, 331). Jimmy Carter negotiated for the release of Americans held hostage in Tehran, implementing an agreement on his last day in office with ten separate executive orders, many of which sharply restricted the rights of private parties to sue the Iranian government for expropriation of their property. It was, according to Harold Hongju Koh, "One of the most dramatic exercises of presidential power in foreign affairs in peacetime United States history" (Koh 1990, 122). In late December 1992, George Bush pardoned six Reagan administration officials who were involved in the Iran-Contra scandal, a step that ended Independent Counsel Lawrence Walsh's criminal investigation. "[In] a single stroke, Mr. Bush swept away one conviction, three guilty pleas, and two pending cases, virtually decapitating what was left of Mr. Walsh's effort, which began in 1986" (Johnston 1992).¹ And as Carl Cannon's quote at the beginning of this paper indicates, during his final days in office Clinton "issued scads of executive orders" on issues ranging from protecting the Hawaiian Islands Coral Reef Ecosystem Reserve

1. Bush granted pardons to Caspar Weinberger, Robert McFarlane, Elliot Abrams, and three CIA officials.

to prohibiting the importation of rough cut diamonds from Sierra Leone to curbing tobacco use both domestically and abroad.

In this article, we document the flurry of activity that regularly occurs during the ultimate weeks of a defeated president's administration, and the lasting impact this can have on his successor's ability to govern. We proceed as follows. First, we review the literature on presidential transitions and recount the conventional understanding of presidential power. We then introduce the president's powers of unilateral action and specify why presidents have such strong incentives to exercise them during the waning hours of their administrations. Analyzing trends in regulatory activity, we identify spikes that coincide with presidential transitions. Finally, through a series of case studies, we illustrate how last-minute directives issued by presidents can tie the hands of their successors, occasionally forcing them to choose between accepting objectionable policies as law or paying a steep political price for trying to change them.

Transitioning In and Out of Government

There is, at present, a sizable literature on presidential transitions (Brauer 1986; Burke 2000; Henry 1960; Jones 1998; Kumar and Sullivan 2003; Pfiffner 1996). Without exception, this work places incoming presidents (aides and advisers brought in tow) front and center. The literature really is about the challenges of moving from a campaign to a governing stance, of transforming former governors, senators, and vice presidents into presidents, of preparing November victors for the awesome responsibilities and powers that await them in January. It spells out the issues of staffing, management, agenda setting, and policy formulation that inevitably confront presidents-elect. It catalogs the personal and professional tensions—between policy and political advisers, between campaign workers and governing staffers, between Washington insiders and loyal aides from the president-elect's home state—that regularly infect transitions. Much of this literature, further, has a strong prescriptive element. It offers up advice to newly elected presidents—delineate clearly lines of authority; delegate wisely; heed the importance of management; promote loyalty, though not at the expense of free and open dialogue—in the hopes that they will avoid the mistakes of past transitions. This literature, in short, details how former presidential candidates steady their sights on the presidency itself, lay the groundwork for governance, and, if they are lucky, generate the momentum needed for change.

To the extent that they receive attention in the transitions literature, outgoing presidents stand as little more than informational resources for incoming administrations. In his presidential memos, for instance, Richard Neustadt recommends that newly elected presidents actively (though with due skepticism) seek the advice of sitting secretaries and undersecretaries, advisers, and staffers. Lamenting how little these officials are used, and how quickly they are forgotten, Neustadt notes that “transitions offer opportunities to extract a whole governmental generation's lore at once. But those who need it most and could best use it, the incomers, rarely think of such things” (Jones 2002, 167).

Instead, outgoing presidents rapidly fall out of favor and fade away. In his authoritative book on presidential transitions, James Pfiffner argues that,

When control of the presidency changes parties, the lame-duck administration has eleven weeks to tidy up its affairs and prepare the way for the new administration. Immediately after the election power begins to shift noticeably. Senior career executives begin to distance themselves from their bosses. . . . The bureaucratic machine begins to slip into neutral gear because its present leaders cannot guarantee any commitments beyond January 20. (1996, 5-6)

Pfiffner's perspective is widely shared. Writes Carl Brauer, during presidential transitions "formal authority continues to reside in the occupant of the White House, [but] his political power is small compared to that of his successor. The focus of attention is on the person about to become President, not on the person about to vacate the office" (1986, xiv). Laurin Henry characterizes outgoing presidents as "caretakers" who enjoy three final months to close up shop and ease into retirement (1960, 3). The sitting president's policy agenda, his independent interests and initiatives, along with the powers he wielded during the prior three and three-quarter years, quickly dissipate in the waning months of his administration, as attention rightfully shifts to the newly elected president and the spectacle of a new government being formed.

A fair amount of quantitative work on second-term presidents substantiates the impression that presidential influence begins to decline the moment that reelection prospects foreclose. For instance, second-term presidents have an especially difficult time using ceremonial activities (major speeches, foreign and domestic travel) to harness public support, underscoring "what appears to be a lessening of effort" on their part (Brace and Hinckley 1993, 395). This effort, apparently, extends into the legislative arena. Charles Jones, for instance, studied the legislative histories of twenty-one landmark laws initiated by presidents between 1947 and 1990 (1994). Second-term presidents launched only three of these laws; presidents with longer electoral horizons initiated the remaining eighteen.

Presidential struggles, however, are not confined to second terms. Indeed, all presidents face a common dilemma. As Paul Light observes, opportunities to advance an agenda peak early, typically during an administration's first hundred days—precisely when presidents are least organized and least knowledgeable about the workings of the federal government. While expertise may grow over time, presidential influence wanes. Midterm losses in Congress, the crowding of legislative calendars, and depleted "energy and creative stamina" all conspire against the president, locking him in a "cycle of decreasing influence" (Light 1994, 41).

