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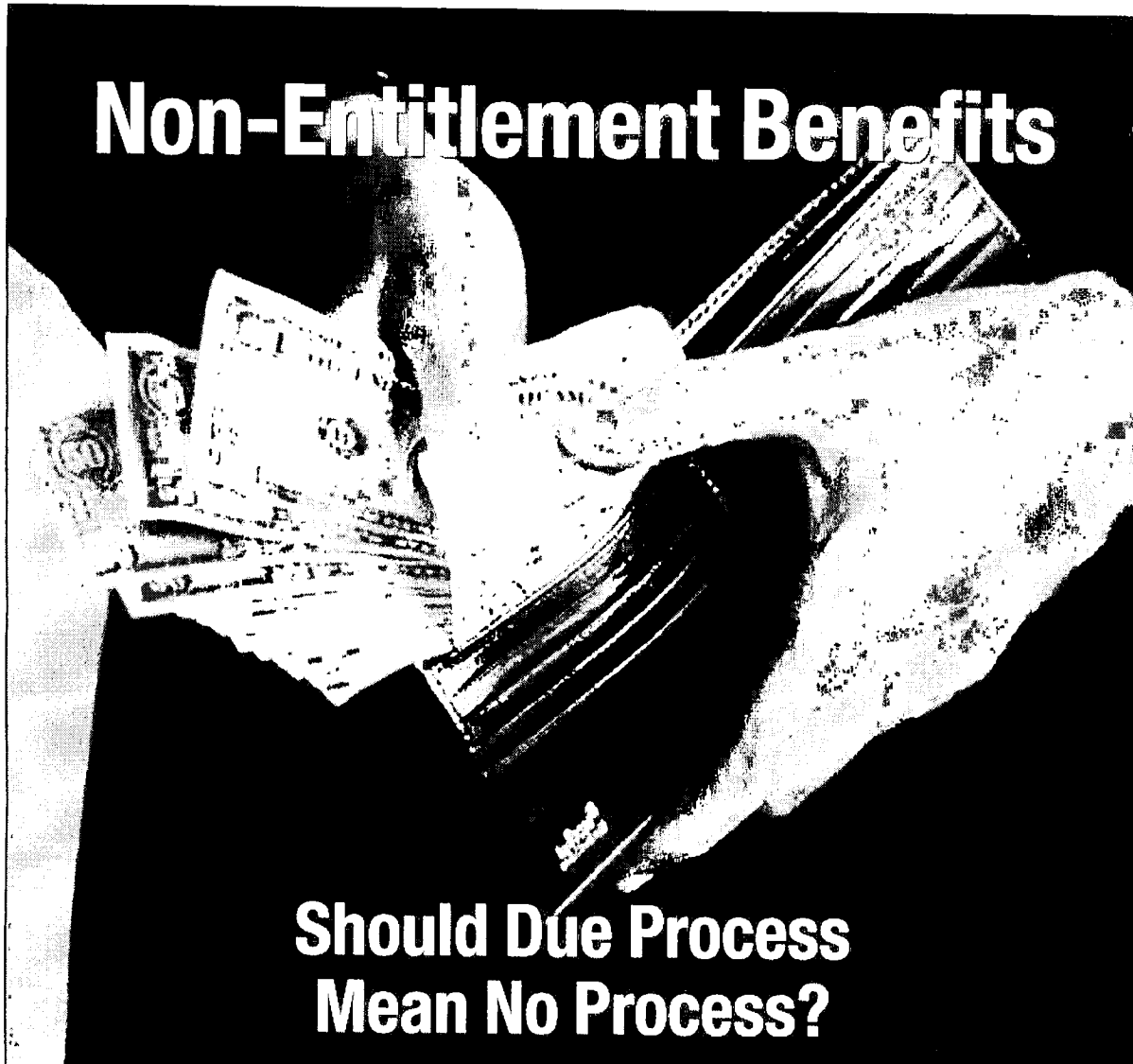
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Non-Entitlement Benefits



Should Due Process Mean No Process?

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Two Months in the Life of the Regulatory State

By *Stuart Shapiro, Ph.D.* *

Regulation has become a fundamental tool of governance. The Cato Institute's annual report on the regulatory state notes that in 2002, agencies issued 4,167 final rules and the Federal Register consumed 75,606 pages. There have, however, been very few empirical studies of the process that generates this massive amount of regulation. There have been various studies on the economic impact of regulations and various case studies of the regulatory process and these have been valuable. The significant disagreements in the economic studies, however, and the limited generalizability of the case studies leave a considerable gap in our knowledge.

