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# Commentary: Is There a Silver Lining to Midnight Mischief?

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TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS
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# TRANSITIONS

## Legal Change, Legal Meanings

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# Commentary on Chapter 2

## Is There a Silver Lining to Midnight Mischief?

*William L. Andreen*

## I. Introduction

Even the dullest of publications can make good reading during the last few months of a presidential administration. This is especially true when the incoming president is from the opposing political party. Those months typically witness, at least since the 1970s, a rush to publish many new regulations in the *Federal Register* as the incumbent administration scrambles to leave its mark on national policy.[1]

Such midnight rulemaking often produces "an instinctively negative reaction."[2] The reasons why this kind of last-minute activity is so roundly condemned are not altogether clear, but the reaction is likely linked to three factors identified by Nina Mendelson. First, it appears antidemocratic "because it seems aimed at undermining the control and authority of the newly elected President."[3] Second, since these rulemakings often occur after an election, the "voters potentially lose an important tool for holding agencies accountable."[4] Perhaps the most important reason for this often-visceral reaction is the perception by many that the lame-duck president is simply thumbing his nose at the president-elect and those who voted for him.[5] In short, the outgoing administration is not acting in an honorable, sportsmanlike fashion because it is trying to tie the hands of the duly elected, incoming administration, a figure of speech that is especially apt in the case of rulemaking since rescinding or otherwise altering a final administrative rule can consume a great deal of time and effort.

Despite the fact that late-term rulemakings are often considered unsporting and a form of policy mischief, Nina Mendelson has identified in her chapter an instance where such rulemakings appear to facilitate greater



democratic participation in the rulemaking process. The example involves two rulemakings involving the Endangered Species Act that were finalized during the waning days of the administration of President George W. Bush.[6] The rules were controversial, and widely opposed,[7] and the new administration indicated, at least initially, that it would seek to reverse both.[8] All of this attracted the attention of Congress, and a debate ensued that otherwise might not have occurred.[9] That debate, Mendelson suggests, may have prompted the new Obama administration to reevaluate its initial position on one of the rules and eventually embrace it rather than rejecting it.[10] Thus, Mendelson concludes that midnight rulemakings can lead to better-informed and more democratically responsive decisions than might otherwise be the case.[11]

Mendelson, therefore, has identified a possible silver lining in midnight mischief. The controversy surrounding these rules, undoubtedly heightened by their eleventh-hour timing, did generate attention and debate in Congress. And the content of that debate may have influenced the administration, at least to some extent, to change its position and accept one of the rules rather than reject it out of hand. Mendelson, as a result, has made an important contribution to a richer, more accurate understanding of this phenomenon. Midnight rules are not necessarily always a negative factor, even when an outgoing administration promulgates a rule knowing that it will create difficulties for the new president.

Did this congressional involvement, however, actually change the Obama administration's mind? Even if it had some influence in doing so, is it an odd case? Is it just an interesting anecdote that proves little about the overall costs and benefits of late-term rulemaking? In short, are the problems posed by midnight mischief offset by the occasional salutary effect? This chapter is an attempt to place Mendelson's valuable observation into the overall context of late-term administrative actions.

## II. Distinguishing between Midnight Mischief and Legitimate Last-Minute Administrative Action

Not all administrative work done during the waning days of a presidential administration is objectionable as a form of midnight mischief. As long as the Constitution provides for an approximately eleven-week transition period,[12] the normal processes of government must continue while the new president-elect waits off-stage. Most of this work is routine.[13] Permits must be processed; grants made; enforcement actions instituted; projects overseen; and civil servants hired. None of that is problematic. In addition, it

is not truly objectionable that administrative activity tends to rise during the last weeks of an administration. As Jack Beermann has pointed out, there are perfectively natural aspects of human life—such as working to a deadline and hurrying to do as much as possible at the last minute—that also animate or reflect the life of administrative bodies.[14]