Over the course of presidential administrations, most trajectories point downward. Public approval ratings steadily (though not monotonically) decline (Mueller 1973; Stimson 1976); the president's ability to guide legislation through the House and Senate drops, often precipitously (Bond and Fleisher 1990; Rudalevige 2002); and the probability that presidents successfully steer their Supreme Court nominees through the confirmation process declines rather markedly, especially in the final months of his

administration (Krutz, Fleisher, and Bond 1998; Ruckman 1993; Segal 1987). And as it is with approval ratings, agenda setting, and the confirmation of Supreme Court nominees, so it is with legislative productivity rates more generally. By David Mayhew's count, 3.5 fewer landmark laws on average are enacted during the second two years of a presidential term than during the first (Mayhew 1991). By the end of a presidential term, the government appears to shift into low gear, putting off major action, stalling nominations, and generally biding time, as key actors await the arrival of a new administration.

For the most part, these trends bottom out during the final three months of a presidential term. Defeated at the polls and granted but a few months to disband his administration, an outgoing president has none of the resources he needs to ensure compliance within the executive branch or rally support on Capitol Hill. Indeed, it is difficult to imagine a time when the president's bargaining position is more bereft than the period after he, or his party, has lost a national election. The moment the public boots him from office, the president's promises turn hollow, his threats idle, his political capital effete. As there is little presidents can do for those who occupy other parts of the federal government, there is little reason for them to expend much effort, or time, advancing his agenda. The president's capacity to negotiate, broker deals, and ultimately persuade is, at last, depleted.

His power, however, is not.

All Is Not Lost

Portraits of outgoing presidents going quietly into the night overlook an important feature of American politics, and of executive power—namely, the president's ability to unilaterally set public policy (Cohen and Krause 1997; Cooper 1986, 1997, 2002; Howell 2003; Howell and Lewis 2002; Krause and Cohen 1997; Mayer 1999, 2001; Mayer and Price 2002; Moe and Howell 1999a, 1999b; Shull 1997). Using executive orders, proclamations, executive agreements, national security directives, memoranda, and other directives, presidents have at their disposal a wide variety of means to effectuate lasting and substantive policy changes, both foreign and domestic. Because they do not depend upon the active support or cooperation of Congress, these tools of direct action present ample opportunities for presidential influence, influence that has very little to do with bargaining or persuasion (Howell 2005). "With the stroke of the pen," these actions assume the weight of law. And so they remain until and unless someone else overturns them.

A basic principle governs the production of unilateral directives: presidential policy making rises as Congress's capacity to legislate declines (Howell 2003). If Congress cannot get its act together—either because of partisan divisions within its membership or the timing of the electoral calendar—presidents have strong incentives to exercise their unilateral powers. For indeed, when gridlock prevails within Congress, presidents can (and regularly do) strike out on their own and set policies that would not survive the legislative process. As Justice Jackson recognized in his famous concurring opinion of *Youngstown Sheet & Tube Co. v. Sawyer*, "Congressional inertia, indifference, or quies-

cence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility” (343 U.S. 579 (1952), p. 637). The reverse of this governing principle, however, also holds: when Congress stands poised to enact sweeping policy changes, unilateral activity should decline, *regardless of whether Congress supports the president*. If Congress stands ready to enact his agenda, the president has every reason to engage the legislative process, if only because laws are more durable than unilateral directives. Likewise, if Congress opposes his agenda, the president cannot readily exercise his unilateral powers without subsequently being overturned.

Incentives to exercise these unilateral powers, as such, should intensify in the final stages of a presidential administration. It is then that Congress is least likely to do the president’s bidding because, all agree, his powers to bargain, negotiate, and persuade have diminished. It is also then that the legislative process grinds to a virtual standstill, assuring that little effort will be expended on advancing his agenda—nor, by extension, on reversing policy directives that the president issues on his own. Precisely because legislative success rates taper off at the end of a term, unilateral activity should spike upward.

Not all transitions, however, invite unilateral activity. When the office passes from Republican to Republican, or Democrat to Democrat, the sitting president has little cause to hurry through a slew of last-minute directives. A reelected incumbent need not issue a slate of unilateral directives during the final months of his first term; nor does an outgoing president who is to be replaced by a co-partisan. Emerging victorious in November, these presidents are assured of four more years in service of their legislative agendas. Rather, it is when the incumbent’s party loses that presidents should exercise these powers with exceptional zeal, making final impressions on public policy in the short time before the opposition party assumes control.

Patterns of Unilateral Activity

Our empirical expectations are straightforward: presidential transitions should witness jumps in unilateral activity when power switches from one party to the other; but transitions from first to second terms, and transitions from co-partisans, should not impact the frequency with which presidents issue unilateral policy directives.

Some preliminary evidence already supports our expectations. Kenneth Mayer has demonstrated that presidents issue nearly twice as many executive orders (exempting purely administrative orders) during the final month of those terms when they are leaving office to a successor of the opposite party (Mayer 2001). Mayer finds no effects during transitions between first- and second-term presidents, or in the final month that divides two presidents from the same party.² In every one of Mayer’s regressions, the observed impact of presidential transitions on unilateral activity is substantially larger than those

2. Mayer and Price (2002) and Howell (2003) also find that presidents issue more significant executive orders during the first year of their administration when they succeed an incumbent of the opposite party. Many of these orders amend, or overturn, actions taken by the prior administration (more on this later) or direct policy initiatives that the previous president refused to undertake.

observed for all other explanatory variables.³ The results, further, hold irrespective of whether one examines the 1939-99 or the 1949-99 time period. These findings, according to Mayer, give credence to the contention “that executive orders have a strong policy component, as otherwise presidents would have little reason to issue such last-minute orders” (2001, 97).

