

Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations

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INTRODUCTION

Debates over regulatory policy focus both on the substance of regulations and on the nature of the regulatory process. Despite the often strident nature of these debates, there are several propositions that generate widespread agreement. Few would argue that the substance of regulations has been dramatically different in the George W. Bush Administration than in that of Bill Clinton.¹ And while the merits of various aspects of the regulatory process are the subject of considerable debate, the vigor with which these debates are carried out² is evidence of agreement that the process is important.

Despite the perceived importance of the regulatory process in affecting regulatory substance, large-scale empirical examinations of the process are limited. In particular, we have little idea how the regulatory process varies with changes in regulatory substance. Does the process look very different in a presidential administration that has a pro-regulatory outlook than in one that favors deregulation? This article is a large-scale empirical examination of the role of procedural controls in the rulemaking process. I compare variables characterizing the regulatory process from analogous periods in the Clinton and Bush (43) administrations. It is well documented that the regulatory preferences of these two presidents are quite different.³ Despite this, I find that the regulatory process is remarkably similar

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¹ See, e.g., CTR. FOR AM. PROGRESS & OMB WATCH ON BEHALF OF CITIZENS FOR SENSIBLE SAFEGUARDS, SPECIAL INTEREST TAKEOVER: THE BUSH ADMINISTRATION AND THE DISMANTLING OF PUBLIC SAFEGUARDS (2004).

² See, e.g., Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL'Y 589 (2004); John D. Graham, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953 (2006).

³ THOMAS O. MCGARITY, SIDNEY A. SHAPIRO, RENA I. STEINZOR, JOANNA GOGER & MARGARET CLUNE, CTR. FOR PROGRESSIVE REGULATION, TRUTH AND SCIENCE BETRAYED: THE CASE AGAINST THE INFORMATION QUALITY ACT (2005).

between the Clinton and Bush administrations. I looked at more than 900 regulations issued by the two administrations. The administrations received similar numbers of comments on their rules, bypassed the public comment process at similar rates, changed rules between proposal and finalization at similar rates, used regulatory analysis requirements with nearly identical frequencies, and took roughly the same length of time to complete regulations.

This finding raises questions about the relationship between the regulatory process and substantive regulatory outcomes. While similar values for these regulatory process variables does not mean that procedures have no impact on regulatory substance, it does cast doubt upon the academic and political emphasis on procedural reform to the regulatory process.

Part I of this article reviews the literature on the role of procedural controls in the regulatory process. In Part II, I introduce the data that I have collected regarding rulemaking under Presidents Bush and Clinton, and identify some of the data's most basic features, for example, which agencies were issuing rules under each administration. In Parts III, IV, V, and VI, I compare various aspects of the data under each administration: Part III focuses on the public-comment process, with particular emphasis on the volume of comments received; Part IV reviews the extent to which rules changed between proposal and final promulgation; Part V describes the role of other procedures; and Part VI considers the time it took to finalize rules. Finally, I draw conclusions about the differences between administrations and suggest implications for theories of political control of the regulatory state.

I. PROCEDURES, PRESIDENTS, AND RULEMAKING

Matthew McCubbins, Roger Noll, and Barry Weingast (who together are often referred to as McNollgast) highlighted the role of procedures in political control of bureaucrats nearly twenty years ago.⁴ According to the theory articulated by McNollgast, when Congress creates or empowers a bureaucratic agency, it creates a certain procedural environment. This

⁴ Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McNollgast 1987]. See also Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

environment, Congress hopes, will ensure that the interests represented by the enacting coalition remain in a favorable position with respect to agency decisions.⁵ This “deck stacking” ensures that the bureaucracy implementing a statute faces the same environment as the coalition enacting the statute.⁶ While McNollgast specifically referred to procedural controls contained within specific statutes, their argument applies equally to controls on an entire series of bureaucratic actions such as rulemaking.⁷ A later work by McNollgast uses the APA as an example of such a control.⁸

The notion that procedural controls severely constrain the decisions of bureaucrats and future politicians has received a fair amount of criticism. Notably, Murray Horn and Kenneth Shepsle argue that those implementing procedural controls ignore the tradeoff between coalitional and bureaucratic drift.⁹ A control that will successfully stifle bureaucratic discretion will be unable to prevent changes in policy by a new legislative coalition, and vice versa.¹⁰ In other words, enacting coalitions may be able to control bureaucrats but the mechanisms that these coalitions create to do so will be in the hands of future political coalitions who may be hostile to the aims of those who created the procedures. Additionally, the enactment of procedural controls may have a more pragmatic explanation: rather than attempting to bind future bureaucrats, a requirement’s enactors may simply be implementing a compromise with those who seek to make it more difficult for an agency to regulate.¹¹

Another prominent criticism of McNollgast and other like-minded scholars was that they focused primarily on Congress and underestimated the role of the President in controlling agency decisions.¹² Harvard Law Professor and former Clinton Administration official Elena Kagan

⁵ McNollgast 1987, *supra* note 4, at 261.

⁶ *Id.*

⁷ Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

⁸ *Id.*

⁹ Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 504 (1989).

¹⁰ *Id.*

¹¹ See Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul Peterson eds., 1989). For additional criticisms, see William F. West, *Searching for a Theory of Bureaucratic Structure*, 7 J. PUB. ADMIN. RES. & THEORY 591 (1997); Glen O. Robinson, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Political Uses of Structure and Process*, 75 VA. L. REV. 483 (1989).

¹² See, e.g., Terry M. Moe and Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 43 (1994).

provided additional support to a number of these criticisms in her description of how the Clinton Administration used procedural tools developed by its Republican predecessors to shape regulatory policy despite the presence of a hostile Congress.¹³ According to Kagan, “the Clinton [Office of Management and Budget] chose to implement the [Reagan] order in a way generally sympathetic to regulatory efforts.”¹⁴ Kagan is referring here to Executive Order 12,291, the order issued by President Reagan empowering the Office of Management and Budget (“OMB”) to review agency regulations and imposing the requirement that federal agencies conduct cost benefit analyses.¹⁵ President Clinton replaced Executive Order 12,291 with Executive Order 12,866, which reaffirmed the central role of OMB in the regulatory process.¹⁶

Despite the academic debate over the precise role of regulatory process procedures, Congress and the President have both continually added procedures over the past several decades.¹⁷ The requirement that agencies follow a notice and comment process when engaging in rulemaking is one of the oldest such controls. Participation by interested parties in rulemaking predates the notice and comment process adopted in the Administrative Procedure Act (APA), passed in 1946.¹⁸ The notice and comment process has evolved considerably since the passage of the APA, as agencies now respond to comments in the preambles to their final regulations in order to ensure that courts will not find their actions arbitrary and capricious.¹⁹

As the use of rulemaking increased, so too did the number of procedural controls. In 1981, President Reagan issued Executive Order 12,291,²⁰ requiring both that agencies conduct cost-benefit analyses of certain regulations and that the Office of Information and Regulatory Affairs (OIRA) review proposed and final regulations from agencies on behalf of the President prior to their issuance.²¹ Scholars have characterized both

¹³ Elena Kagan, *Presidential Administration* 114 HARV. L. REV. 2245 (2001).