Nonetheless, a number of late-term actions certainly appear "unseemly."[15] One obvious example is when an outgoing administration attempts to embed its ideological bent into the administrative state by placing political appointees, who serve at the will of the president, into key civil service positions or even the Senior Executive Service where they can only be removed from office for cause.[16] While some such moves may at least occasionally be well motivated, placing well-qualified and not overtly political individuals into career positions, such appointments appear, overall, to be an effort to insert some loyal retainers into agencies in order to undercut new policy directions the next administration may wish to pursue.[17] Last-minute rulemakings may also appear particularly political in nature. They may be hurried and as a result poorly considered.[18] Even more troubling is the fact that many late-term rulemakings appear to involve policy decisions on which the incoming administration will likely disagree. Such actions will, of course, divert a new administration from pursuing its policy initiatives as it attempts to repair the damage that it perceives has just been done.

The distraction caused by such rulemakings is not insignificant. Agencies are bound to follow their own regulations until the rules are validly amended or rescinded.[19] Thus, agencies must promulgate a new rule to undo eleventh-hour regulations, and that involves a lengthy and complicated process. Not only must agencies give notice and take comment on proposed rules,[20] but they must also respond in writing to every significant comment made in the final rulemaking.[21] In addition, although an agency may have good reason for abrogating all or part of a recently promulgated rule, the existence of an administrative record supporting or tending to support a contrary position may add substantially to the litigation difficulties the agency will face on judicial review.[22]

Finally, an agency may well have to contend with a myriad of add-on analyses that Congress and various presidents have appended to the rulemaking process for certain kinds of rules such as the Regulatory Flexibility Act,[23] the Unfunded Mandates Reform Act,[24] the Paperwork Reduction Act,[25] the Congressional Review of Agency Rulemaking Act,[26] the Data Quality Act,[27] and Executive Order 12,866, which provides for cost-



benefit assessments and review by the Office of Regulatory Affairs located within the Office of Management and Budget.[28] These congressional- and presidential-level analytical requirements have slowed down the rulemaking process and have imposed even greater administrative costs.[29]

So, outgoing administrations that hurry through last-minute rulemakings knowing that they will be anathema to an incoming administration are clearly acting in a cynical and wasteful fashion, knowing that their action will not likely survive long, but also knowing that the process of rescission or amendment will chew up precious time and resources. That is bad enough for a substantive rule that is aimed at regulating the conduct of the private sector. It is, however, perhaps even worse when a procedural rule, pertaining to internal governmental processes, is promulgated, such as the last-minute Bush rule that dealt with federal agency consultation under section 7 of the Endangered Species Act. In such cases, the only entity the new rule is going to govern is the incoming administration, at least until such time as the new process is altered by rulemaking. Such an attempt to procedurally hamstring a new administration seems especially pernicious to me since it is so invasive of the internal decision-making process within the next administration.

On the one hand, one can argue that the outgoing administration should pursue its policy agenda until the last possible moment. That is certainly within its authority, and it might even feel entitled to do so since it may have been treated in similar fashion when it initially took office. On the other hand, the more problematic actions of an outgoing administration do not contribute to an easy or efficient transition, which is a serious problem since smooth transitions of power could advance the public interest by encouraging the healing of some of the raw nerves exposed during the preceding electoral cycle. By setting a good example and exhibiting more civility, the outgoing administration would set a more constructive tone that could promote the kind of bipartisan discussion and compromise necessary on Capitol Hill to more effectively govern our nation.

## III. A Closer Look at Mischief's Silver Lining

Midnight mischief, due to its timing and often due to its ideological content, often precipitates controversy and produces ill will. This reaction is most notable among those stakeholders who are especially concerned with the subject matter of the mischief. However, the alarm bells may also be set off in Congress. This was the case with the two Endangered Species Act rules examined by Mendelson, both of which were finalized in mid-

December 2008—approximately one month before the inauguration of the new president.