Mayer’s analysis does not differentiate trivial from significant executive orders. Because many executive orders concern rather mundane matters—renaming administrative agencies, exempting individuals from mandatory retirement, amending civil service rules, establishing working groups and commissions—it is important to distinguish those that substantively change public policy from those that purely affect the administration and management of the executive branch. Fortunately, both Howell (2003; and see the introductory paper to this volume) and Mayer and Price (2002) have constructed time series of those executive orders that had a significant impact on public policy. Identifying citations of executive orders by federal judges, members of Congress, and the media, Howell created two significant executive order time series during the post-War era. From a random sample of 1,000 executive orders, Mayer and Price isolated significant orders based upon both the political and media coverage they received, as well as their policy and legal importance based upon content analyses.

The two datasets generate very different results with respect to presidential transitions. In Howell’s data, presidents do not appear to issue any more orders during the final three months of their administrations than during earlier periods of their terms. Significant differences, however, are observed in Mayer and Price’s data. Based on the random sample of orders issued between 1945 and 1999, presidents issued, on average, 1.08 significant orders during each of the last three months of their terms. During transitions from first to second terms, and from incumbents to newly elected presidents from the same party, 1.32 significant orders are issued. But when presidents, or their parties, lose the office to the opposition, they issue an average of 2.34 significant orders during each of the final three months of office—almost twice the average level of activity recorded during the modern era.

The differences observed in the two data sets may reveal an important facet of unilateral policy making that occurs at the end of a presidential term. To generate their lists, Howell consulted political citations and media coverage while Mayer and Price read the content of the orders and relied upon historians and policy experts to evaluate their substantive importance. If presidents are issuing important last-minute directives that attract little public attention—as all anticipate the arrival of an incoming administration—then it stands to reason that Howell’s data set would not generate effects, while Mayer and Price’s does.

Bursts of unilateral activity at the end of a presidential administration, however, should not be restricted to executive orders. Indeed, regulatory activity more generally ought to shoot up during the last three months of an outgoing president’s term. In a

3. These include, but are not limited to, fixed presidential effects (occasionally interacted with divided government), indicators for election years and the first years of a term, presidential popularity, and a series of lagged versions of the dependent variable.

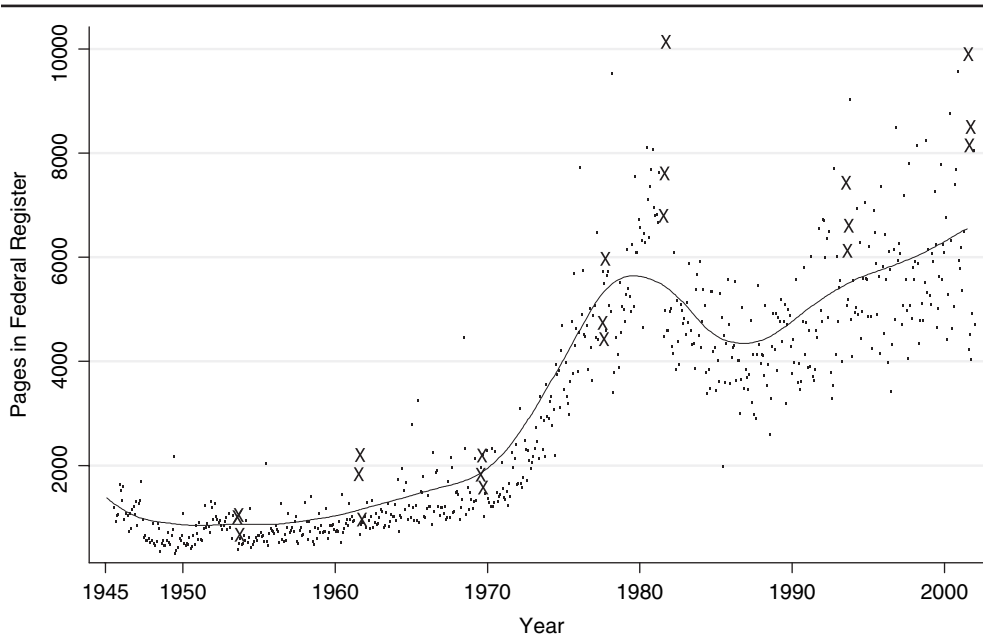


FIGURE 1. Regulatory Activity.

report put out by the Mercatus Center at George Mason University, Jay Cochran uses the number of pages in the *Federal Register* as a proxy for production levels of rules and regulations (Cochran 2001). In addition to executive orders, these pages include proclamations, administrative directives, and documentation relating to the regulatory process (from notices of proposed rulemaking to final rules). Rudimentary statistical tests show jumps in presidential activity during transitions, especially after an incumbent president or his party loses in November. Cochran concludes that “there is in fact a systematic tendency across time and across parties to increase regulatory volumes during the waning days of an administration” (2001, 15).

In this section, we extend the *Federal Register* time series and subject it to more rigorous tests. Figure 1 presents the data. The solid line depicts a nonlinear smoother that, by omitting noise components from the time series, reveals underlying trends in the data. While the number of pages of the *Federal Register* rises slowly from 1945 to 1970, it takes off in the early 1970s, then dips slightly in the 1980s, only to rise again in the 1990s.