¹⁴ *Id.* at 2248.

¹⁵ Exec. Order No. 12,291, 3 C.F.R. 127 (1982). The role of regulatory review delegated to OMB in the Executive Order was carried out by the Office of Information and Regulatory Affairs (OIRA).

¹⁶ See Exec. Order No. 12,866, which explicitly made clear that the regulatory review function was to be carried out by OIRA.

¹⁷ See, e.g., *infra* notes 20, 23, 24, and 30.

¹⁸ 5 U.S.C. §§ 553(c) (2000).

¹⁹ Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1410 (1992).

²⁰ Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

²¹ Executive Order 12,291 was eventually replaced by Executive Order 12,866, which continued to require OIRA review and regulatory impact analyses. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

measures as attempts by enacting coalitions to control future bureaucratic decisions.²²

The Republican takeover of Congress in 1994 led to further attempts to place procedural constraints upon the rulemaking process. The Unfunded Mandates Reform Act, passed in 1995, required consideration of state and local views in regulatory decisions,²³ and the Small Business Regulatory Enforcement Fairness Act (SBREFA) required that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene panels of small business representatives to review rules to ensure that they did not unfairly burden small businesses.²⁴

How would we expect this panoply of procedures to affect agency regulatory decisionmaking? McNollgast expects procedures to help ensure that bureaucrats follow the wishes of the coalition that enacted the procedures.²⁵ In other words, the procedures are intended to create a decisionmaking environment for bureaucrats that mirrors that of the political coalition that created the procedure by empowering those groups that supported this coalition. Virtually all of the procedures in the regulatory process were enacted either by Republican Congresses or Republican presidents who were opposed to regulation.²⁶ Indeed, scholars have argued that even notice and comment, which is now hardly seen as partisan,²⁷ was enacted as a curb on agency action.²⁸ The procedures themselves have also often been described as anti-regulatory.²⁹ Therefore we would expect the pro-regulatory administration to have an interest in bypassing these procedures more frequently so as to avoid their anti-regulatory intent. It also seems reasonable to expect that, because of the anti-regulatory nature of procedural controls, such controls would have a

²² See, e.g., Steven Croley, *White House Review of Federal Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001).

²³ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

²⁴ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-53, 110 Stat. 847, 857-875 (1996).

²⁵ McNollgast 1987, *supra* note 4, at 262.

²⁶ All of the statutes mentioned in footnote 17 were passed by Republican Congresses. The Executive Order cited in footnote 20 was issued by President Reagan.

²⁷ KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65 (1969).

²⁸ McCubbins, Noll, and Weingast, *supra* note 7, at 193.

²⁹ See, e.g., Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 134 (1994); David M. Dreisen, *The Societal Cost of Environmental Regulation*, 24 ECOLOGY L.Q. 545, 609 (1997). Also, pro-regulation groups such as OMB Watch and the Center for Progressive Reform often argue forcefully against the adoption of regulatory procedures.

greater impact on regulatory efforts than on de-regulatory efforts. Certainly the expectation of the anti-regulatory coalitions that put the controls in place was that they would hamper regulatory initiatives. Therefore, we should see procedural controls play a more active role in a pro-regulatory administration than in an anti-regulatory administration.

But there is an argument to be made in the other direction. It is possible that an anti-regulatory administration, interested in slowing down the regulatory process, may wish to use procedural controls to do so. For example, such an administration might be more likely to declare rules as falling under the Regulatory Flexibility Act.³⁰ This would require agencies to do a regulatory flexibility analysis, which would add time to the regulatory process and create an additional means by which affected interests could challenge a final rule in court.³¹

Another outcome of the increased proceduralization of the regulatory process has been a debate over the “ossification” of rulemaking. In an influential 1992 article, University of Texas Law Professor Thomas McGarity argued that because writing a regulation had become so difficult for federal agencies (the rulemaking process had become “ossified”), agencies were turning away from rulemaking as a policymaking option.³² While there has been some debate over the extent of ossification,³³ it makes some intuitive sense that additional procedures would elongate the regulatory process.

Proponents of the ossification argument also tend to be supporters of government regulation.³⁴ If ossification is occurring we might expect to see regulatory efforts affected more than de-regulatory efforts. Indeed it has been argued that several procedures such as executive review and cost-benefit analysis are specifically designed not to impact deregulatory efforts.³⁵ Therefore we would expect to see greater evidence of ossification in a pro-regulatory administration than in an anti-regulatory administration.

With the movement of more and more regulatory data online, it has become possible to address these questions with large-scale empirical studies. University of Pennsylvania Law Professor Cary Coglianese

³⁰ 5 U.S.C. §§ 601-612 (2007).

³¹ *Id.*

³² McGarity, *supra* note 19, at 1393.

³³ See, e.g., Stuart Shapiro, *Speedbumps and Roadblocks: Procedural Controls and Regulatory Change*, 12 J. PUB. ADMIN. RES. & THEORY 29, 51 (2002); Richard Pierce, *Seven Ways to De-Ossify Agency Rule-Making*, 47 ADMIN. L. REV. 59 (1995).

³⁴ McGarity, *supra* note 19, at 1391.

³⁵ See generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

provides an excellent summary of the empirical work on the regulatory process.³⁶ He concludes that questions about how regulations are written could be better answered with more empirical work. As more data regarding rulemaking have appeared online, some larger studies have begun to appear.³⁷ Political scientist Steven Balla has examined public participation in the rulemaking process, comparing “e-rulemakings” with non-electronic rulemakings and detailing the various forms that participation takes in the rulemaking process.³⁸ Susan Webb Yackee examines forty rules from four agencies that received between 2 and 200 comments and found that comments made a difference on rules that do not receive much political attention, particularly when commenters agreed on a change.³⁹

This study is an attempt to further this trend toward larger-scale empirical studies of the regulatory process. Like Yackee and Balla, I examined the public comment process, although I focused more on the question of whether the process differed between the Bush and Clinton administrations. I also for the first time used a large dataset to examine other procedures in the regulatory process and their variance between presidencies. Finally, I marshaled the data to answer the question of whether the time to complete a rule varies between administrations.

