

The Role of Procedural Controls in OSHA's Ergonomics Rulemaking

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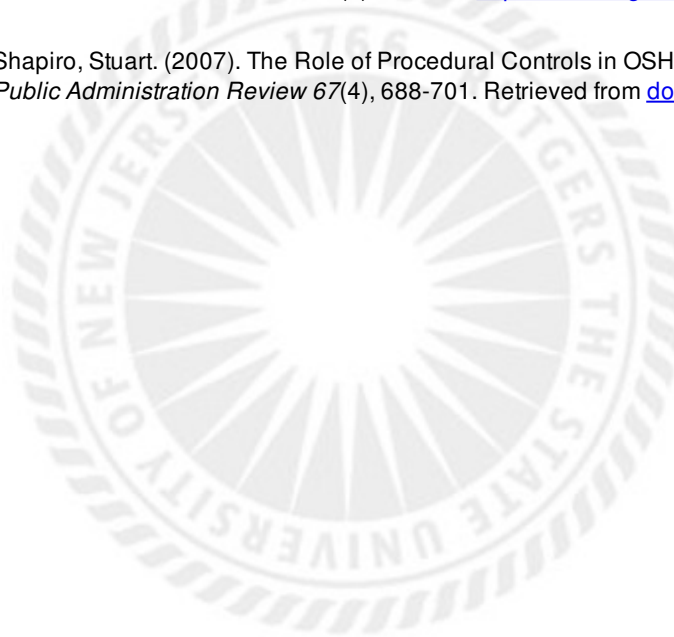
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Biographical Statement

I received my Ph.D. from Harvard University in 1999. My dissertation considered the impact of procedural controls on the rulemaking process on the development of child-care standards in eight states. I then worked for five years at the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) in Washington. There, my responsibility was to review regulations and their supporting analyses for the Executive Office of the President. I returned to academia in Fall 2003 as an assistant professor at the Edward J. Bloustein School for Planning and Public Policy at Rutgers University. At Rutgers, I have taught, conducted research, and written on the regulatory process.

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The Role of Procedural Controls in the Ergonomics Rulemaking

Abstract

Few, if any, regulations over the past decade have received the publicity or engendered the controversy of OSHA's ergonomics regulation. Some may see the ergonomics rule as the paradigmatic instance of procedural hurdles holding up and eventually destroying a regulation. The purpose of this article is to examine the role that procedure played in the ergonomics rulemaking. To draw lessons from the ergonomics rulemaking I have conducted analyses of the four publicly available versions and conducted interviews with seven high ranking officials at OSHA and the Small Business Administration. I find that of the procedural hurdles faced by OSHA, the notice and comment requirement had the largest impact on the final rule. OMB review and requirements to conduct a cost benefit analysis served largely as a fire alarm to political overseers and the required small business panel had largely symbolic effects. The more traditional control of Congressional budgetary oversight had the greatest effect by delaying the rule for three years which eventually doomed OSHA's attempts to regulate.

The Role of Procedural Controls in the Ergonomics Rulemaking

I: Introduction

Over the past several decades, the federal rulemaking process has been in a state of continual reform. Many of these reforms have taken the shape of additional procedures that agencies must follow when promulgating a regulation. The legislative branch has required agencies to analyze the impact of their actions on small businesses, submit rules to Congress before they become effective, and avoid imposing “unfunded mandates” upon states. The President has created an office to review all significant rules and has required agencies to analyze the economic impacts of their most significant rules.

Academic perspectives on these procedures are nearly as varied as the procedures themselves. Some have argued that they work to ensure that bureaucrats make decisions in conformance with the preferences of the politicians who imposed the requirements (McNollgast 1987, 1989). Others have seen the procedures as embodying important values like economic efficiency (Sunstein 2002) and public participation (Davis 1969). Finally, some have criticized the procedures for overburdening the bureaucrats who write regulations and deterring them from using the regulatory process altogether (McGarity 1992).

While considerable academic attention has been devoted to the purpose of procedural controls and how they might work in theory, much less attention has been focused on their actual effects. Although several works have examined the public comment process (Golden 1998; West 2004; Balla 1998) and negotiated rulemaking (Coglianese 1997; Harter 2000), many of the more recent procedural requirements on rulemaking have generated much rhetoric but little analysis.

The purpose of this article is to examine the effects of several procedural controls on one particular rulemaking. Few if any regulations over the past decade have received the publicity or engendered the controversy of the Occupational Safety and Health Administration's (OSHA) ergonomics regulation. OSHA's efforts to require employers to implement programs to reduce musculo-skeletal disorders (MSDs) garnered front-page attention repeatedly over the ten-year rulemaking process. The ergonomics regulation combined complex technical issues and political salience, with an abundance of procedural hurdles it was required to clear before its ultimate rejection by Congress in March, 2001.