Observations that occur during transition periods from one party to another are denoted by an “X”; all others are dots. Note that a solid majority number of X’s in Figure 1, and every single X since Carter, are located well above the smoother, lending some preliminary support for our contention that unilateral activity increases during the waning months of an outgoing president’s administration. Simple descriptive statistics tell much the same story. In a typical month, 3,215 pages of presidential directives, rules, and memoranda fill the *Federal Register*. During those transitions that do not yield a

TABLE 1
Summary Statistics

	<i>Mean</i>	<i>Std. Dev.</i>	<i>Minimum</i>	<i>Maximum</i>
<i>Fed. Reg.</i> pages	3215.37	2244.49	428	10134
Transition	0.06	0.24	0	1
Transition*Switch	0.03	0.17	0	1
Divided gov.	0.60	0.49	0	1
Majority size	57.53	4.47	50.4	67.9
Opposition pres.	0.43	0.50	0	1
War	0.26	0.44	0	1
Recession	0.17	0.38	0	1
Budget size	923.17	445.96	218.7	1678

change of party, 3,499 pages are issued on average. When a challenger from the opposite party as the incumbent’s wins in November, however, outgoing presidents issue directives that fill fully 4,747 pages in each of the final three months of their administrations. These differences are significant at $p < .01$.

Much the same is observed in multivariate regressions. Autocorrelation functions reveal that the time series contains a unit root, and hence is not stationary; uncorrected, all t and F tests are spurious. Fortunately, by taking first differences the series becomes stationary, allowing us to perform standard time-series regressions. Autocorrelation and partial autocorrelation functions suggest that the differenced series has a first-order moving average component, but no autoregressive component.⁴ We therefore estimate the following IMA (0, 1, 1) model:⁵

$$Y_t = \beta_0 + \beta_1 M_t + \beta_2 (M_t * S_t) + e_t + \theta_1 e_{t-1}$$

where Y represents the number of pages of presidential documents in the *Federal Register*, M identifies the last three months of completed presidential administrations, and $(M * S)$ is an interaction variable between M and S , an indicator for a change in the party of the president. All variables are first differenced, and robust standard errors are calculated. Our theory principally concerns the value of β_2 , which we expect to be positive and statistically significant. Table 1 presents descriptive statistics for all variables.

Column 1 of Table 2 presents the results. As expected, presidential transitions generally do not witness surges in regulatory activity. When the office switches parties, however, significant and positive impacts are observed. Having lost in November, presidents usher through the regulatory process roughly 25 percent more rules and direc-

4. ACFs show a significant negative spike at the first lag, while all subsequent lags are small and insignificant; PACFs begin large and negative, but dampen steadily thereafter.

5. The first term refers to the autoregressive component, the second to the moving average component, and the third to the variance of the error term. For all regressions estimated, cumulative periodograms show the residuals to be white noise. Nonetheless, we also estimated numerous low-order alternatives to the (0, 1, 1) specification, each of which generates results that are consistent with those presented below.

TABLE 2
 Presidential Transitions and Regulatory Activity, 1945-2001

	<i>Model 1</i>		<i>Model 2</i>		<i>Model 3</i>	
Transition	182.09	(202.68)	322.88	(212.28)	369.56*	(213.81)
Transition*Switch	832.90**	(331.65)	758.36**	(348.70)	710.51**	(348.32)
Additional controls						
Divided government	—		—		-316.86*	(169.65)
Majority size	—		—		-12.13	(13.88)
War	—		—		-279.95**	(130.51)
Recession	—		—		59.90	(83.59)
Budget size	—		—		0.98**	(0.43)
Fixed effects included for						
Month of year	No		Yes		Yes	
Year of term	No		Yes		Yes	
Presidential administration	No		Yes		Yes	
Constant	7.04	(4.87)	5.98	(3.75)	5.15	(3.45)
(N)	678		678		678	
Log pseudo-likelihood	-5513.41		-5457.71		-5453.10	
Prob > chi-square	0.00		0.00		0.00	

IMA (0, 1, 1) models estimated. *Significant at $p < .10$, two-tailed test; ** $p < .05$; *** $p < .01$. Robust standard errors are reported in parentheses. Moving average component is not reported.

tives during the final three months of their terms. To check the robustness of the results, column 2 then adds to the model fixed effects for the month, year of term, and presidential administration to account for seasonal, intra-administration, and presidency variations, respectively. Little changes. The main effects, while positive, remain statistically indistinguishable from zero, while the interaction term is substantively large and statistically significant.⁶

There are, of course, considerably more factors that contribute to unilateral activity than simply issues of timing. Howell, for instance, presents a simple game theoretic model that predicts more unilateral directives during periods of unified government and when gridlock prevails in Congress (Howell 2003).⁷ In addition, a number of scholars have found that war and the state of the economy contribute to unilateral activity (Howell 2003; Krause and Cohen 2000; Mayer 1999, 2001; Mayer and Price 2002). As

6. To conserve space, estimates for the fixed effects are not reported. Within each year, effects are largest during the spring, summer, and fall months; over the course of each administration, the production of presidential orders appears relatively constant; and while Ford and Carter stand at the time series' apex, Bush (43) rests at its nadir.

7. In addition to majority party size and divided government, Howell (2003) also argues that newly elected presidents who replace presidents of the opposite party will rely upon their unilateral powers with greater frequency than will newly elected presidents of the same party as their predecessor. When adding to the statistical models in Table 2 an indicator variable for such presidents, or when comparing the fixed effects for the two types of presidents, negative and statistically significant results emerge. Unlike the results presented in Table 2 of Howell's contribution to this volume, however, all of the other findings included in the model remain unaffected by the inclusion of this indicator variable.

such, we re-estimate the above models adding controls for divided government, the average size of the majority parties in the House and Senate, war, the size of the federal budget, and recession. Column 3 presents the results.

