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

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Executive Summary

Do procedural controls placed on the regulatory process allow politicians to control bureaucratic decisionmaking? I use data on the regulatory process under the Clinton and Bush Administrations to assess the differences between these presidents with distinct ideological regulatory agendas. I find that the number of comments received, the changes made between proposal and finalization of rules, the frequency with which agencies bypass notice and comment and the time to complete a rulemaking did not vary substantially between the two presidencies. This raises questions about the effectiveness of procedural controls on agency desicionmaking.

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

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I. Introduction

Do procedural controls placed on the regulatory process allow politicians to control bureaucratic decisionmaking? Academic attention to rulemaking has focused on the political influence over regulatory policy. A number of scholars, most prominently McNollgast (1987, 1989), have emphasized the procedural mechanisms by which political principals control bureaucratic agents. These procedures might require public participation in rulemaking decisions, require review by political principals of decisions before enactment, or require cost benefit analysis of such decisions.

However, procedural controls carry with them an inherent problem. The ability to operate a procedural control lies in the hand of political actors who may be hostile to the goals of those who implemented the control. Kagan (2001) showed how procedures implemented to deter regulatory efforts were used by the Clinton Administration to spur regulation. After procedural controls are enacted, do they serve the interests of those who put them in place or those who are charged with implementing them?

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 (see e.g. McGarity et. al. 2005). If procedural controls affect the substance of regulatory decisions, presumably we would see some differences in the regulatory process between these very ideologically different administrations.

Instead I find that the regulatory process is remarkably similar between the Clinton and Bush administrations. I looked at over 900 regulations issued by the two administrations. The two 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, and took roughly the same time to complete

regulations.

While similar values for these regulatory process variables does not mean that procedures have no effect on regulatory substance, it does cast doubt upon the academic and political emphasis on procedural reform to the regulatory process. The article is structured as follows. In Part II, I review scholarly work on the role of procedural controls in the regulatory process. In Part III, I introduce the data I have collected regarding rulemaking under Presidents Bush and Clinton and identify some of the data's most basic features: e.g., which agencies were issuing rules under each administration. In Parts IV, V, and VI, I compare particular aspects of the data under each administration; Part IV focuses on the public-comment process, with particular emphasis on the volume of comments received; Part V reviews the extent to which rules changed between proposal and final promulgation; 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 in Part VII.

II. Procedures, Presidents, and Rulemaking

McNollgast (1987) highlighted the role of procedures in political control of bureaucrats nearly 20 years ago. According the theory articulated by McNollgast, when Congress creates or empowers a bureaucratic agency, it creates a certain procedural environment. This environment, Congress hopes, will ensure that the interests represented by the enacting coalition remain in a favorable position with respect to agency decisions. This "deck stacking" ensures that the bureaucracy implementing a statute faces the same environment as the coalition enacting the statute.[1]

The notion that procedural controls severely constrain the decisions of bureaucrats and future politicians has received a fair amount of criticism. Notably, Horn and Shepsle (1989) argue that those implementing procedural controls ignore the tradeoff between coalitional and bureaucratic drift. A control that will successfully stifle bureaucratic discretion will be unable to prevent changes in policy by a new legislative coalition and vice versa. In other words, enacting coalitions may be able to control bureaucrats but the

[1] 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. A later work by McNollgast (1999) uses the Administrative Procedure Act as an example of such a control.

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.

McNollgast and other positive political economists have also received criticism from Moe and Wilson (1994) for underestimating the role of the President. According to Moe and Wilson, because the President cares more about institutional power than Congress, and because it is easier for the President to act unilaterally, control of the bureaucracy is more a presidential issue than a legislative one. Kagan (2001), writing about the Clinton administration demonstrated the validity of the points made by both Horn and Shepsle and by Moe and Wilson. Clinton, using procedural tools developed by his Republican predecessors was able to shape regulatory policy despite the presence of a hostile Congress. Do procedural controls restrict bureaucratic (and by extension presidential) decisionmaking? Or can presidents achieve their substantive goals regardless of the procedural controls in place? One way to examine this question is to compare the regulatory process during administrations. We would expect the regulatory process to somehow vary between a pro-regulatory administration and an anti-regulatory administration. Specifically, because procedures are often seen as anti-regulatory (Asimow 1994), we would expect the pro-regulatory administration to attempt to bypass these procedures more frequently, be forced to change rules because of these procedures more frequently, and perhaps take longer to complete regulations.