The Endangered Species Act requires that all federal agencies "in consultation with and with the assistance of" the Fish and Wildlife Service or National Marine Fisheries Service must "insure" that their actions are "not likely to jeopardize the continued existence" of any endangered or threatened species.[30] To facilitate compliance with that prohibition, the statute requires these agencies to inquire of the Services about the presence of listed species within areas to be affected by their actions.[31] If such species may be present, the action agency must complete a biological assessment to identify any endangered or threatened species.[32] The rule, which was altered by the first midnight rule Mendelson examined, required the action agency to submit its biological assessment to the appropriate wildlife service for review and to initiate formal consultation unless the service concurred in writing that the action was not likely to adversely affect any listed species.[33] Instead, the midnight rule would permit the action agency to avoid consultation, without seeking concurrence from either service, if the action agency on its own determined that the action would not cause a take of a listed species[34] and (1) would not have an effect on a listed species; (2) would have effects that would be manifested through a global process such as climate change; or (3) would have effects that are difficult to measure or detect.[35] The new rule, therefore, would have eliminated consultation under the Endangered Species Act for a wide number of actions and permit action agencies to "unilaterally determine the appropriateness of its action" under the act.[36]

The second rule was a direct response to the May 2008 listing of the polar bear as a threatened species and reflected concern that any project located anywhere in the country might be affected if it could be linked to an enhancement of anthropogenic climate change and thus harm the polar bear. This rule, consequently, eliminated the prohibition on incidental takes of the polar bear for activities outside the bear's range. It also declared that the act's prohibition on take would not apply to any activity that is conducted in compliance with the Marine Mammal Protection Act or the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[37]

The two rules created quite a stir. Over 265,000 comments were submitted on the proposed rules, most in opposition, and lawsuits were filed immediately to overturn the final consultation rule. The controversy reached Congress as well where a rider to an appropriations bill was passed giv-



ing the relevant agencies the authority to summarily withdraw both rules and reinstate the prior consultation rule.[38] According to Mendelson, it appeared at the time that this course of action was in line with the desires of the Obama administration.[39] However, the administration only withdrew the consultation rule, reinstating the older one,[40] while leaving in place the polar bear rule,[41] a move that may have been presaged by the president's memorandum of March 3, 2009, which called upon the relevant agencies to review only the consultation rule.[42]

Mendelson suggests that the apparent change in the administration's approach may have resulted from a debate that occurred in the Senate on an amendment offered by Senator Murkowski of Alaska[43] and three colleagues to delete the appropriations rider.[44] During this debate, which occurred on March 5, 2009, a number of senators attacked the Bush administration's consultation rule, while those supporting the amendment focused upon the polar bear rule.[45] Those supporting the amendment argued that, without the polar bear rule, the Endangered Species Act would be transformed into a forum where climate change policy would be developed case by case on the basis of projects involving small incremental increases in total greenhouse gases and the impacts those projects would have upon Arctic ice and the polar bear.[46] The amendment failed to pass, however, and the rider was enacted into law.[47]

Following enactment of the rider, a great deal of pressure was applied to overturn both rules. Forty-one members of the House, eight senators, over 13,000 scientists, and more than 200,000 citizens asked the agencies to rescind both rules.[48] However, there were indications that the polar bear rule was not as controversial, as broadly damaging, or perhaps as easily understood as the consultation rule. While 235,000 comments had been submitted on the proposed consultation rule, not quite 30,000 were filed on the proposed polar bear rule.[49] Some groups, moreover, concentrated their efforts in the spring of 2008 upon overturning the consultation rule.[50] There may have been good reason for the differential levels of intensity in the public's response to the two rules.