The main effect of presidential transitions now is statistically significant, suggesting that presidents generally issue more rules and regulations during the final three months of their administration. Again, though, effects are significantly larger when the office of the presidency changes parties. Consistent with other scholars' claims, regulatory activity decreases during periods of divided government and large budgets. The impacts for congressional majorities and recession, though of the expected sign, are not statistically significant. Finally, the observed impact of war conflicts with conventional wisdom. While previous scholars find that presidents issue more executive orders when the nation is at war, regulatory activity more generally appears to decline.⁸

Making Orders Stick

How long do last-minute presidential actions endure? Surely, what an outgoing president accomplishes unilaterally in the twilight of his administration, the incoming president can undo unilaterally during his honeymoon. Presidents regularly issue executive orders, proclamations, and rules that overturn unilateral actions taken by their predecessors. And should they prefer not to overturn an order, newly elected presidents can simply block its implementation. Just as Reagan imposed a sixty-day moratorium on the implementation of rules that Carter instituted during the last three months of his administration, so did Bush (43), immediately upon taking office, put a halt to orders that Clinton issued in the waning days of his administration.

It would be a mistake, however, to conclude that the bursts of unilateral activity that occur in the final months of an outgoing president's administration ultimately, indeed almost immediately, amount to little more than last gasps of a discredited regime. Occasionally, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation's credibility, or confronting serious legal obstacles. Consider the following.

The Arsenic Regulations

Outgoing presidents can impose a wide range of obligations on incoming presidents. Some of these commitments may come directly from the president, in the form of executive orders, proclamations, administrative directives, appointments, or other unilateral actions. Others may originate in executive branch agencies through the rule-making process. And there are special advantages associated with pursuing this latter route. "[Once] a final regulation has been published in the *Federal Register*, the only uni-

8. For the most part, the results for the fixed effects also hold constant—the one exception being year-of-term effects, which appear significant and positive during year three.

lateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must first develop a factual record that supports the change in policy” (Dudley 2001). If a lame-duck administration can hustle a final rule out the door before January 20th, the new administration must begin an entirely new cycle of rulemaking. Not only does this require time, but *changing* the status quo may well mean taking on interest groups who are reticent to give up ground that they have just won.

To see this, consider the December 2000 water quality regulations issued by the Environmental Protection Agency (EPA). On January 22, 2000, the EPA published a ninety-one-page final rule on the maximum levels of arsenic permitted in public drinking water.⁹ The new rule lowered the maximum allowable level of arsenic from 50 parts per billion (ppb), a threshold that had been in effect since 1975, to 10 ppb, with the new standard to go into effect in March 2001. Shortly after taking office, the Bush administration delayed the effective date of all pending regulations by sixty days, a move that applied to the arsenic rule.¹⁰ On March 20, amid hints that the Bush administration planned on scrapping the Clinton-era rule altogether, EPA Administrator Christine Todd Whitman announced an additional sixty-day delay.¹¹

And then, all hell broke loose. Cass Sunstein described the reaction:

A national survey conducted between April 21 and April 26, 2001, found that fifty-six percent of Americans rejected the Bush decision, whereas only thirty-four percent approved of it—and that majorities of Americans opposed the decision in every region of the nation. At various points, the public outcry combined concern, certainty, and cynicism. “Arsenic Everywhere, and Bush Is Not Helping,” according to one newspaper. “You may have voted for him, but you didn’t vote for this in your water,” wrote the *Wall Street Journal*. In an editorial, the *New York Times* demanded that “Americans should expect their drinking water to be at least as safe as that of Japan, Jordan, Namibia, and Laos,” all of which impose a 10 parts per billion (ppb) standard. A respected journalist asked, “How callous can you get, Mr. Compassionate Conservative?” (2002, 2261)

Soon thereafter, the Democratic National Committee assessed the first 100 days of the Bush administration with an ad, in which a young toddler asks, “Can I please have some more arsenic in my water, mommy?”¹² In unusually blunt language, an attorney for the Natural Resources Defense Council criticized the decision as one that will “force millions of Americans to continue to drink arsenic-laced water. Many will die from arsenic-related cancers and other diseases, but George Bush apparently doesn’t care. This

9. Environmental Protection Agency, “National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring; Final Rule,” 66 *Federal Register* 6976-7066, January 22, 2001.

10. Executive Office of the President, “Memorandum for the Heads and Acting Heads of Executive Departments and Agencies,” 66 *Federal Register* 7702, January 24, 2001.

11. In April 2001, the EPA delayed the rule again, until February 2002. 66 *Federal Register* 20580, April 23, 2001.

12. Julie Samuels, “DNC Sounds Off on First 100 Days,” *NationalJournal.com*, April 30, 2001. Available from <http://nationaljournal.com/members/adspotlight/2001/04/0430dnc1.htm>.

outrageous act is just another example of how the polluters have taken over the government.”¹³

The Bush administration argued, initially, that it was not at all clear that the benefits of the 10 ppb standard would outweigh the costs. Clinton’s January 22, 2001 rule estimated the total annual cost of the 10 ppb rule to be \$206 million, with the household cost varying from under \$1 per year in large systems to \$327 per year in small systems.¹⁴ The main benefit would be a reduction in the number of both fatal and non-fatal bladder and lung cancers, with the EPA estimating that the 10 ppb standard would prevent between twenty-one and thirty fatalities annually.¹⁵ Using a baseline of \$6.1 million per life saved and \$607,000 per illness prevented, the EPA found that the benefits of the proposed regulation could be valued at up to \$198 million per year, with additional nonquantifiable benefits stemming from reduction in illnesses other than lung and bladder cancer.¹⁶ Even though the highest quantified benefits of the 10 ppb standard (\$198 million) were less than the highest estimate of the costs (\$206 million), the EPA “concluded that once the non-quantified benefits of the 10 ppb standard were included, the costs would well be justified” (Sunstein 2002, 2275).