With the movement of more and more regulatory data online, it has become possible to address these questions with large scale empirical studies. Coglianese (2002) provides an excellent summary of the empirical work on the regulatory process.[2] He concludes that there remain many questions about how regulations are written that could be better answered with more empirical work. As more data regarding rulemaking has appeared online, some initial larger studies have begun to appear.[3] Balla (2004, 2005) 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. Balla's work focuses on the Department of Transportation. Yackee (2005) examines 40 rules from four agencies that received between 2 and 200 comments

[2] Coglianese calls for more empirical research in all areas of the regulatory process, not just the role of procedural controls.

[3] One larger-n work that is a bit older is, "Rules in the Making"by Magat, Krupnick, and Harrington (1986). They examine EPA rules under the Clean Water Act in an attempt to explain variations in regulatory stringency across industry.

and found that comments made a difference on rules that do not receive much political attention, particularly when commenters were in agreement on a change.

This article attempts to take advantage of the growing reservoir of data about the rulemaking process available on the internet to compare the regulatory process in the Clinton and Bush administrations. The goal of this comparison is to shed light on the role played by procedural controls in the substance of regulatory decisions made by these very different presidential administrations.

III. The Data

The Federal Register is 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 supporting rules varies significantly by agency,[4] the texts of the rules and the preamble 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 rules[5] 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 first term of each administration, but the rules from Clinton's first term are not available online (as browsable issues on the Federal Register website only go back to 1998). As it was quite unclear in 2003 whether there would be a second Bush term, I think the comparison is valid. I also wanted to avoid the final year of an administration because of the potentially atypical nature of rulemaking during this period.[6] I chose therefore to gather data from November and December of 2003 and 1999.

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

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

[6] Much has been written about "midnight rulemakings." See for example Mendelson (2003) and Beermann (2005).

To gather data, my research assistants and I combed through each issue of the Federal Register from these four months. The list of the variables for which we gathered data appears in Appendix I. 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"[7] and the promulgation of the final rule. This variable will be discussed in Section VI. The second exception is a variable quantifying the extent of change since the proposed rule which is discussed extensively in Section V.

In the two months examined from the Bush Administration, there were a total of 400 final rules that met the criteria for inclusion.[8] During the corresponding two months of the Clinton Administration, there were 579 such final rules. This 37% decrease across administrations gives support to the perception of the Bush Administration as being less interested in issuing regulations than its predecessor. This is evidence of the widely perceived substantive difference in regulatory policy between the two presidents.

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.

We can make several observations regarding this table. First, the overall order of the agencies is relatively independent of administration. 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 Transportation). The number of regulations at EPA dropped 38%; regulations in the Department of Agriculture, 58%; and regulations at HHS, 40%. This difference in the issuance of regulations gives some confirmation to widely perceived policy differences between the Presidents that are consistent with popular perceptions.

Of course, not all regulations are created equal. Some have a very general impact,

[7] The Unified agenda is published semiannually and contains agency descriptions of all of the regulations they plan on issuing over the next six months.

[8] As explained in note 5, above, I included only those rules that have some substantive content. A more detailed list of criteria for inclusion can be found in Appendix I. The number of rules I analyzed for each two-month period is lower than one would expect, based on the total number of annual rules reported elsewhere (e.g., Crews (2006)), because of my exclusions.

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 used on airplanes) from the Federal Aviation Administration, the EPA's state implementation plan approvals (allowing States to oversee Clean Air Act improvements), and approvals of state regulatory programs from the Office of Surface Mining at the Department of the Interior. 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 I) differed between administrations. In November and December 1999, USDA produced 47 general regulations, EPA 27, and DOT 26. In November and December 2003, five agencies (DOT, USDA, Commerce, Defense, and FCC) produced between 18 and 21 general rules each. This is 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.