During the prior year, the polar bear rule had been widely discussed within the executive branch. The U.S. Geological Service (USGS), for example, had concluded in May 2008 that it was "currently beyond the scope of existing science to identify a specific source of $CO_2$ emissions and designate it as the cause of specific climate impacts at an exact location."[51] In addition, the EPA observed in early October 2008 that "[t]he climate change research community has not yet developed tools specifically in-

tended for evaluating or quantifying end-point impacts attributable to the emissions of [greenhouse gases] GHGs from a single source, and we are not aware of any scientific literature to draw from regarding the climate effects of individual, facility-level GHG emissions."[52] The solicitor of the Department of the Interior, therefore, concluded in the fall of 2008 that "any observed climate change effect on a member of a particular listed species or its critical habitat cannot be attributed to the emissions from any particular source."[53] In short, the Endangered Species Act is not well designed to address the problem of climate change; it is too narrow and reactive.[54] So, even though these memoranda were signed by political appointees, the professional staff in both services were likely well aware of the administrative difficulties that would follow a rescission of the polar bear rule. Many members of the public might also have realized this problem. It should have been no surprise, therefore, that the new secretary of the interior, Ken Salazar, mirrored these concerns when he announced in May 2009 that the polar bear rule would be retained. While recognizing the impact of climate change upon the polar bear, he said that the control of greenhouse gases "requires comprehensive policies, not a patchwork of agency actions carried out for particular species. It would be very difficult for our scientists to be doing evaluations of a cement plant in Georgia or Florida and the impact it's going to have on the polar bear habitat."[55] He added that "I just don't think the Endangered Species Act was ever set up with that contemplation in mind."

## IV. Evaluating the Value of the Silver Lining

It appears that the Senate debate that occurred on March 5, 2009, may have had little to do with the eventual decision by Secretary Salazar to keep the polar bear rule in place. The difficulty of predicting the impact of individual projects around the country upon the polar bear and its habitat was well known within the relevant portions of the government and some segments of the public.[56] The specter of a morass of litigation, if the polar bear rule was not retained, was also likely well understood.[57] Furthermore, the president's memorandum of March 3 gave a strong signal that the administration was already considering retention of the polar bear rule.[58] Nevertheless, one cannot rule out the possibility that the debate might have had some impact on the administration's decision. In any case, discussion of issues like this on Capitol Hill always has value. Such discussions shed light on the views of the members and their constituents; such discussions can also cast certain issues in a new way, with new facts and new



arguments. Finally, congressional discussions tend to receive more attention than most discussions in our society. They are, if you will, amplified in such a way that much of what is said on Capitol Hill is heard at least by the relevant stakeholders.

Regardless of the impact of this particular debate, it is not difficult to envision situations where congressional consideration of midnight rules would make a significant difference.[59] Certainly, the passage of the appropriations rider made it easier for the Obama administration to rescind the Bush administration's consultation rule and reinstate the prior rule. Congress can also enact legislation overturning a midnight rule.[60] Congressional consideration can also, as Mendelson argues, prompt heightened public discussion and interbranch dialogue and, in doing so, encourage a more deliberative and more democratic decision-making process.[61] Whether the cost of midnight rulemaking is outweighed by the value of this kind of additional dialogue depends, in part, upon how often it occurs. Certainly, Congress's ability to respond would be swamped if a deluge of last-minute rulemaking were to take place.[62] Even in the absence of a deluge, however, it may well be that Congress only has the time or inclination to respond to the most controversial of rules. After all, Congress is a political institution, not an expert agency that is charged with executing thousands of tasks, many of them highly technical in nature and others that, while more value-oriented in nature, are nevertheless constrained to one extent or another by statutory standards and technical considerations.