Such estimates, though, were based on what some analysts considered to be dubious assumptions. Sunstein notes that the calculations of lives saved and illnesses prevented came from epidemiological studies from Taiwan, and were based on the assumption that the health risks of arsenic increased as a linear function of exposure (Sunstein 2002, 2272-73).¹⁷ In addition, the valuation assigned to lives saved was based largely on 1970s studies of how much employers had to compensate employees for risky jobs. The estimate of the value of an illness avoided “does not come from measurements of people’s willingness to pay to reduce a statistical chance of nonfatal cancer, but instead—and somewhat astonishingly—from shoppers’ responses to hypothetical questions about how much they would pay to reduce a statistical risk of chronic bronchitis” (Sunstein 2002, 2275). A Brookings Institution–American Enterprise Institute study attacked the proposed rule, arguing that the costs would exceed the benefits by up to \$190 million per year (Burnett and Hahn 2001).

Nevertheless, the new rule put the Bush administration in an impossible situation. However much officials might have wanted to argue about the ambiguities in the scientific data, the health risks of arsenic, the costs of lowering the standard, and the uncertain benefits, they were, quite simply, swamped by the prevalent view that arsenic was a *poison*, and that quibbling over costs and benefits and uncertainties and linear versus sublinear dose-response curves was ridiculous when children were drinking contaminated water. In October 2001, after additional reviews supported the lower threshold, the EPA

13. Natural Resources Defense Council press release, March 20, 2001. Available from <http://www.nrdc.org/media/pressReleases/010320.asp>.

14. Environmental Protection Agency, Final Rule, January 22, 2001, 7011.

15. EPA Final Rule, January 22, 2001, 7009.

16. EPA Final Rule, January 22, 2001, 7017.

17. Alternatively, the EPA could have used a “sublinear” dose-response curve, which assumes that the risk drops significantly below some threshold of exposure. See Sunstein (2002, 2273).

announced that it would implement the 10 ppb standard according to the schedule set out in the January rule.¹⁸

Prior to the January 2001 arsenic rule, 50 ppb stood as the reversion policy. But once the final rule was issued, the default outcome changed to the lower 10 ppb standard. This is an obvious but crucial change, as it completely reframed the regulatory question. The Bush administration was no longer simply defending the higher standard. In order to succeed it had to discredit the *new* standard. Moreover, the new reversion point fundamentally altered the debate, which was no longer about whether it made sense to lower the permissible levels of arsenic; rather, the question became why the Bush administration wanted to *raise* current permissible levels. Although the counterfactual is speculative, it is reasonable to think that absent the new rule the Bush administration would have had an easier time imposing a compromise it position were working down from 50 ppb rather than up from 10. Faced with the new analyses which supported the lower standard, EPA Administrator Whitman “[had] little choice but to adopt a standard at least as tough as the one she had delayed” (Kaiser 2001, 2189). In June of 2003 the U.S. Circuit Court of Appeals upheld the Clinton standard of 10 ppb, dismissing a suit filed by the state of Nebraska.¹⁹ The new standard is now slated to go into effect in 2006, right on schedule with the original Clinton order.

Public Lands

Clinton’s high end-of-term energy had some consequences that Bush could not undo, even if he were so inclined. Throughout his terms, Clinton had aggressively used his delegated power under the 1906 Antiquities Act to establish numerous national monuments.²⁰ Unlike many unilateral acts, though, these national monuments, once established by proclamation, could *not* be “disestablished” by a subsequent proclamation. The Antiquities Act, which Clinton used to legally justify his actions, only permits

18. During the summer of 2001, three separate expert reviews supported the 10 ppb standard. The EPA’s Science Advisory Board concluded in August 2001 that the original cost–benefit analysis had underestimated the benefits of the lower standard. Environmental Protection Agency, *Arsenic Rule Benefits Analysis: An SAB Review*. Review by the Arsenic Rule Benefits Review Panel (ARBRP) of the U.S. EPA Science Advisory Board, EPA-SAB-EC-01-008, August 2001. A National Academy of Sciences update to its 1999 report reached the same conclusion. National Academy of Sciences, *Arsenic in Drinking Water: 2001 Update*. Report from the Subcommittee to Update the 1999 Arsenic in Drinking Water Report, Committee on Toxicology and Board on Environmental Studies and Toxicology (Washington, DC: National Academies Press, 2001). At the same time, The National Drinking Water Advisory Council found EPA’s cost estimates reasonable. NDWAC, *Report of the Arsenic Cost Working Group to the National Drinking Water Advisory Council*, August 14, 2001. Available from <http://www.epa.gov/safewater/ars/ndwac-arsenic-report.pdf>.

19. *State of Nebraska v. Environmental Protection Agency*, 356 U.S. App. D.C. 410.

20. Congress enacted the Antiquities Act in 1906 to give the president the authority to protect historically important archeological sites from development. Clinton, though, used the act to create huge new national monuments (most controversially, the Grand Staircase-Escalante National Monument in Utah, covering 1.7 million acres) that critics claimed went well beyond appropriate use. See Mayer and Price (2002) for a description of some of these proclamations. This usage, “largely obscure before Bill Clinton’s invocation of it in the [1996] Grand Staircase decision, the Antiquities Act achieved a degree of cultural salience when it played a key role in an episode of the NBC television series about the White House, *The West Wing*” (2002, 369).

presidents to extend federal protections to new sites; nothing in the act allows presidents to weaken, much less retract, existing protections. The only way Bush could reverse Clinton's actions was to assemble the necessary majorities and supermajorities required to enact a law—a difficult feat indeed, given the multiple veto points and collective action problems that plague the legislative process.²¹

Knowing this, Clinton issued a batch of proclamations during the final months of his administration that extended federal protections to more than 2 million acres of public lands. On November 9, 2001, Clinton issued proclamations 7373 and 7374 which expanded the protected lands in Craters of the Moon, Idaho and Vermilion Cliffs, Arizona. Then, just days before leaving office, Clinton issued proclamations 7392-99 and 7402, which created national monuments in the Virgin Islands, California, New Mexico, Idaho, Montana, Arizona, and New York totaling more than 1 million acres.²² And with executive orders 13178 and 13196 issued in December 2000 and January 2001, Clinton extended federal protections to fully 84 million acres of Hawaiian undersea coral reefs.