The ergonomics rulemaking is not a typical rulemaking (if any rulemaking is). It occupies the extremes of dimensions such as economic impact, political salience, and technical complexity. As such, it implicates with particular significance the concerns that prompted Congress and the President to implement many of the broadest procedural controls in the first place. Although the rule's uniqueness compromises its usefulness as a basis for generalizing about the impact of procedural controls across regulations, it makes the rule an ideal tool to illuminate how these controls work on the regulations they were designed to affect.

This paper has four sections. In Section II, I briefly review the literature on procedural controls and outline my methodology in conducting this case study. The bulk of the paper is in Section III, in which I review the history of the ergonomics rulemaking, highlighting the particular role of procedural controls. Finally, Section IV draws conclusions.

II: Procedural Controls

Much of the academic discussion of attempts to influence bureaucratic decisionmaking in the regulatory process has utilized principal-agent theory. Political principals, whether

legislatures or executives, attempt to ensure that bureaucratic agents make decisions in a way that reflects the principals' preferences.¹ Microeconomics teaches that one of the difficulties for principals is the high cost of continuously monitoring agent behavior (Kreps 1990). This cost is particularly problematic in the case of political principals and bureaucratic agents: bureaucrats possess technical knowledge unavailable to political superiors (Bawn, 1995) and will be making decisions long after those superiors have left the policy arena (Hecklo 1977).

McNollgast (1987, 1989) frames the problem as the difficulty faced by enacting coalitions of legislators and executives in attempting to control "agency drift" and "coalitional drift." "Agency drift" refers to the tendency of bureaucrats to make decisions that differ from the intent of the enacting coalition, and "coalitional drift," to the possibility that future political officeholders will have different preferences than those of the enacting coalition.

McNollgast explains the creation of procedural controls on bureaucratic decisionmaking as responses of enacting coalitions to the problem of controlling both types of "drift." The enacting coalition creates a procedural environment that will ensure that its interests will continue to influence agency decisions even after the enacting coalition is no longer around to monitor the agency or future coalitions. By "stacking the deck," the enacting coalition hopes to ensure that the bureaucracy implementing a statute faces the same environment as the coalition that enacted the procedural requirement (McNollgast 1987). This framework has been expanded considerably since it was first described (Lupia and McCubbins 1994; Ferejohn and Shipan 1990; Bawn 1995).

Other scholars argue that procedural controls may not work as McNollgast envisions. Horn (1995) argues that procedural constraints work best when the beneficiaries of regulation are small concentrated groups. Horn and Shepsle (1989) note that such controls ignore the tradeoff

between agency drift and legislative drift -- while procedural requirements curb agency drift, new legislative coalitions may choose to ignore the controls or overturn them. 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 (Moe 1989). West (1997) and Robinson (1989) cite other problems with the McNollgast framework.

Epstein and O'Halloran (2000), in an examination of post-World War II statutes, discovered that while delegation to the executive branch has increased during this period, bureaucratic discretion has not, because of the increased use of procedural controls. Huber and Shipan (2002) acknowledge that "[s]cholars seem to agree that the use of procedural rather than policy details represent the most important way in which Congressional majorities use legislation to influence bureaucratic autonomy," but they emphasize the greater importance of specific policy instructions in statutes.

The procedural controls debated in much of this literature are requirements placed specifically within a particular statute. Additionally, however, legislators and executives place controls on the regulatory process generally -- across statutes. In McNollgast's terms, these controls can also be characterized as attempts to influence bureaucratic decisionmaking by empowering those who support the legislators or executive imposing the control. McNollgast (1999) indeed examine the Administrative Procedure Act and conclude that it fits well within their earlier discussion of more particular controls.

These general procedural controls have become extremely prevalent in the federal regulatory process.² The requirement that agencies follow a notice and comment process when engaging in rulemaking can be seen as the oldest of these controls. Participation by interested

parties in rulemaking predates the notice and comment process adopted in the Administrative Procedure Act (APA), passed in 1946 (Kerwin 2003).³ 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.

As the use of rulemaking increased, so did the number of procedural controls. In 1981, President Reagan issued Executive Order 12291,⁴ 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. Scholars have characterized both measures as attempts by enacting coalitions to control future bureaucratic decisions (Croley 2003, Posner 2001).

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,⁵ and the Small Business Regulatory Enforcement Fairness Act (SBREFA) required the Environmental Protection Agency (EPA) and OSHA to convene panels of small business representatives to review rules to ensure that they did not unfairly burden small businesses. As part of the same statute that included SBREFA, the 104th Congress passed the Congressional Review Act (CRA). The CRA created expedited procedures by which Congress could review and veto regulations. (Hence, it differs from other requirements discussed here, in that it is not a procedure the agency must follow.) The CRA and SBREFA, both passed as part of the same statute in 1996,⁶ played a role in the ergonomics rulemaking.