I have begun a project to gather data on a wide variety of regulations. Unlike work by economists, my research aims primarily to determine how the various requirements of the regulatory process affect regulations. My hope is that by building a database of regulations and the regulatory requirements to which each was subjected, we will be better able to understand the impact of those requirements. In current debates about proposed regulatory reforms (e.g., electronic rulemaking; peer review of information agencies use to support proposed rules), information about the process as it now stands is absent. These debates would be well served by an improved understanding of how our regulations are currently generated.

There are many questions that a comprehensive database could answer. For example, many scholars, including Thomas McGarity, have criticized the rulemaking process for taking too long.

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With a comprehensive database, we could determine how the various requirements imposed on the regulatory process actually affect the time that it takes to finalize a rule. Do rules with many public comments take longer to finish? (The answer to this question will be particularly important in light of the movement toward electronic rulemaking, as this reform could multiply significantly the number of comments agencies receive.) We will learn whether rules subject to review by the Office of Management and Budget (OMB) take longer, and which agencies take the longest to finalize proposed rules.

Additionally, it will be useful to learn what factors affect the extent of change that a rule undergoes from its proposed to its final version. My database will include a simple variable representing the extent of change: a rule will be assigned a "0" if there was no change between the proposed and final versions; a "1," if there were only clarifications; a "2," if there was at least one significant change; and a "3," if the entire direction of the rule was reversed (a very rare occurrence). With this variable in hand, we will be able to answer another series of questions about the regulatory process. For example: Are rules that garnered more comments more likely to be changed by agencies? Do rules with more changes take longer to finalize? Are rules more likely to change if they are finalized by a different Administration than the one that proposed them?

To begin this project (and to test its feasibility), I gathered data from all final rules published in the Federal Register in November and December 2003. (The only exceptions were temporary final rules; clarifications or corrections; changes in effective dates; and rules from the Federal Communications Commis-

sion entitled "Radio stations; table of assignments.") My research assistant and I gathered the data by reading through the preambles to the 392 final rules issued during the two-month period. What follows are my observations from two months in the life of the regulatory state.

A Few Qualifications Before We Get Started

These observations are necessarily limited in scope to those aspects of the process that can be meaningfully analyzed using only 392 observations. For example, because many rules go through the notice-and-comment process, I was able to draw meaningful conclusions about the effect of that process. By contrast, it is harder to draw conclusions about the impact of OMB review and the Paperwork Reduction Act because only 10-15% of these 392 rules are subject to these requirements. As this project expands to a larger number of rules, I hope to be able to provide meaningful analysis on aspects of the regulatory process such as OMB review which occur less frequently.

The Administrative Procedure Act (APA) defines a rule as "the whole or any part of any agency statement of general or particular applicability . . ." In the terminology of the APA, "particular" rules affect a specific entity, while "general" rules have a broader impact. Only rarely does the text of a rule identify the rule as "particular" or "general," and the legal distinction is sometimes controversial. To avoid this controversy, I use my own labels, referring to rules as being of "general" or "narrow" impact.

In my two-month sample, 222 of the 392 rules were of general impact. The 170 rules with a narrow impact were mostly "airworthiness directives" from

the Federal Aviation Administration; "flood elevation determinations" from the Federal Emergency Management Agency; and "clean air act permit actions" by the Environmental Protection Agency. These 170 rules (like all narrow rules) did not involve the type of rulemaking typically discussed in controversies over regulatory policy. I will be careful to differentiate them from rules of general impact in the analysis that follows.

Avoiding "Notice and Comment": Interim and Direct Final Rules

The best-known aspect of the regulatory process is the notice-and-comment process that has evolved to meet the requirements of the APA. Notice and comment is designed to solicit public input and information regarding agencies' proposed rules. The APA, however, allows agencies to circumvent the public comment process by issuing either "interim final rules" or "direct final rules." On direct final rules, the agency does not request comments; on interim final rules, the 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. In either case the rule becomes effective without the benefit of public comment. 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).

Over the two-month period examined, 159 or 40.6% of the rules examined were either direct or interim final rules. Thirty-nine of these were interim final rules and 120 were direct final rules. In other words, in 40.6% of all rulemakings, agencies did not solicit public comments before their rules took effect. Had these rules been mainly ones of narrow impact, then this might have raised little concern.