However much Bush might have objected to both the substance of Clinton's orders and the process by which they were issued, he lacked statutory authority to undo them unilaterally. Moreover, the Bush administration noted that any organized effort to overturn them legislatively would be pointless. In February 2001, Secretary of the Interior Gail Norton stated that while she "disapprove[d] of the process by which those monuments were generally created," there would be no effort to revoke them (Pianin 2001). In June 2001, Representative Mike Simpson (R-ID) introduced legislation to curb the president's authority under the Antiquities Act. Under the proposal (H.R. 2114), a president would have a difficult time creating national monuments larger than 50,000 acres. In these cases, the law imposes notification, consultation, and public comment. Crucially, it requires positive congressional action within two years to approve the designation. Although the bill was reported by the House Committee on Resources, no floor action occurred.²³ Simpson reintroduced the bill in 2003 as H.R. 2386; as of this writing, the bill has yet to emerge from committee.

International Commitments

Last-minute domestic policy initiatives can, as the arsenic rules demonstrated, put the new administration in an uncomfortable (if not altogether untenable) position. There are times, however, when an outgoing president can create international commitments,

21. See, for example, U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Executive Orders and Presidential Directives*. 107th Cong., 1st Sess., Serial no. 10, March 22, 2001; Carol Hardy Vincent and Pamela Baldwin, *National Monuments and the Antiquities Act*, Congressional Research Service, RL 30528, April 17, 2000; Carol Hardy Vincent and Pamela Baldwin, *Authority of a President to Modify or Eliminate a National Monument*, Congressional Research Service, RS 20647, August 3, 2000; Todd F. Graziano, "The Use and Abuse of Executive Orders and Other Presidential Directives," The Heritage Foundation Legal Memorandum, No. 2, February 21, 2001.

22. Proclamations 7392-99, January 17, 2001, and Proclamation 7402, January 20, 2001.

23. U.S. Congress, House Committee on Resources, *National Monument Fairness Act*. Report 107-408, 107th Cong., 2d Sess., April 15, 2002.

which have the effect of putting the international prestige of the United States on the line. To be sure, a newly elected president can withdraw from international agreements negotiated by his predecessor—doing so, however, may damage relations with the other nations that were party to the agreement, just as they harm the United States' perceived credibility in the globe more generally. Consider two such examples, one involving a president's efforts to dissolve an international crisis, the other an effort to construct a new international court.

In 1981, outgoing President Carter used executive orders, many signed on his last day in office, to secure the release of American hostages held in the Tehran embassy since November 1979. These orders committed the United States to abide by a series of international agreements governing the disposition of claims against the Iranian government. Although it was within the Reagan administration's power to revoke them, the fact that Carter had used the orders to bind the nation to international law made the legal situation much more complicated than it would have otherwise been:

Had President Reagan been confronted with a piece of unwanted domestic legislation, he would have had to consider only the domestic political ramifications of the course he took. By contrast, in adhering to the Algiers Declarations, President Carter had bound the United States to international obligations that thereby rendered the United States accountable to the international community. Further, in contrast to many treaties which contain obligations but do not contain clear provisions as to remedies for violations of those obligations, the Algiers Declarations expressly created an enforcement mechanism: the Iran-United States Claims Tribunal—with the power to resolve disputes over the interpretation and performance of any provision to the Declarations. Thus, the Reagan Administration knew from the outset that its stringent interpretation of the Declarations could be passed upon by an international tribunal. (Combs 2001, 307-8)

Combs, who was a legal adviser to the claims tribunal, also notes that although the Reagan administration was hardly enthusiastic about the agreement Carter had negotiated, officials ultimately saw no alternative to implementing it.²⁴

On December 31, 2000, Clinton announced that the United States would become a signatory to the Treaty of Rome, which established the International Criminal Court (ICC). The United States was one of seven nations to vote against the final treaty in 1998, largely because of concerns that the ICC would be able to assert jurisdiction over U.S. military personnel. "The principal objection raised by the administration . . . was that American nationals, particularly members of the armed services, could in certain contingencies be subjected to trial in the new court without the specific consent of the United States" (Leigh 2001, 126).²⁵ But on the last day on which nations could sign,

24. Some administration officials urged Reagan to abrogate the agreement, under the theory that it was negotiated under threat, and therefore invalid. Other possibilities included "selective implementation," although the Office of Legal Counsel concluded that this was not a viable option (Combs 2001, 342-44).

25. Monroe Leigh, "The United States and the Statute of Rome," *American Journal of International Law* 95, no. 1 (2001), 124-31.

Clinton reversed course. And he did so without any intention of even submitting the treaty for Senate ratification.²⁶

Unlike Carter's Algiers Declaration executive orders, Clinton's decision did not formally bind the incoming administration to the ICC. Still, many international legal scholars argued that as a signatory, the United States *did* have an obligation under international law to refrain from actively working to undermine the treaty.²⁷ But the Bush administration, along with Congress, remained strongly opposed to the ICC. It was obvious to all observers that ratification was out of the question; indeed, Congress enacted language to a 2002 supplemental Department of Defense Appropriations Act that prohibited any expenditures "to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court."²⁸

In May 2002, shortly before the new ICC was set to enter into force, the White House announced its intention to "unsign" the treaty and renounce all obligations as a signatory, an act that UN officials claimed was unprecedented (Lewis 2002). Yale Law School professor Harold Hongju Koh called the action a "profound error," and argued that the United States was missing what he called "an international *Marbury v. Madison* moment" that could redefine the role of international institutions (as quoted in Lewis 2002). Former presidential candidate John Anderson argued that the repudiation "[tra-duced] one of the most important principles of American democracy" (2002, 7).²⁹ Critics claim that the nation was playing a particularly sharp-edged form of political hardball, withholding foreign aid from any country that refuses to immunize U.S. citizens against ICC action, and threatening to veto any Security Council resolutions on peacekeeping operations unless U.S. military personnel are exempted from ICC jurisdiction (Becker 2003; Marquis 2002).