II. THE DATA

The Federal Register is available online at <http://www.gpoaccess.gov/fr/index.html>, with browsable daily issues dating from 1998 and searchable issues dating from 1994. While the online availability of additional information like comments and analyses

³⁶ Cary Coglianese, *Symposium: Empirical and Experimental Methods of Law: Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002). Coglianese calls for more empirical research in all areas of the regulatory process, not just the role of procedural controls. *Id.* at 1137.

³⁷ See, e.g., WESLEY A. MAGAT, ALAN J. KRUPNICK & WINSTON HARRINGTON, *RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR* (1986). This larger, slightly older work examines EPA rules under the Clean Water Act in an attempt to explain variations in regulatory stringency across industry.

³⁸ See Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 ISJLP 59 (2005); Steven J. Balla and Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46 (2007).

³⁹ Susan Webb Yackee, *Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking*, 26 J. OF PUB. ADMIN. RES. & THEORY, 117-19 (2006).

supporting rules varies significantly by agency,⁴⁰ the text of and preambles to the rules are available for all rules, and are an important source of data. These texts include a wealth of information, including dates of issuance and effectiveness, whether the rules were subject to various procedural requirements, and, usually, the number of comments. Occasionally, the online material about a rule will also include information on the identity of the commenters and on the economic impact of the rule.

For this project, I collected data on nearly all final rules⁴¹ issued during corresponding months of the first term of the first Bush administration and the second term of the Clinton Administration. Ideally, one would have compared rules from the same term of each administration, but the rules from Clinton's first five years in office are not available online (browsable issues on the Federal Register website only go back to 1998). And it was unclear in 2003 whether there would be a second Bush term. I also wanted to avoid the final year of an administration because of the potentially atypical nature of rulemaking during this period.⁴² Therefore, I chose to gather data from November and December of 2003 and 1999.

To gather data, my research assistants and I combed through each issue of the Federal Register from these four months. With the exception of two variables, each piece of data was taken straight from the text of the final rule (or, where the data involved a proposed rule, from the corresponding proposed rule). One of the two exceptions is the variable representing the amount of time between the proposed rule's first appearance in the "Unified Agenda"⁴³ and the promulgation of the final rule. This variable will be discussed in Part V. The second exception is a variable quantifying the extent of change since the proposed rule, and this is discussed extensively in Section IV.

In the two months examined from the Bush Administration, there were a total of 400 final rules that met the criteria for inclusion.⁴⁴ During the

⁴⁰ The current Bush Administration's e-docketing system promises to give electronic access to all rulemaking dockets when it comes online.

⁴¹ I excluded temporary final rules, confirmations of effective dates, corrections to final rules, and "lists of radio station assignments" by the Federal Communications Commission. None of these actions are substantive policy changes.

⁴² Much has been written about "midnight rulemakings." See, e.g., Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U.L. REV. 947 (2003); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

⁴³ The Unified Agenda is published semiannually and contains agency descriptions of all of the regulations they plan on issuing over the next six months. See *infra* note 106.

⁴⁴ As explained in footnote 41, *supra*, I included only those rules that have some substantive content. A more detailed list of criteria for inclusion can be found in the Appendix I. The number of rules I analyzed for each two-month period is lower than one would expect, based on the total number

corresponding two months of the Clinton Administration, there were 579 such final rules. This 37 percent decrease across administrations gives support to the perception that the Bush Administration is less interested in issuing regulations than its predecessor, and is evidence of the widely perceived substantive difference in regulatory policy between the two administrations.

The ten departments or independent agencies with the largest number of final rules during each two-month period are shown in Table 1. For each agency, I list in parentheses the number of rules the agency promulgated during the two-month period and the percentage that that agency's rules represented of the total rules for the period.

Table 1: Top Ten Rulemaking Agencies Under Bush and Clinton

Bush Administration (n=400)	Clinton Administration (n=579)	Combined (n=979)
Transportation (116, 29%)	Transportation (167, 28.8%)	Transportation (283, 28.9%)
EPA (50, 12.5%)	EPA (81, 13.9%)	EPA (131, 13.3%)
Agriculture (26, 6.5%)	Agriculture (56, 9.7%)	Agriculture (82, 8.4%)
Homeland Security (25, 6.25%)	HHS (35, 6.0%)	HHS (56, 5.7%)
Commerce (22, 5.5%)	Treasury (27, 4.6%)	FCC (48, 4.9%)
HHS (21, 5.25%)	FCC (27, 4.6%)	Defense (47, 4.8%)
Defense (21, 5.25%)	Defense (26, 4.5%)	Commerce (44, 4.5%)
FCC (21, 5.25%)	Commerce (22, 3.8%)	Treasury (40, 4.1%)
Interior (16, 2.5%)	Interior (22, 3.8%)	Homeland Security/FEMA (40, 4.1%)
Treasury (13, 3.25%)	FEMA (15, 2.6%)	Interior (38, 3.9%)

We can make several observations regarding this table. First, roughly the same agencies promulgated the most rules in both administrations. Second, the reduced number of regulations between administrations shows up most prominently in those agencies that were the most active during the Clinton Administration (with the exception of the Department of

of annual rules reported elsewhere, because of my exclusions. Cf. CLYDE WAYNE CREWS, JR., *TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE REGULATORY STATE* (2006).

Transportation).⁴⁵ The number of regulations promulgated at the EPA dropped 38 percent; regulations in the Department of Agriculture, 58 percent; and regulations at HHS, 40 percent. This difference in the issuance of regulations gives further confirmation to widely perceived policy differences between Presidents Bush and Clinton.

Of course, not all regulations are created equal. Some have a very general impact, while the impact of others is specific to a single firm or state. I divided the regulations in the database into two categories: “general” and “particular.” The “particular” rules are those whose impact is limited (usually to a particular applicant who has asked for the rulemaking). Examples of “particular” rules are airworthiness directives (evaluating equipment to be used on airplanes and helicopters) from the Federal Aviation Administration (FAA),⁴⁶ the EPA’s state implementation plan approvals (allowing states to oversee Clean Air Act improvements),⁴⁷ and approvals of state regulatory programs from the Office of Surface Mining at the Department of the Interior.⁴⁸ All other rules are “general,” including those that get widespread attention.

The identity of the agencies that produced the largest number of general rules (unlike the data in Table 1) differed between administrations. In November and December 1999, USDA produced forty-seven general regulations, EPA, twenty-seven, and DOT, twenty-six. In November and December 2003, five agencies (DOT, USDA, Commerce, Defense, and FCC) produced between eighteen and twenty-one general rules each. This is yet more evidence of the substantive policy differences between Bush and Clinton. Much of the analysis that follows differentiates between rules of general and particular impact because many of the issues that surround rulemaking involve the broader, more general rules rather than the particular ones.