In fact, however, un-commented rules were almost equally divided between narrow and general. (Specifically, 39.1% of general rules and 42.9% of narrow rules became effective without benefit of public comment. This difference is not statistically significant.)

There was, however, a difference between direct and interim final rules. Fifty percent of the 120 direct final rules were of general applicability, while two thirds of the 39 interim final rules were of general applicability. From this we can infer that the interim final rule "loop-hole" for avoiding notice and comment is more often used for the more important rules than on less important rules. I examined the "good causes" that were given for the seven most prominent interim final rules in the period in question (using whether or not the rule was subject to OMB review as an indicator of prominence). One of the seven rules was issued as an interim final rule to meet a statutory deadline. In another instance, the regulating agency gave no reason for issuing an interim final rule. Five other agencies gave varying excuses, mainly claiming that some benefit to the public would be lost if the agency waited for public comment to issue a final rule.

The public comment process is often heralded as an important control on agency action. However, if in 40% of cases agencies avoid notice and comment, then it is apparently a control that can be ignored in many circumstances. One of the most interesting findings in looking at two months' worth of regulations was the widespread use of interim and direct final rules. Examining a broader set of data will answer the important questions of how this use varies by agency and how it has varied over time.

Public Comments: Who, How Many, and How Much Influence?

As just noted, only 59.4% of the final rules examined received the benefit of public comment. Of the 233 rules that were opened for public comment there was a clear difference between rules of general and those of narrow impact. Table 1 highlights this difference.

The table shows us several things about the notice and comment process. Rules of narrow impact get very few comments; more than half get none. Rules of more general impact get a greater number of comments, but the distribution is quite skewed: a very few receive a high percentage of the total. (In this two-month period, a National Park Service rule got 104,000 comments, a Forest Service rule received over 133,000, and a Fish and Wildlife Service proposal received over 50,000. Only two other rules received more than 1,000 comments, and only several received between 100 and 1000.)

The extent to which comments are submitted via the internet may be of interest to those (including this author) in the research community. Unfortunately, agencies rarely make this information easily available in the preambles to their final rules. I examined the ten rules that received the greatest volume of public comments to try to determine the extent to which electronic commenting was used. Information was available for only one of the ten: on the National Park Service rule just mentioned, nearly 90% of the over 100,000 comments were received electronically. Three of the ten rules noted that the agency had not permitted electronic commenting, and the other six said nothing about the

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Table 1: Frequency of Public Comments.

	# with no comments	Mean # comments	Median # comments
General Rules (136)	25	2408	5
Narrow Rules (97)	59	1.1	0
Total	84	1384	1

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breakdown between electronic and written comments.

Who were the commenters? Table 2 identifies them by specific categories. (Note that many rules had more than one type of commenter.)

Table 2: Who Were the Commenters?

Category	# of rules commented on
Industry	64
Public Interest Groups	39
Individuals	33
Other Federal Agencies	23
State Agencies	23
Academics	3
Unions	2
Others	12

As one can see, a diverse set of commenters participated in the regulatory process. Significantly, industry commented on a greater number of rules than any other group. This agrees with academic predictions that the greater impact of regulations upon industry coupled with industry's greater resources will lead to industry's becoming more involved than other groups.

Measuring the influence of comments is a very tricky thing. Rules change between being proposed and finalized for many reasons; no particular change, therefore, can conclusively be attributed to the effect of public comments. That said, noting how changes in rules vary with the extent of public participation will be a first step in determining how and whether comments have an impact.

In order to determine whether change varies with the presence of public comments, I assigned each rule a value ranging from 0 to 3 to quantify the degree of change from proposal to final rule (if the rule was preceded by a proposal). Of the 232 rules preceded by a proposal, only two received a "3" (these

Table 3: Changes in Rules of General vs. Narrow Impact.

	0	1	2	3
General Rules	59 (44%)	39 (29%)	34 (25%)	2 (1%)
Narrow Rules	83 (85%)	11 (11%)	4 (4%)	0

Table 4 Changes in Rules vs. Comments Received.