## V. Conclusion

The legitimacy of policymaking performed by unelected administrators depends in no small measure upon the accessibility of those officials to the ideas and arguments presented by the public from whom their authority derives.[63] Congress, in turn, can serve as a vehicle for distilling and communicating these views to the administrative state. On occasion, midnight rules can spark the kind of controversy that ignites additional public debate, including discussions on Capitol Hill, all of which may lead to more thoughtful and democratic decision making at the administrative level. Determining whether a particular debate in Congress actually affected an administrative decision is a difficult undertaking as illustrated by the two rulemakings that Mendelson and I address. One cannot, however, gainsay the value of additional dialogue in a democratic society. The ultimate question, however, is whether it occurs often enough and in significant enough fashion to outweigh all of the negatives produced by mid-

night mischief. Chief among those negatives, perhaps, is the fact that the outgoing administration has abjured an opportunity to set a more constructive tone during the transition, a tone that could reduce the level of partisan rancor and lead to more bi-partisan cooperation in the next administration. One might hope that future administrations would demonstrate more civility in pursuit of smoother and more productive transitions. Unfortunately, that is most likely a vain hope.

## Notes

1. As Susan E. Dudley has noted, "sudden bursts of regulatory activity at the end of a presidential administration are systematic, significant, and cut across party lines." Susan E. Dudley, "Reversing Midnight Regulations," *Regulation* (Spring 2001): at 9.

2. Jack M. Beermann, "Combating Midnight Regulation," *Northwestern University Law Review* 103 (2009): 352.

3. Nina Mendelson, "Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives," *New York University Law Review* 78 (2003): 557, 566.

4. Ibid., 566–567.

5. Ibid., 565.

6. Nina Mendelson, "Midnight Rulemaking and Congress," this volume, 54.

7. The Department of the Interior, for example, received nearly 30,000 comments on the proposed polar bear rule (73 *Federal Register* 76,249, 76,263 [December 16, 2008] and a whopping 235,000 comments on the consultation rule (73 Federal Register 76,272 [December 16, 2008]), most of them opposed to it. 39 Envt. Rep. (BNA) 2371, 2372 (2008). Four lawsuits were immediately filed to challenge the consultation rule. *Ctr. for Biological Diversity v. Kempthorne,* No. 08-5546 (N.D. Cal., filed December 11, 2008); *Natural Resources Defense Council v. Dep't of Interior,* No. 08-5605 (N.D. Cal., filed December 16, 2008); *Nat'l Wildlife Fed'n v. Kempthorne,* No. 08-5654 (N.D. Cal., filed December 18, 2008); *State of Cal. v. Kempthorne,* No. 08-5775 (N.D. Cal., filed December 29, 2008). An earlier version of the polar bear rule had already been challenged in *Ctr. for Biological Diversity v. Kempthorne,* No. 08-1339 (N.D. Cal.) (Second Amended Complaint).

8. Mendelson, "Midnight Rulemaking and Congress," 69.

9. Ibid., 70.

10. Ibid., 71.



11. Ibid., 71, 72–73.

12. A fairly lengthy transition period appears to be absolutely necessary given our system of government. Absent a parliamentary approach to government, where a shadow government with likely cabinet members already exists in the legislative branch, a nearly three-month period within which to organize a government is not unreasonable.

13. Mendelson, "Agency Burrowing," 564.

14. See Jack M. Beermann, "Presidential Power in Transition," *Boston University Law Review* 83 (2003): 950–951.

15. Mendelson, "Agency Burrowing," 564.

16. See Juliet Eilperin and Carol D. Leonnig, "Administration Moves to Protect Key Appointees," *Washington Post,* November 18, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/17/AR2008111703537.html (last visited June 26, 2011) (recounting the Bush administration's move of fourteen political appointees into career jobs and six others into the Senior Executive Service [SES]). This is not unusual. The Clinton administration shifted forty-seven political appointees into the SES or other career positions during its last year in office. Ibid.

17. Agency reorganizations can also play havoc in some instances with the policy aims of an incoming administration. See Mendelson, "Agency Burrowing," 607–608.

18. The consultation rule discussed by Mendelson appears to have been particularly rushed. According to the Associated Press, the Fish and Wildlife Service set a deadline and assembled a special team in Washington to review over 200,000 public comments in a four-day period. See "Feds Rush to Ease Endangered Species Rules," msnbc.com, October 21, 2008, http://www.msnbc.msn.com/id/27312289/ (last visited June 26, 2011).