⁴⁵ Many of the rules issued by the Department of Transportation are evaluations of a model of airplane or airplane parts by the FAA called “Airworthiness Directives.” There is no reason to think that there would be fewer of these evaluations in the Bush administration than there was in the Clinton administration.

⁴⁶ *See, e.g.*, Airworthiness Directives, 68 Fed. Reg. 69,596 (Dec. 15, 2003) (to be codified at 14 C.F.R. pt. 39).

⁴⁷ *See, e.g.*, Order Approving Designation of Areas for Air Quality Planning in Lake Tahoe Area, 68 Fed. Reg. 69,611 (Dec. 15, 2003).

⁴⁸ *See, e.g.*, Approval of Amendments to West Virginia Surface Coal Mining Regulatory Program 68 Fed. Reg. 68,724 (Dec. 10, 2003).

III. THE PUBLIC COMMENT PROCESS

The first variables related to the regulatory process that I examined involved public comments on regulations. The public comment process is one of the oldest aspects of rulemaking.⁴⁹ Requirements for participation in agency decisionmaking have existed for many years,⁵⁰ but were formalized in the APA in 1946.⁵¹ By requiring agencies to propose rules, accept comments on those rules, and consider those comments, Congress set up a mechanism by which the public can influence the rulemaking process.

One choice that federal agencies make regarding the public comment process is whether to skip it altogether. The APA allows regulatory agencies to bypass the public comment process via the use of special procedures for promulgating “direct” and “interim final” rules.⁵² In promulgating a direct final rule, an agency does not request comments; in promulgating an interim final rule, an agency asks for comments and leaves open the possibility that it may modify the interim final rule into a final rule at a later date.⁵³ Another important distinction between interim final rules and direct final rules is the predicate for their issuance: direct final rules are rules for which the agency has found public comment to be unnecessary (rules in which the agency infers the public will have little interest), whereas interim final rules are ones with respect to which the agency has determined that public comment is impractical (usually because of some type of emergency).⁵⁴ In either case, the rule becomes effective without the benefit of public comment.⁵⁵ The first question I looked at regarding the public comment process was whether the Bush and Clinton administrations varied in their use of these exemptions to the notice and comment requirements.

Both the Bush and Clinton Administrations made extensive use of the two exemptions. In November and December 1999, the Clinton Administration issued 224 direct final rules and fifty interim final rules. This means that over 47 percent of the final rules issued in this period were issued without a public-comment process. In November and December

⁴⁹ CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 165 (3d ed. 2003).

⁵⁰ *Id.* at 161.

⁵¹ 5 U.S.C. §§ 551-59 (2000).

⁵² See Ronald M. Levin, *Direct Final Rulemaking* 64 *GEO. WASH. L. REV.* 1, 1 (1995); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 *ADMIN. L. REV.* 401, 407 (1999).

⁵³ Levin, *supra* note 52, at 2-3.

⁵⁴ 5 U.S.C. §§ 553(b) (2000).

⁵⁵ *Id.*

2003, the Bush Administration issued 122 direct final rules and forty-one interim final rules, which together represent over 40 percent of the rules issued during this period. This is similar to the results of a 1998 United States General Accounting Office (GAO) study, which found that half of the rules issued in 1997 were issued without a proposed rule.⁵⁶

Were the rules issued without a public comment period more likely to be in the category of particular rules? One might expect this to be especially true of direct final rules, which are issued when agencies expect little public interest in the issue involved. Indeed, the percentage of direct final rules that were of particular impact was slightly higher (though not to the point of statistical significance) than the percentage of final rules as a whole; approximately 50 percent of the direct final rules were narrowly tailored in both administrations (as opposed to 42 percent of all rules). Interim final rules were less likely to be narrowly tailored than rules in the sample as a whole. Again, the pattern is consistent across administrations, as two-thirds of the interim final rules issued were of a general impact under both presidents.

The next question regarding the public comment process that I examined was whether the number of comments that agencies received on their proposed rules varied between administrations. In both of the two-month periods examined, roughly the same proportion (37 percent) of rules in which there was an opportunity for the public to comment, received no public comments.⁵⁷ A significant majority (70 percent) of these rules were of a narrow impact.⁵⁸

As for those rules that received comment, comparing the number of comments received by federal agencies across administrations is more difficult than it may appear. A small but significant proportion of the rules in the databases made clear that comments were received but gave no indications of how many comments (thirty-four of the rules in the 1999 database and sixteen of the rules in the 2003 database had no such data). In addition, the number of comments on rules has a distribution that is

⁵⁶ Agencies Often Published Final Actions Without Proposed Rules, GAO/GGD-98-126, 1, 2 (1998). The use of interim final and direct final rules varies dramatically by agency. In both administrations the Department of Transportation used direct or interim final rules less than 40 percent of the time. By contrast, the Environmental Protection Agency issued rules without prior comment over 65 percent of the time and the Department of Homeland Security did so 68 percent of the time.

⁵⁷ During November and December 2003, 37.5 percent of the rules issued received no comments, and during November and December 1999, 36.7 percent received no comments. The proportion may be even closer since there were eleven rules in the 1999 database for which it was impossible to determine whether comments were received. There was only one such rule in the 2003 database.

⁵⁸ This leaves fifty-nine rules with a general impact that received no comments. This is roughly 20 percent of all general impact rules opened for comment.

extremely likely to be severely skewed (a small proportion of rules get many comments) and therefore the mean is not a good barometer of the comment volume.⁵⁹

This latter problem is particularly evident in a comparison of the mean number of comments received across the two administrations. An average of 1,347 comments was received on the 2003 rules, and an average of only twenty-seven comments was received on the 1999 rules. This difference is largely attributable to three Bush Administration rules. A rule governing consultation under the Endangered Species Act received over 50,000 comments;⁶⁰ a regulation issued by the Department of the Interior regarding snowmobiles in the national parks received over 104,000 comments;⁶¹ and a regulation reversing Clinton Administration policy on road building in the national forests received approximately 133,000 comments.⁶² Without these three regulations the average number of comments received on the rules in the 2003 database drops to thirty-nine. The difference between thirty-nine and twenty-seven (the mean number of comments in the Clinton Administration) is not statistically significant.

Indeed, the similarity between the volumes of comments received across administrations is more apparent when examining the median number of comments received. For both the 1999 and 2003 data, the median number of comments was equal to one. If we restrict ourselves to the rules of general impact that received comments, the median number of comments received for both sets of data was equal to five.