	0	1	2	3
All Rules	142 (61%)	50 (22%)	38 (16%)	2 (1%)
Rules with Comments	58 (39%)	49 (33%)	38(25%)	2 (1%)
General-Impact Rules with comments	35 (31%)	39 (36%)	34 (31%)	2 (2%)
Rules with Industry Comments	22 (33%)	24 (36%)	19 (29%)	1 (2%)

were an Occupational Safety and Health Administration rule on tuberculosis and a Federal Election Commission rule on Leadership PACs). Of the remaining rules, there were 142 for which there was no change (resulting in a value of "0"), fifty for which there were only clarifying changes (yielding a "1"), and thirty-eight for which at least one provision had a significant change (a "2"). Change between the proposed and final stages of a rulemaking was neither the norm nor a rarity.

As shown in Table 3, rules with a general impact were much more likely to be changed. It is likely that this is in part true because these general rules were much more likely to receive public comments.

Table 4 shows data on the extent of changes between proposed and final rules for four categories of rules: all rules, rules with comments, general rules with comments, and rules with comments from industry.

Several interesting observations present themselves:

- Not surprisingly, proposed rules that received comments were more likely to be changed than proposed rules that didn't receive them. (If a proposed rule receives no comments, an agency is limited, legally, to making changes that are

"logical outgrowths" of the proposal.) However, 72% of the proposed rules that received comments underwent only minor or clarifying changes. This tends to confirm the conclusions/predictions of scholars William West and Marissa Golden, who contend that comments have only a minor impact on agency decisions.

- Comments had a more significant effect on rules of general than on rules of narrow impact. (This was evaluated with a chi-squared test at a 2.5% significance level.) This is most likely due to the greater volume of comments on general rules.
- Rules on which industry commented were no more likely to be changed (even under the pro-industry Bush administration) than rules on which only parties outside of industry commented. (This was again evaluated using a chi-squared test.) There are several possible explanations for this phenomena: it could mean that agencies are unaffected by the source of comments, or it could mean that industry was so satisfied with the proposed rules that it felt no need to advocate significant changes.

In future work I will use regression techniques to see if the number of

comments affects the extent of change between proposed and final rules.

Why Does It Take So Darn Long to Finalize a Proposed Rule?

The amount of time it takes a federal agency to complete a rulemaking has been the subject of much discussion and uninformed analysis. Critics generally blame the length of time on the many procedural requirements imposed on agencies writing regulations. There is also a general consensus that it is taking longer to write a rule with each passing year. In contrast, skeptics who do not believe the rulemaking process is broken, point to the large number of regulations issued each year.

The average time between proposal and finalization of the rules in my study was 322 days. The median time was 175 days—meaning that half of the rules

studied were completed in less than six months' time. The far shorter median time also shows that a small number of rules take far longer to complete than the rest. How do specific characteristics of regulations correspond to the length of time it takes to finalize them? Table 5 breaks down the duration of rulemakings by category of rule:

The basic results are not surprising: rules of general impact take longer to complete than those of narrow impact; rules with comments take longer than those without; rules reviewed by OMB take longer than those not reviewed by OMB; and rules that change more take longer than rules that change less. More work needs to be done to separate out how much of the extra time to finish a rule is due to each of these components. (For those who are curious, there were 11 general rules with comments,

reviewed by OMB, that received a change variable of 2. These rules took an average of 578 days to complete.)

Conclusion

The regulatory process is often criticized, often reformed, and always poorly understood. The results presented above mark the beginning of what I hope will be a series of efforts to better understand how the way we write our regulations works in practice. In just looking at this initial set of data, we were able to generate a number of interesting observations.

- The fact that roughly 40% of all final rules are promulgated without the benefit of public comment tells us that federal agencies often find ways around the APA's notice-and-comment requirement.
- There are often limited changes between proposal and final rule, even when public comments have been received by the agency. A deeper understanding of the frequency and distribution of public comments and the relationship between comments and changes to final rules will help us understand the utility of public comment when it does occur.
- Finally, the length of the regulatory process is often bemoaned. It is clear from these results, however, that if we want the benefits associated with public comment, OMB review, and other regulatory procedures, then some delay may be the inevitable price. ☹

Table 5: Length of Time to Finalize a Proposed Rule

Type of Rule	Median Days to Completion	Mean Days to Completion
All Rules	175	322
General Rules	293	423*
Rules with Comments	285	414*
Rules Reviewed by OMB	371	520**
Change = 0	138	257***
Change =1	296	343***
Change =2	366	472***

* Different than the opposite category (particular rules and rules without comment) at the 1% level of significance.

** Different than rules not reviewed by OMB at the 5% level of significance.

*** Categories 0 and 1 and 1 and 2 are different at the 5% level of significance. Categories 0 and 2 are different at the 1% level of significance.

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