IV. The Public Comment Process

The first variables related to the regulatory process that I examined involved the public comment process. The public comment process is one of the oldest aspects of the rulemaking process. Requirements for participation in agency decisionmaking have existed for many years (Kerwin 2003) but were formalized in the Administrative Procedure Act in 1946. 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 Administrative Procedure Act (APA) allows regulatory agencies to bypass the public comment process via the use of special procedures for promulgating "direct" and "interim final" rules (Levin 1995). 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. 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). In either case, the rule becomes effective without the benefit of public comment. 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 50 interim final rules. This means that over 47% of the final rules issued in this period were issued without a public-comment process. In November and December 2003, the Bush Administration issued 122 direct final rules and 41 interim final rules, which together represent over 40% of the rules issued during this period. This is similar to the results of a 1998 GAO study, which found that half of the rules issued in 1997 were issued without a proposed rule (GAO 1998).[9]

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% of the direct final rules were narrowly tailored in both Administrations (as opposed to 42% 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. Because interim final rules are often justified with some type of emergency or urgency that makes public comment impractical, it is not surprising that general rules are more likely to have interim final designations than

[9] The use of interim final and direct final rules varies dramatically by agency. In both administrations DOT used direct or interim final rules less than 40% of the time. By contrast, EPA issued rules without prior comment over 65% of the time and DHS did so 68% of the time.

rules with a narrow impact.

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 (3 7%) of rules in which there was an opportunity for the public to comment, received no public comments.[10] A significant majority (70%) of these rules were of a narrow impact.[11]

As for those rules which 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 (34 of the rules in the 1999 database and 16 of the rules in the 2003 database had no such data). In addition, the number of comments on rules has a distribution that is extremely likely to be severely skewed (a small proportion of rules get many comments) and therefore the mean is not likely to be a good barometer of the comment volume.

This latter problem is particularly evident in a comparison of the mean number of comments received across the two Administrations. An average of 1347 comments was received on the 2003 rules, and an average of only 27 comments were 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 approximately 50,000 comments (68 FR 68254). A regulation issued by the Department of the Interior regarding snowmobiles in the national parks received over 104,000 comments (68 FR 69267). Finally a regulation reversing Clinton Administration policy on road building in the national forests received over 133,000 comments (68 FR 75136). Without these three regulations the average number of comments received on the rules in the 2003 database drops to 39. The difference between 39 and 27 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

[10] During November and December 2003, 37.5% of the rules issued received no comments, and during November and December 1999, 36.7% received no comments. The proportion may be even closer since there were 11 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.

[11] This leaves 59 rules with a general impact that received no comments. This is roughly 20% of all general impact rules opened for comment.

received. For both the 1999 and 2003 data, the median number of comments was equal to 1. 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 5.

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. On those regulations on which the agency invited comment, 37% received no comments. The majority of these "no comment" rules were narrowly tailored. Finally, if one ignores the presence of three particularly controversial Bush Administration rules, the pattern of the number of comments received by agencies was very similar across administrations.

V. 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 comments they received. This is a more difficult question to tackle. Golden (1998) and West (2004) have both conducted multiple 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 to whose comments received the most attention. Similarly, after reviewing one specific rulemaking, Balla (1998) agreed that the public-comment process was of limited influence. Magat, Krupnick, and Harrington (1986) looked at rulemakings under the Clean Water Act and found that public comments had a negligible effect. On the other hand, as mentioned above, Yackee (2005) examined 40 rules from four agencies that received between 2 and 200 comments and found that comments made a difference on low-salience rules, particularly when commenters were in agreement on a change.

To attempt to answer the question of how agencies change rules in response to comments, I used a variable with 4 values to describe how much a rule changed between its proposal and its final promulgation. As described above, 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 in a rule and often use language like "the rule was clarified to show . . ." when the changes are minor.[12]

Table 2 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% of all rules published for public comment receive no changes or only minor changes. The second is that while there were a greater percentage of "2"'s in the 1999 data (and a corresponding greater percentage of "0"'s in the 2003 data), the difference is not statistically significant.[13]

Both of these observations require greater analysis. Since the data above includes those rules for which no comments were received, it may not be a fair indicator of agency use of the public comment process.[14] Table 3 lists the data only for those rules on which comments were received. Both of the observations hold when narrowing the types of rule we are examining to those that received public comments. Approximately 55% of rules on which comment was received had at most minor changes between proposal and promulgation. Also, again while a difference appears to exist between the Bush and Clinton administrations, this difference is again not statistically significant.[15]

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, on which one might assume change from a proposal is most likely, approximately 45% 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.[16]

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[12] In the only other work measuring change on a large dataset of rules, Yackee (2005) used a variable based on the extent to which agencies made the top 5 changes suggested by commenters. This approach is impractical in this broader study.