The pattern of comments received thus appears to be quite consistent across administrations. Agencies under both Presidents Bush and Clinton were quite prone to use direct and interim final rules with direct final rules used more often for narrowly tailored regulations and interim rules used more often for regulations with a broader impact. For those regulations on which the agency invited comment, 37 percent received no comments. The majority of these “no comment” rules were narrowly tailored. Finally, if one ignores the presence of three particularly controversial Bush

⁵⁹ One might also suspect that the movement toward allowing commentators to submit comments via email would increase the number of comments for the later set of rules. *But see* Balla & Daniels, *supra* note 38 (finding that electronic rulemaking had little impact upon the number of comments agencies received).

⁶⁰ Joint Counterpart Endangered Species Act, 68 Fed. Reg. 68,354, at 68,257 (Dec. 8, 2003) (to be codified at 50 C.F.R. pt. 402).

⁶¹ *Id.* at 68,254.

⁶² Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, at 75,138 (December 30, 2003) (to be codified at 36 C.F.R. pt. 294).

Administration rules, the number of comments received by agencies was very similar across administrations.

IV. CHANGES IN RULES

One other way to assess the use of the public comment process is to measure the extent to which agencies adopted the suggested changes in the comments they received. This is a more difficult question to tackle. Political scientists Marissa Golden⁶³ and William West⁶⁴ have both conducted case studies of the public comment process. Both concluded that agencies made only limited changes to their proposals in response to public comments, and that there was no consistent pattern as to whose comments received the most attention.⁶⁵ Similarly, after reviewing one specific rulemaking, political scientist Steven Balla agreed that the public-comment process was of limited influence.⁶⁶ Further, economists Wesley Magat, Alan Krupnick, and Winston Harrington looked at rulemaking under the Clean Water Act and found that public comments had a negligible effect.⁶⁷ On the other hand, as mentioned above, Yackee examined forty rules from four agencies that received between two and 200 comments and found that comments made a difference on low-salience rules, particularly when commenters were in agreement on a change.⁶⁸

To attempt to compare how agencies changed rules in response to comments under the Bush and Clinton administrations, I used a variable with four values to describe how much a rule changed between its proposal and its final promulgation.⁶⁹ A value of “0” means that no change occurred, a value of “1” signifies only minor clarifications in the proposed rule, a value of “2” was given when at least one provision was significantly modified and a “3” was given for the rare cases of a wholesale change in the rule. Agencies are usually quite clear that there have been no changes

⁶³ Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998).

⁶⁴ William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004).

⁶⁵ See Golden, *supra* note 63 at 245, 259, 261; West, *supra* note 64, at 66, 73.

⁶⁶ See generally Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663 (1998).

⁶⁷ MAGAT, ET. AL., *supra* note 37, at 135-158.

⁶⁸ Yackee, *supra* note 39, at 117-19.

⁶⁹ While research assistants gathered nearly all of the data, I checked every assignment of the regulatory change variable because of its inherent subjectivity.

in a rule and often use language such as, “the rule was clarified to show . . .” when the changes are minor.⁷⁰

Table 2 below describes how this variable differed between the Bush and Clinton administrations for all rules that were issued for public comment. Two observations emerge from this data. The first is that roughly 70 percent of all rules published for public comment received no changes or only minor changes. The second is that while there was a greater percentage of “2s” in the 1999 data (and a corresponding greater percentage of “0s” in the 2003 data), the difference is not statistically significant.⁷¹

Table 2: Changes in Rules

Level of Change	Clinton (11/99 – 12/99)	Bush (11/03 – 12/03)
0	153 (50.1%)	149 (62.6%)
1	48 (15.7%)	35 (14.7%)
2	90 (29.5%)	53 (22.3%)
3	2 (0.7%)	2 (0.8%)

Both of these observations require greater analysis. Since the data above include those rules for which no comments were received, it may not be a fair indicator of agency use of the public comment process.⁷² Table 3 lists only the data for those rules on which comments were received. Both of the observations hold after narrowing the types of rule examined to those that received public comments. Approximately 55 percent of rules on which comments were received had at most minor changes between proposal and promulgation. Once again, while there is a difference between the Bush and Clinton administrations, this difference is not statistically significant.⁷³

⁷⁰ In the only other work measuring change on a large dataset of rules, Yackee used a variable based on the extent to which agencies made the top five changes suggested by commenters. Yackee, *supra* note 39, at 112. This approach is impractical in this broader study.

⁷¹ Using a chi-squared test with a 10 percent significance test, the critical value is 5.68.

⁷² Agencies are limited in the changes they can make to proposed rules. Any changes must either arise from public comments or be a logical outgrowth of the proposed rule.

⁷³ Using a chi-squared test with a 10 percent significance level, the critical value is 5.15.

Table 3: Changes in Rules that Received Public Comments

Level of Change	Clinton (11/99 – 12/99)	Bush (11/03 – 12/03)
0	55 (29%)	59 (40%)
1	38 (20%)	34 (23%)
2	87 (45%)	53 (36 %)
3	2 (1%)	2 (1%)

We can narrow the type of rule being examined one more time and look at just those rules with a general impact that received public comments. Table 4 displays the extent of change for this more limited set of rules. Even on this narrow subset of rules, for which one might assume change from a proposal is most likely,⁷⁴ approximately 45 percent of all rules had either minor changes or no changes when finalized. As for the difference between administrations, in all three comparisons there is no statistically significant difference in the extent of change between proposals and final rules. If anything the difference is narrower on this most important group of rulemakings.

Table 4: Changes in General Impact Rules that Received Comments

Level of Change	Clinton (11/99 – 12/99)	Bush (11/03 – 12/03)
0	25 (19%)	34 (31%)
1	32 (24%)	27 (25%)
2	65 (50%)	46 (42%)
3	2 (2%)	2 (2%)

What this data tells us is that presidents with very different ideological preferences used the notice and comment requirements of the APA in very similar ways. They bypassed the public comment period in similar proportions. The proposed rules issued by agencies under each administration received similar numbers of comments. Finally, and most importantly, the administrations were about equally likely to respond to public comments by making changes.

This points us toward an important observation about presidents and process. Presidents Bush and Clinton had clear differences in regulatory preferences, as demonstrated by the number of overall rulemakings and the

⁷⁴ We would expect more changes in general rules than in particular ones because the former are likely to raise a greater number of issues.

particular agencies issuing rules described in Part II (as well as the popular perceptions described above). However, the two presidents did not use the notice and comment process any differently to achieve their purposes. This most prominent feature of the regulatory process did not vary between administrations.