19. *United States v. Nixon,* 418 U.S. 683 (1974); *Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

20. 5 U.S.C. § 553(b), (c).

21. *Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375, 393–394 (D.C. Cir. 1973), cert. denied, 403 U.S. 921 (1974) (construing 5 U.S.C. § 553(c)).

22. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29 (1983).

23. 5 U.S.C. §§ 601 et seq.

24. 2 U.S.C. §§ 658, 1501–1503, 1531–1536, 1571.

25. 44 U.S.C. §§ 3501 et seq.

26. 5 U.S.C. §§ 801–808.

27. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106–554, § 515 (2001).

28. 58 *Federal Register* 51,735 (September 30, 1993), as amended by Exec. Order 13,258, 67 *Federal Register* 9,385 (February 26, 2002), and by Exec. Order 13,422, 72 *Federal Register* 2,763 (January 23, 2007).

29. While more stringent judicial review and the judicial elaboration upon the bare procedural bones of informal rulemaking under the Administrative Procedure Act may have slowed the rulemaking process, those developments certainly improved the overall quality of agency deliberation without ossifying the process itself. See William L. Andreen, "Administrative Rulemaking in the United States: An Examination of the Values that Have Shaped the Process," *Canberra Bulletin of Public Administration* 66 (October 1991): 112, 116. I am afraid that I cannot say the same for the cumulative efforts of Congress and a series of presidents to try to control the direction of agency rulemaking. When the total impact of the requirements imposed by the three branches is considered, however, it is relatively easy to conclude that the process has become ossified. See Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal* 41 (1992): 1385.

30. Endangered Species Act (ESA) § 7(a)(2), 16 U.S.C. § 1536(a)(2). The Fish and Wildlife Service is an office located within the Department of the Interior and the National Marine Fisheries Service is a division in the Commerce Department.

31. ESA § 7(c)(1), 16 U.S.C. § 1536(c)(1). The rule was promulgated in 1986.

32. Ibid.

33. 50 C.F.R. §§ 402.12(j); 402.13(a); 402(b)(1) (2009).

34. A take is broadly defined to include "harm, . . . kill, [or] capture" (ESA § 3(19), 16 U.S.C. § 1532(19)), and "harm" has been administratively defined as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2009).

35. 73 *Federal Register* 76,272, 76,287 (December 16, 2008).

36. Mendelson, "Midnight Rulemaking and Congress," 67.

37. See 73 *Federal Register* 76,249 (December 16, 2008). The rule basically restated, with some modifications, an interim final rule, which was promulgated, without prior notice and comment, on the same day as the polar bear was listed as a threatened species. See 73 *Federal Register* 28,306 (May 15, 2008).

38. Mendelson, "Midnight Rulemaking and Congress," 68.

39. Ibid. A presidential memorandum, issued on March 3, 2009, however, requested only the secretaries of the Interior and Commerce review the consultation rule. Memorandum from Barack Obama, President, to Heads of Executive Departments and Agencies: The Endangered Species Act (March 3, 2009) (requesting, moreover, the heads of all agencies to exercise their discretion and continue following the prior, long-standing practices involving consultation and concurrence), http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/ (last visited June 26, 2011).



40. 74 *Federal Register* 20,421 (May 4, 2009).