[13] Using a chi-squared test with a 10% significance test the critical value is 5.68.

[14] 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.

[15] Using a chi-squared test with a 10 significance level, the critical value is 5.15.

[16] Many who study rulemaking have argued that agencies are primarily responsive to Congress (McNollgast 1987). Over the past decade, 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 very 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 to a greater extent than the rules proposed afterwards (four of the six rules received a "2") but this is far too small a sample to draw conclusions from.

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 the changes that commenters requested.

This points us toward an important observation about presidents and process. Presidents Bush and Clinton had clear differences over their regulatory preferences as demonstrated by the number of overall rulemakings and the particular agencies issuing rules described in section III. 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. This shows that this procedural control can be used or ignored by Presidents of either party to achieve their substantive goals.

VI. Thinking about Ossification: Time Between Proposed and Final Rules

McGarity and others have long bemoaned the ossification of the regulatory process (McGarity 1992). Referring mainly to requirements for economic analysis and "hard look" judicial review, McGarity argues that the regulatory process has become too burdensome. As a result, agency officials are turning away from rulemaking as a policymaking option. While some have questioned McGarity's more dire conclusions (Shapiro 2002), 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. Scholars such as McGarity (1992), Moe (1989), and Asimow (1994) agree that such controls will make it harder to regulate. If this is the case then presumably we would see a pro-regulatory administration take longer to complete a rule than an anti-regulatory administration. This would be true because procedural controls such as the Regulatory Flexibility Act, requirements for cost-benefit analysis,[17] and the

[17] However the most prominent requirement for cost-benefit analysis, Executive Order 12866, is coupled with the ability for the President more effectively oversee agency regulatory activity. Isolating the impact of cost benefit analysis is therefore particularly difficult (Shapiro 2005).

Paperwork Reduction Act are designed to make it harder to issue regulations which impose burdens on particular constituencies.

There has been little examination however of the question of whether it now takes longer to complete a rule. One difficulty is ambiguity regarding when a rulemaking 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 12866 (if applicable), and revision of the supporting analyses for the rule. If ossification of rulemaking has occurred, one may very well see it in long periods between proposal and final rule.[18]

West (2004) argued that much of the work in rulemaking is done before the rule is even proposed. If this is 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 they completed it. 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. Because it only comes out twice per year, and because agencies are less than perfectly diligent in publishing their plans in the Unified Agenda, 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 on December 17, 2003 (68 FR 70185), 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 (64 FR 72466). It

[18] A key part of the ossification argument holds "hard look" review by the judiciary responsible for the retreat from rulemaking (Mashaw and Harfst 1990). 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.

had been proposed on May 28, 1991.

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 (since 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 (because this procedure is often cited as one of the reasons that rulemaking has gotten so burdensome for agencies (McGarity 1992)).

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% of the rules moved from proposal to finalization in fewer than 6 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 of several rules that took a very long time.

The first three observations above are self-explanatory and require no further analysis. The observation regarding OMB review however, on the surface appears to lend support to the argument that procedural controls lengthen the regulatory process. One difficulty with this observation however, is that 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 12866 and OMB has significant discretion to review other regulations as well.

While OMB review by definition[19] can add up to 90 days to the period between proposed and final rules, it is unclear whether the additional time taken on rules reviewed by OMB can be attributed to the fact that review exists. Some would argue that the

[19] Executive Order 12866 gives OMB 90 days to review agency rules.

additional time (beyond the 90 days) is due to the fact that agencies have to take more time preparing rules for OMB review. Others might argue that agencies are particularly careful in responding to comments in preparation for possible judicial review on politically charged rules, 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[20], 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 1073 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 subjected rules to a more rigorous review than it did under President Clinton (West 2005).

Even this difference casts doubt on the role of procedural controls. If, as is popularly believed, OMB review serves as an impediment to regulatory initiatives, one would expect OMB review to have more of an effect when there is a pro-regulatory president. Instead, this tentative data indicates that instead, an anti-regulatory president makes use of OMB review to slow down the process, meaning that the procedural control is only as influential as the existing coalition desires.