V. OTHER REGULATORY PROCEDURES

Since the passage of the APA in 1946, the regulatory process has become increasingly complicated. Both the legislative and executive branches have added procedures to the regulatory process.⁷⁵ In this section, I examine whether there is any difference in the application of these procedures across administrations. Many of these procedures are designed to require further analysis of regulations. The popular perception is that they are intended to make it more difficult to regulate.⁷⁶ Therefore we might expect them to be more commonly applied in a pro-regulatory administration. Such an administration would issue more of the regulations that these procedures were intended to impede. Alternatively, it is also feasible that an anti-regulatory administration would be more diligent about applying these procedures in order to carefully examine individual regulations.

Arguably one of the most prominent of these procedures has been the review of proposed and final rules by the Office of Management and Budget (OMB). Regulatory review by the Office of Information and Regulatory Affairs (OIRA), an office within OMB, was originally established by Executive Order 12,291⁷⁷ by President Reagan and then reaffirmed by President Clinton in E.O. 12,866.⁷⁸ In addition to giving the President a chance to influence regulations, the executive orders also

⁷⁵ Many who study rulemaking have argued that agencies are primarily responsive to Congress. See, e.g., McNollgast 1987, *supra* note 4. In the decade preceding the rules in this study, there has been only one change in congressional party control: after the 1994 elections, Republicans took over both houses of Congress. Since very few of the rules in the database were proposed before the Republican takeover, it is difficult to use this data to analyze agency responsiveness to Congress because there has been little variation in congressional control. The six rules in the database that were proposed before 1995 did change more than the rules proposed afterwards (four of the six rules received a “2”) but this is too small a sample from which to draw conclusions.

⁷⁶ See, e.g., David C. Vladeck & Thomas O. McGarity, *Paralysis by Analysis: How Conservatives Plan to Kill Popular Regulation*, AM. PROSPECT, Summer 1995, at 78.

⁷⁷ Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

⁷⁸ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

established the requirement that agencies conduct an economic analysis on economically significant rules.⁷⁹

From their start, both executive review by OIRA and the cost-benefit analysis requirement have been controversial.⁸⁰ Advocates of regulation have seen the requirements as ways to thwart agency regulatory efforts.⁸¹ Opponents of regulation supported the requirements as ways of imposing rationality on the regulatory process and ensuring political accountability for decisions made by unelected agency officials.⁸² More recently, the executive review portion of the order has been seen as capable of facilitating regulation as much as blocking it,⁸³ and as rendering the cost-benefit requirement less meaningful.⁸⁴

OMB allows for calculation of the number of rules it reviews and the number of rules it deems economically significant on its website.⁸⁵ This data differs from the data I collected in that I based my data on the date a rule was published in the Federal Register, whereas the OMB data is based on the date of OMB clearance. Also, the OMB data does not allow for comparison to the total number of rules issued since OMB collects data only on those rules that it reviews.

Both the data on the OMB website and my data show small differences between the Bush and Clinton Administrations in the time period examined. The OMB website shows eighty-eight rules reviewed by OMB in November and December of 1999, and ninety-six rules in November and December of 2003. Similarly, my data shows that OMB reviewed 10.5 percent of all rules published in November and December of 2003, and 8.1 percent of all rules published in November and December of 1999. This difference is not significant at the 90 percent confidence interval. In both periods, fewer than 2 percent of rules issued were declared economically significant.

⁷⁹ Economically significant rules are defined in E.O. 12,866 as rules with an economic impact of at least \$100 million in any given year. *Id.*

⁸⁰ See, e.g., Alan B. Morrisson *OMB Interference With Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

⁸¹ See, e.g., *id.* at 1065.

⁸² Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

⁸³ Kagan, *supra* note 13, at 2282.

⁸⁴ See Stuart Shapiro, *Unequal Partners: Cost Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REV. 10433, 10442 (2005).

⁸⁵ Review Counts, available at <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Apr. 13, 2007).

Another prominent procedure in the regulatory landscape is the Regulatory Flexibility Act (RFA).⁸⁶ It requires agencies to assess the impact of their rules on small businesses and either assert that their rules will “not have a significant impact on a substantial number of small entities,” or conduct a “regulatory flexibility analysis.”⁸⁷ The RFA is explicitly designed to affect rules with impacts on small businesses.⁸⁸ One would expect that more such rules would be issued in a pro-regulatory administration than in an anti-regulatory administration.

The percentage of rules that agencies designated as having a significant impact on a substantial number of small businesses was virtually identical in the two periods examined. In November and December of 1999, 9.6 percent of all rules required regulatory flexibility analyses, and in November and December 2003, 9.5 percent of all rules fell in this category. This does mean that more rules under the Clinton Administration required a regulatory flexibility analysis (fifty-six versus thirty-eight) although it is curious that the percentage of all rules issued that impact small businesses did not vary.

The Paperwork Reduction Act⁸⁹ requires agencies to examine the burden, and solicit comment on any action—including regulations—that imposes an information collection burden on at least ten members of the public. While the PRA affects many agency actions besides rules, information collections contained in rules compose a significant proportion of all information collections.⁹⁰ For this reason, we would expect rules with information collections to be more common in a pro-regulatory administration than in an anti-regulatory administration.

The data regarding the PRA is very similar to the data on the RFA. In both of the periods studied, 14 percent of all rules contained an information collection as defined by the PRA and required analysis and comment. Again, this means that more rules with information collections were issued in November and December of 1999 than in November and December 2003 (eighty-two versus seventy-six).

The final statute that I examined was the Unfunded Mandates Reform Act (UMRA).⁹¹ Passed in 1995, the Act was designed to make it harder for

⁸⁶ 5 U.S.C. §§ 601-12 (2007).

⁸⁷ Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 *FORDHAM URB. L.J.* 1119, 1125-26 (2006).

⁸⁸ *Id.* at 1119.

⁸⁹ 44 U.S.C. § 3501 (2007).

⁹⁰ *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, INFORMATION COLLECTION BUDGET OF THE UNITED STATES FISCAL YEAR 2006 (2006).

⁹¹ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

agencies to impose costs on state and local governments.⁹² The Act, like Executive Order 12,866, requires cost-benefit analyses for a certain subset of regulations.⁹³ As evidenced by the annual reports by OMB on compliance with UMRA,⁹⁴ this Act affects far fewer rules than the RFA or the PRA. And this was indeed true in my dataset. Only three rules—two in 2003 and one in 1999—triggered the UMRA requirements. Meaningful comment about how the effect of UMRA varied across administrations is therefore not possible. What can be said, however, is that UMRA did not appear to have a significant effect in either two-month period.

The data on each of these regulatory procedures is similar. In the case of all of them, both the Bush and Clinton Administrations applied the procedure to the same percentage of all rules issued. Because the Clinton Administration issued more rules in November and December of 1999 than the Bush Administration issued in November and December of 2003, each procedure applied to a greater number of rules under Clinton than under Bush.