Of course not everyone thinks that withdrawing from the Treaty of Rome is a bad idea, and the withdrawal did not attract a significant amount of public attention (Rabkin 2002; Swaine 2003). But the move did (and continues to) complicate foreign policy, requiring the Bush administration to expend political capital that it might otherwise have been able to devote to other purposes.

Conclusion

At its core, this article identifies a straightforward empirical pattern. Contrary to conventional wisdom on the matter, presidents do not quietly relinquish their powers

26. "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." President Clinton, "Statement on the Rome Treaty on the International Criminal Court," *Weekly Compilation of Presidential Documents*, December 30, 2000, p. 4.

27. For a fuller analysis of this issue, see Swaine (2003).

28. PL 107-117, section 8173.

29. For other criticisms of the decision, see Arnold (2003) and Scheffer (2002).

the moment that the nation votes them out of office. Instead, these presidents squeeze these last moments in office for all they are worth, issuing all sorts of rules and directives, many of which cannot be changed without exacting a significant political price to either the incoming president or to the nation as a whole. While legislative processes may lay dormant at the end of a presidential term, the production of unilateral directives kicks into high gear.

More generally, though, our analysis makes use of an emerging theoretical emphasis on the president's unilateral powers. We argue that presidents have always had a motive to wield their power up to the very last minute. Our contribution is a confirmation that presidents have the means to do so in ways that establish concrete and enduring policies—policies that the current Congress would likely refuse to enact, and that the succeeding president is sometimes forced to accept.

Reflecting upon the legitimacy of these “lame-duck” policies, we can distinguish between two types of last-minute presidential actions. The first are those that are consistent with the presidential preferences as expressed throughout his term, or which are merely an extension or continuation of existing policy. Because policy processes, even for unilateral actions, take time, a decision issued a week before the inauguration might reflect work that has been going on for months—even well before the election. The second category consists of those decisions that *would not have been made* had the president (or at least the president's party) been reelected. Such policies are either inconsistent with previous actions or are sufficiently controversial that they would have created unacceptable political consequences for the president. As we have noted, defeated presidents are no longer encumbered by the threat of electoral retribution; by definition, that threat has already been carried out. Outgoing presidents need no longer concern themselves about the electoral consequences of what they do during the transition, or about how a controversial decision will affect the rest of their agendas. A poorly considered act could, of course, affect a president's legacy, but that is more of a personal than a public concern. Democratic accountability, if it is to be exercised at all, can only be enforced through indirect means, such as through threats that an unpopular last-minute action might hurt a future presidential nominee.

Obviously, some policies that emerge in the final months of a president's term have nothing to do with presidents trying to rush through last-minute orders that they either could not, or would not, advance during the first three and three-quarter years of their term. Many, however, do. For instance, Bush's Christmas pardons of key Iran-Contra figures, and Clinton's notoriously controversial pardons of Marc Rich and Carlos Vignali, generated such strong criticism that it is easy to infer that they would not have happened had Bush won reelection in 1992 or Gore succeeded Clinton in 2000. In addition, the findings from the regression models suggest that many more reflect presidential efforts to hurry through last-minute orders before the closing of their administrations. The models, recall, control for intra-year, intra-administration, and administration fixed effects. Moreover, the interaction effects of end-of-term periods and party switches generate substantively large and statistically significant effects. Given that transitions from Democratic (Republican) to Republican (Democratic) administrations yield significantly higher levels of regulatory outputs than do Democratic (Republican) to Democratic

(Republican) transitions, we can fairly attribute these bursts of activities to something more than just standard regulatory processes.

As Susan Dudley notes, "Of course, some of these so-called midnight regulations may have been developed carefully over many years, in a rulemaking process that just happened to have culminated during the final months of the administration. But certainly others were hurried into effect without the usual checks and balances, and may cater to special interests rather than the public interest."³⁰ As an example, Dudley documents new Department of Energy standards mandating minimum energy efficiency for air conditioners, heat pumps, and washing machines that typically require upward of a decade to develop, but that "hurtled through the regulatory process at lightning speed" during the last couple of months of Clinton's administration.

Criticisms, of course, are easily cast at last-minute policy making, both the directives themselves and the powers presidents deploy to issue them. Nancy Combs, for instance, expresses concern that "a democratic tension arises whenever a lame-duck office holder uses his remaining days in office to advance policy objectives that he believes his successor does not support." These directives lack the sort of legitimacy that pre-election activity has, because by definition they are issued after a president (and, in many cases, his party) has been repudiated at the polls. Moreover, there are no opportunities for democratic accountability, because, again, voters do not have a subsequent chance to express their approval or disapproval.³¹

To engage this normative debate, however, is to concede a basic fact that runs contrary to conventional understandings of presidential power: precisely when powers of persuasion abandon them, when presidential command over the legislative process reaches its low point, presidents regularly strike out on their own, set vitally important public policies, and leave it up to Congress and an incoming administration to try and recover an old status quo.

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30. See Susan E. Dudley, "Midnight Regulations at All-Time High," *Intellectual Ammunition*, March 1, 2001. Available from <http://www.heartland.org/Article.cfm?artId=99>.

31. The political legitimacy of the second type of decision—as distinct from the formal legal legitimacy—is certainly open to question. Nevertheless, it is difficult to make blanket statements about legitimacy unless we are prepared to divorce the concept from other perhaps equally valid considerations—such as justice or fairness. It is quite possible that a president could make an unpopular or politically risky decision that happens to be fair.

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