[20] The sample size for 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 82 observations from November-December 2003 and 110 observations from November-December 1999.

VII. Conclusion

Do procedural controls have an effect on the decisions made by agency regulators or the presidential administrations that oversee them? Scholars have argued that such controls "stack the deck" to ensure that the outcome of substantive decisions are those preferred by enacting coalitions (McNollgast 1987). Horn and Shepsle (1989) and Kagan (2001) have argued that such controls become tools that existing coalitions, particularly presidents can use to achieve their policy goals.

This article has compared the regulatory process in the Clinton and Bush (43) administrations. I have found that the two administrations were remarkably similar in a wide range of characteristics of the regulatory process. Both administrations skipped the notice and comment process over 40% of the time. Both administrations received a median of 5 comments on rules put out for public comment. Both administrations made changes to their proposed rules with a similar frequency. Finally both administrations took a similar amount of time to finalize a rule.

I also found that the Bush Administration issued fewer substantive regulations than the Clinton Administration and that the mix of agencies issuing regulations with the most general impact was different across presidencies. This lends support to the widely held perception that the two presidents brought very different ideologies to regulatory issues. We are therefore presented with two presidents with very different substantive regulatory agendas for whom the regulatory process appears identical.

It is possible that the effects of procedural controls are much more subtle than indicated by the metrics I have used. I find two other explanations for this data more convincing however. The first is the one put forward initially by Horn and Shepsle (1989). The operation of procedural controls is left in the hands of existing coalitions. These coalitions (or more particularly the President) can use these controls to achieve their own aims rather than those for which they were intended. This supports the argument put forth by Kagan (2001) who showed how President Clinton used controls developed by Presidents Reagan and Bush to achieve pro-regulatory goals.

The second possible explanation is that agency officials and their political overseers have grown accustomed to the procedural environment in which they operate and know how to manage that environment. The procedures become mere "speed bumps"

on the road to achieving the preferred regulatory policies of the existing political coalition. This is in agreement with a study conducted on state child care licensing regulations (Shapiro 2002).

In either case, it seems unlikely that procedural controls have the effect expected of them by academics or political figures who continue to introduce new procedures to the regulatory process. The Bush Administration has added numerous such procedures. These include regulatory peer review, information quality guidelines, and risk assessment guidelines. Opponents fear that these new requirements will make issuing regulations impossible. This article suggests that the new regulatory procedures may either be irrelevant to regulatory outcomes or may be used by future pro-regulatory presidents to achieve their own regulatory goals.

Appendix A Database Details

The Following Rules were Excluded from Both Databases

Final rules that do nothing besides change or announce the effective date of a final rule.
Any final rule that says it is merely a "correction."
Any rules referred to as "Temporary Regulations."
FCC rules categorized as "Radio stations; table of assignments:"

Data Elements Collected

Title
RIN Number
Department (if any)
Agency
CFR Title
Was the rule an Interim Final Rule?
Was the rule a Direct Final Rule or Final Rule with no NPRM?
Date
Effective Date
Date of NPRM
Length of time between effective date and date published.
Length of time between date published and date of NPRM
Length of comment period.
Number of comments (if given)
Number of comments from following groups (if given)
- Other Federal Agencies
- State or local governments or agencies
- Industry
- Academics
- Public Interest Groups
- Unions
- Individuals
- Others

Extent of change from proposal (varies from 0-3, explanation given in paper)
Was there an ANPRM or more than one previous proposed rule?
Who was President during NPRM?
Was the rule significant under Executive Order12866?
Was the rule economically significant under Executive Order 12866?
Costs of the rule (if available).
Benefits of the rule (if available)
Was a Regulatory Flexibility Analysis conducted?
Does the rule contain an information collection under the Paperwork Reduction Act?
If so how much annual burden hours are imposed?
Was the rule an unfunded mandate?

What is the length of the regulatory text (in words)? What is the length of the preamble (in words)?
What is the length of the preamble to the NPRM (in words)? When did the rule first appear in the Unified Agenda?

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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%)

Table 2 Changes in rules

Level of Change	Clinton (11/99-12/99)[20]	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%)

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%)

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%)

Table 5 – The Time Between Proposed and Final Rules

	Clinton Admin. – mean	Bush Admin. – mean	Clinton Admin. – median	Bush Admin. – 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