The lack of difference in the percentage of rules to which OMB review, the PRA and the RFA apply is striking. I would have expected a greater percentage of rules from a pro-regulatory administration to have significant impacts, affect small businesses, or create an information collection burden. As with notice and comment, the differences between the two administrations are not appreciable.

VI. OSSIFICATION: THE TIME TO COMPLETE A RULE

McGarity and others have long bemoaned the ossification of the regulatory process.⁹⁵ Referring mainly to requirements for economic analysis and “hard look” judicial review, McGarity argues that the regulatory process has become too burdensome.⁹⁶ As a result, agency

⁹² *Id.* Specifically, the Act says its purpose is “to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities.” *Id.* at 48.

⁹³ Specifically, analysis is required for all rules that impose at least \$100 million in costs on either the private sector or on state or local governments. *Id.* at 64.

⁹⁴ See, e.g., OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2006 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (2006), available at http://www.whitehouse.gov/omb/inforeg/2006_cb/2006_cb_final_report.pdf.

⁹⁵ See generally McGarity, *supra* note 19.

⁹⁶ *Id.* at 1385.

officials are turning away from rulemaking as a policymaking option.⁹⁷ While some have questioned McGarity's more dire conclusions,⁹⁸ it does indeed seem plausible that the increase of procedural requirements on the rulemaking process will force agencies to take longer to complete a rule.

The time it takes to complete a rule also speaks to the role of procedural controls in the rulemaking process. Numerous scholars agree that such controls will make it harder to regulate.⁹⁹ Indeed, the object of these controls is greater examination of regulatory efforts rather than deregulatory efforts. In his study of economic analysis, McGarity notes the increased level of scrutiny required of regulatory efforts under the Reagan administration as opposed to deregulatory efforts.¹⁰⁰

If controls were designed to hinder the promulgation of regulations, then presumably we would see a pro-regulatory administration take longer to finalize a rule than an anti-regulatory administration. This would be true because procedural controls such as the RFA, requirements for cost-benefit analysis,¹⁰¹ and the PRA are designed to make it harder to issue regulations imposing burdens on particular constituencies. An administration committed to deregulation would not trigger the requirements of these procedures as frequently, and hence would be likely to issue regulations more quickly.

There has been little examination, however, of how the time required to complete a rule varies between administrations.¹⁰² One difficulty in making this assessment is that it is often ambiguous when the rulemaking process begins. In assembling this dataset, I used two measures for the length of time to complete a rulemaking. The first is the amount of time between publication of the proposed rule and publication of the final rule. Many agency actions are required between proposal and promulgation, including processing and responding to comments, a second round of OMB review under Executive Order 12,866 (if applicable), and revision of

⁹⁷ *Id.* at 1386.

⁹⁸ *See, e.g.*, Shapiro, *supra* note 33.

⁹⁹ *See, e.g.*, Asimow, *supra* note 29, at 134; McGarity, *supra* note 19, at 1436; Moe, *supra* note 11, at 324.

¹⁰⁰ THOMAS MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 61 (1991).

¹⁰¹ However, the most prominent requirement for cost-benefit analysis, Executive Order 12,866, also empowers the President to more effectively oversee agency regulatory activity. Isolating the impact of cost-benefit analysis is thus particularly difficult. *See* Shapiro, *supra* note 84, at 10435.

¹⁰² In 1992, Kerwin and Furlong did a study of the factors affecting the time it takes to complete a rule and found that political factors could lead to a rule taking longer to complete. Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 138 (1992).

the supporting analyses for the rule.¹⁰³ If ossification of rulemaking has occurred, one may very well see it in long periods between the proposal and finalization of a rule.¹⁰⁴

Political scientist William West argued that much of the work in rulemaking is done before the rule is even proposed.¹⁰⁵ If this were correct, a more accurate measure of the time to complete a rule would be the time between when an agency first started work on a rule to when it completed the rule. One measure of when an agency begins work on a rule is when it first appears in the Unified Agenda. The Unified Agenda is published semi-annually and describes all rules that an agency is working on.¹⁰⁶ Because it only comes out twice per year, and because agencies are less than perfectly diligent in publishing their plans in the Unified Agenda,¹⁰⁷ this is not a precise measure of when work begins on a rule. However for those rules mentioned in the Agenda, it may be informative.

As with the number of comments received, issues in measuring central tendency plague the measures of time to complete a final rule. The distributions of time (particularly the time between proposed and final rules) are skewed by a small number of rulemakings that take an inordinate amount of time. Both the 1999 and 2003 databases had such data points. For example, the Bush Administration finalized the endangered species designation rule for the dugong (a large marine mammal) on December 17, 2003,¹⁰⁸ more than ten years after it was proposed. Similarly, the Clinton Administration Department of Agriculture finalized a rule entitled "Direct Certification of Eligibility for Free and Reduced Price Meals and Free Milk in Schools" on December 28, 1999.¹⁰⁹ It had been proposed on May 28, 1991.

¹⁰³ Kerwin, *supra* note 49, at 39-85.

¹⁰⁴ A key part of the ossification argument holds "hard look" review by the judiciary responsible for the retreat from rulemaking. Judicial review, according to this argument, has forced agencies to be so careful in responding to comments that engaging in notice and comment rulemaking has lost considerable appeal as a policymaking option. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

¹⁰⁵ West, *supra* note 64, at 69.

¹⁰⁶ Unified Agenda, <http://www.gpoaccess.gov/ua/index.html>.

¹⁰⁷ Occasionally agencies do not know what they will be publishing within the next six months, thus some entries are omitted. Agencies are also reluctant to remove an item from the Agenda even though there may not be any current plans to work on the rule because they do not want to signal to affected constituencies that are abandoning a particular rulemaking effort.

¹⁰⁸ Endangered and Threatened Wildlife and Plants, 68 Fed. Reg. 70,185 (Dec. 17, 2003) (to be codified at 50 C.F.R. pt. 17).

¹⁰⁹ Certification of Eligibility for Free and Reduced Price Meals, 64 Fed. Reg. 72,466 (Dec. 28, 1999) (to be codified at 7 C.F.R. pts. 210 and 245).