41. Mendelson, "Midnight Rulemaking and Congress," 69–70.

42. See n. 39.

43. Senator Murkowski had previously criticized the listing of the polar bear as a threatened species calling the decision "grossly premature" due to uncertainties about climate change. She also expressed concern that the listing decision had opened "a Pandora's Box that the [Bush] administration" would not be able to close. Tom Kizzia, "Listing Disappoints State Political, Industry Leaders," *Anchorage Daily News*, May 14, 2008, http://www.adn.com/2008/05/14/406461/listing-disappoints-state-political.html (last visited June 26, 2011). Then-Senator Stevens of Alaska was even more strident in his denunciation, calling the decision "an unequivocal victory for extreme environmentalists" (ibid.), while Representative Don Young of Alaska deemed it "an assault on common sense." Erika Balstad, "Senators Blast Polar Bear's 'Threatened' Status," *Anchorage Daily News*, May 14, 2008, http://www.adn.com/2008/05/14/405693/senators-blast-polar-bears-threatened.html (last visited June 26, 2011). The State of Alaska, at the behest of then-governor Palin, later filed suit challenging the listing decision. See Mary Gilbert, "Palin Sued to Push Polar Bears Off Endangered List," *National Journal* Online, September 1, 2008, http://www.nationaljournal.com/conventions/co_20080901_2202.php (last visited June 26, 2011).

44. Mendelson, "Midnight Rulemaking and Congress," 68.

45. Ibid.

46. Ibid.

47. Ibid.

48. See "Save the Act, Save Species from the Climate Crisis," Center for Biological Diversity, http://www.biologicaldiversity.ort/campaigns/save_the_act_save_species_from_the_climate_crisis/index.html (last visited June 26, 2011).

49. See n. 7.

50. See Letter from the Center for Progressive Reform, to Ken Salazar, Secretary of the Interior, and Gary Locke, Secretary of Commerce (April 1, 2009) (on file with author).

51. See Memorandum from David Longly Bernhardt, Solicitor, U.S. Dept. of the Interior, to the Secretary of the Interior, Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases at 1 (March 3, 2008) (referring to a May 14, 2008, memorandum from the USGS entitled "The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts"), http://www.doi.gov/solicitor/opinions/M-37017 (last visited June 26, 2011).

52. Ibid., 5 (referring to a Letter from Robert J. Meyers, Principal Deputy Assistant Administrator, Office of Air and Radiation, EPA, to H. Dale Hall, Director, U.S. Fish and Wildlife Service, and James Lecky, Director of Protected Resources, National Marine Fisheries Service, "Endangered Species Act and GHG Emitting Activities" (October 3, 2008).

53. Ibid., 6.

54. See Holly Doremus, "Polar Bears in Limbo: How a Legal Morass Could Save the Environment," *Slate,* May 20, 2008, http://www.slate.com/id/2191707 (last visited June 26, 2011). Doremus, however, added that the litigation that would ensue, in the absence of the polar bear rule, might not be an altogether bad thing because it "would force us to confront the need for national greenhouse-gas legislation sooner rather than later." Ibid.

55. Andrew C. Revkin, "U.S. Curbs Use of Species Act in Protecting Polar Bear," *New York Times,* May 8, 2009, http://www.nytimes.com/2009/05/09/science/earth/09bear.html (last visited June 26, 2011).

56. See nn. 51–54 and accompanying text.

57. See Doremus, "Polar Bears in Limbo." The possibility of a massive amount of litigation may well have been the inspiration for Senator's Murkowski's Pandora's Box reference in May 2008. See n. 43.

58. See n. 42 and accompanying text.

59. See Mendelson, "Agency Burrowing," 620–627 (recounting the effect of congressional discussions, as well as public outcry, on the Bush administration's original plan to reverse the Clinton administration's last-minute rule restricting road building in national forests).

60. See Congressional Review of Agency Rulemaking Act, 5 U.S.C. §§ 801–808. Of some 50,000 final rules that have been submitted to Congress since the enactment of this legislation in 1996, the act has been used only once to disapprove of a rule. The rule that was overturned was the Occupational



Safety and Health Administration's November 2000 rule on ergonomics. See Curtis W. Copeland, Congressional Research Service, *Midnight Rulemaking: Considerations for Congress and a New Administration* 13 (2008).

61. Mendelson, "Midnight Rulemaking and Congress," 72; see also n. 59 (referring to the roadless area rule illustration).

62. Mendelson, "Midnight Rulemaking and Congress," 73.

63. *Sierra Club v. Costle,* 657 F.2d 298, 400–401 (D.C. Cir. 1981).