Therefore, Table 5 reports both the mean and median time between proposed and final rules. The table contains data for four categories of rules for each of the two time periods examined. The first row is all rules in the database that had a proposed rule precede their issuance. The second row is just those rules with a general impact. The third is rules on which comment was received (we would expect these rules to take longer since the agency must respond to comments). Finally, the fourth row presents the data on rules reviewed by OMB (this procedure is often cited as one of the reasons that rulemaking has gotten so burdensome for agencies).¹¹⁰

A number of observations can be made about the data in this table:

- There is no significant difference between the two administrations, particularly in the median data.
- Over 50 percent of the rules moved from proposal to finalization in less than six months.
- The rules with broader impact and those rules that received comments took longer to complete than rules with narrow impact and those that did not receive comments. This is as we would expect.
- Rules reviewed by the Office of Management and Budget took (statistically) significantly longer to complete than other rules. Fifty percent were finalized within a year of proposal, but the average time for these rules was over a year and a half because several rules took a very long time.

Table 5: The Time Between Proposed and Final Rules

	Clinton Administration (mean)	Bush Administration (mean)	Clinton Administration (median)	Bush Administration (median)
All Rules	332 days	316 days	175 days	168 days
General Rules	412 days	422 days	300 days	293 days
Rules with Comments	374 days	412 days	268 days	286 days
Rules Reviewed by OMB	602 days	520 days	370 days	365 days

The last of these four observations regarding OMB review, on the surface appears to lend support to the argument that procedural controls lengthen the regulatory process. One difficulty with this observation is that

¹¹⁰ McGarity, *supra* note 19, at 1405.

the rules reviewed by OMB tend to be the most politically salient rules. Any rule with a large economic impact (more than \$100 million in any one year) is reviewed under Executive Order 12,866, and OMB has significant discretion to review other regulations, as well.¹¹¹

Under the order¹¹² OMB's review can add up to ninety days to the period between proposed and final rules, but it is unclear whether this additional time can be attributed to the fact that review exists. Some might argue that the additional time (beyond the ninety days) is due to the fact that agencies require more time to prepare rules for OMB review. Alternatively, others might argue that agencies are particularly careful in responding to comments on politically charged rules, in anticipation of judicial review, and that this extra care is responsible for the additional delay. Further analysis is necessary to attempt to evaluate these two explanations.

Turning to the data collected from the Unified Agenda,¹¹³ we continue to see many of the same patterns. There was an average of 813 days (and a median of 594 days) between publication in Unified Agenda and finalization for the Bush Administration rules, and an average of 844 days (and a median of 623 days) for the Clinton Administration rules. The data for rules that received comments is also replicated here, as Bush Administration rules that received comments took, an average of 852 days between initial Unified Agenda publication and finalization and Clinton Administration rules took an average of 892 days.

However the data on OMB review shows something different than it did when examining time between proposal and finalization. For the Clinton Administration rules reviewed by OMB, an average of 932 days passed between appearance in the Unified Agenda and finalization. This is three months longer than the average for all rules. For the Bush Administration, the corresponding average is 1,073 days—nearly nine months longer than the average rule. The sample size is too small to be statistically significant, but if the trend is borne out in larger samples it may indicate that agencies spent more time preparing rules for the Bush Administration OMB than they did for the Clinton Administration OMB. This would be in accord with the popular notion that OMB under the Bush Administration has

¹¹¹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

¹¹² *Id.*

¹¹³ The sample size for this analysis is significantly smaller than the previous analyses because most rules of narrow impact are not in the Unified Agenda. Data in this discussion includes eighty-two observations from November through December 2003, and 110 observations from November through December 1999.

subjected rules to a more rigorous review than it did under President Clinton.¹¹⁴

CONCLUSION

One trend is consistent through the various data: despite profound differences in ideology and widespread perceptions of difference in the substance of their regulatory efforts, the regulatory process looks very similar between the Bush and Clinton Administrations. Both administrations made similar use of the notice and comment process; employed various analysis requirements with the same frequency, and took roughly the same time to complete a regulation. Why do we not see differences in the regulatory process that mirror the substantive policy differences between President Bush and President Clinton? There are several possible explanations.

One explanation can be found in the political science and legal literature. While McNollgast posited that procedures could effectively ensure regulatory outcomes,¹¹⁵ numerous scholars disagreed.¹¹⁶ Most notably, Horn and Shepsle argued that procedures put in place by an enacting coalition of legislators were subject to coalitional drift.¹¹⁷ When there was a change of those in power, the new officeholders could use the procedures to achieve their own aims.¹¹⁸ This explanation was given support by Kagan, who described the Clinton Administration's use of regulatory procedures put in place by Presidents Reagan and Bush.¹¹⁹ These procedures were used by Clinton to achieve regulatory aims rather than the deregulatory goals for which they were originally intended.¹²⁰

Perhaps therefore, the regulatory process looks the same in administrations with different regulatory philosophies because the process is just an instrument that can be manipulated to achieve any political goals. Under this explanation, both the Bush and Clinton administrations were able to use regulatory procedures to further their policy aims.

Another explanation can be found in organizational theory literature. Federal agencies are, of course, bureaucratic organizations. Such

¹¹⁴ William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STU. Q. 76, 85 (2005).

¹¹⁵ McNollgast 1987, *supra* note 4, at 244.

¹¹⁶ See, e.g., Moe, *supra* note 11, *passim*.

¹¹⁷ Horn & Shepsle, *supra* note 9, at 503.

¹¹⁸ *Id.*

¹¹⁹ See Kagan, *supra* note 13.

¹²⁰ *Id.* at 2249.

bureaucracies have long been renowned for creating routines out of new requirements imposed upon them.¹²¹ Regulatory procedures may fit into this category. The agencies that write regulations have figured out how to manage the regulatory procedures so that they do not interfere with the agency achieving its goals (or the goals of their political overseers). Indeed, the regulatory procedures have become like any other generic procedure (such as making six copies of official documents or getting five signatures on such a document) that an organization follows and knows how to manage.¹²²

Finally, it is also possible that the metrics contained in this article do not measure the impact of regulatory procedures. Perhaps these procedures impact regulatory substance in ways that are impossible to measure. Such possible effects include changing the mindset of regulators and those who oversee them, impacting regulatory decisions long before any document is made public, and leading agencies to decide to try alternative approaches to regulation.

While admitting this last possibility, the data presented in this article should still raise serious questions about the impact of regulatory procedures. Such procedures—often enacted under the guise of regulatory reform—have been a constant feature of the debate over regulations for the past two decades. The Bush Administration has added numerous other requirements to the regulatory process.¹²³ If these requirements bear no relation to the substance of regulations, scholars and politicians alike should think twice before implementing them.

¹²¹ JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 333 (1991).

¹²² See Shapiro, *supra* note 33, at 52 (providing examples of how agencies manage regulatory procedures).

¹²³ See generally Stuart Shapiro, *An Evaluation of the Bush Administration Reforms to the Regulatory Process*, 37 *PRESIDENTIAL STUD. Q.* 270 (2007).