Work examining the actual effects of procedural controls is much less common than works on the theory behind their imposition.⁷ Such academic work as exists is predominantly in the legal literature. According to McGarity (1992), the regulatory process has become “ossified.” Once an agency has written a rule, the agency is, as a result of new procedural requirements, unlikely to change it, and in some cases the new requirements may deter agencies altogether from using rulemaking as a policy device. The costs of rulemaking have increased to the point where it may no longer be worthwhile for bureaucrats to undertake the effort associated with rulemaking.⁸

Other scholars have found that in practice, procedural controls may only have a limited impact on bureaucrats. Both Golden (1998) and West (2004) examined multiple rulemakings and found that agencies made only limited changes to their proposals in response to public comments, and that there was no consistent pattern in whose comments received the most attention. Similarly, Balla (1998), reviewed one particular rulemaking, agreeing that the public comment process was of limited influence; Korn (1996) found that the legislative veto had little impact on the substantive outcomes of bureaucratic decisions; and Shapiro (2002) found that procedural controls had a very limited effect on state child-care licensing standards. Spence (1999), in an examination of the Federal Energy Regulatory Commission (FERC), found that FERC was able to circumvent procedural controls designed to force the agency to give greater weight to environmental considerations. In studies of negotiated rulemaking, Coglianese (1997) found that this tool was of limited effect while Harter (2000) disagreed.

In a study of the public comment process, West (2004) theorizes that the public comment requirement could have one of three possible effects; this point applies to procedural controls generally. Such controls can, first, play an important substantive role in the outcome of

regulatory decisionmaking. Alternatively, they can serve as signals to political overseers of agencies that increased oversight is necessary (i.e. “fire alarms” as described by McCubbins and Schwartz (1984)). Third, they may be of merely symbolic importance. To these three I would add a fourth possibility: McGarity's (1992) argument, discussed above, that controls can cripple the regulatory process and lead bureaucrats to turn away from rulemaking altogether.⁹

Because ergonomics was a single rulemaking effort, and because it was so salient, so complex, and would have had such a large economic impact, there are limits on the generalizability of observations about it.¹⁰ However, its extremely high salience and complexity help us understand the operation of procedural controls on the rulemaking process.¹¹ Such controls were largely put in place in reaction to agency promulgation of rules with a very large impact on the public without oversight by the political branches.¹² Given the limited empirical work in this area, the observation of a case that exemplifies the type of rule Congress had in mind when imposing procedural controls and where so many of these procedural controls were at work can only add to our understanding of their actual impact of the controls in practice.¹³ As will be evident in the next section, the ergonomics rulemaking went through as many procedural hurdles as nearly any rulemaking in history; as such, it makes for an excellent case study of procedural controls in practice.

III Ergonomics: A Case History

To draw lessons from the ergonomics rule's history, I have used two approaches. First, the rule had four public versions,¹⁴ each representing the outcome of OSHA's work and the influence of different parties at a different stage of the rulemaking process.¹⁵ These four versions were the draft OSHA submitted to the SBREFA panel ("the SBREFA Draft"), the draft proposed

rule submitted to OMB ("the OMB Draft"), the proposed rule, and the final rule. I examined these four versions and detailed the changes from one to the next. Second, in an effort to determine whether each change was in fact caused by the procedural control that the rule had just cleared, I conducted seven interviews with OSHA and Small Business Administration (SBA) officials.¹⁶

A. Background

The ergonomics rulemaking effort spanned more than a decade. OSHA began issuing citations for ergonomics hazards under the General Duty Clause of the Occupational Safety and Health Act in 1987.¹⁷ In July 1991, more than thirty labor organizations petitioned OSHA for an Emergency Temporary Standard to address ergonomic hazards.¹⁸ The first Bush Administration denied the petition in April of 1992 but committed to moving forward with a standard rulemaking. In August of 1992, that administration followed up with an Advance Notice of Proposed Rulemaking (Federal Register, 57 FR 34192).

In March of 1995, OSHA provided a draft proposed standard to stakeholders. The standard was exceptionally detailed and provoked a negative reaction. Over the next several years, Congress attached to OSHA's appropriations bills a number of riders prohibiting OSHA from spending funds on an ergonomics proposal. The last rider finally expired on September 30, 1998. Soon after the rider expired, according to one interview subject, ergonomics became the top priority of organized labor and therefore a top priority at the Labor Department. Both labor unions and policy officials at DOL and OSHA recognized that there were only two years remaining in President's Clinton's term and that work had to move quickly if the rule was to be finished by the end of the Administration.¹⁹ In early 1999, OSHA convened a panel under SBREFA to discuss a revised proposed standard.²⁰

The draft rule considered by the SBREFA panel (the “SBREFA draft”) imposed requirements on any employer with an employee who had a work-related musculo-skeletal disorder (MSD) and on any "employer in general industry [excluding agriculture, construction, and maritime operations] whose employees work in manufacturing or material handling jobs.” Such an employer would have been required to implement an ergonomics program with six elements: management leadership and employee participation, hazard information reporting, job analysis and control, training, MSD management,²¹ and program evaluation.

B. The SBREFA Panel

i. History

OSHA convened a SBREFA panel for its ergonomics rule on March 1, 1999. This panel consists of the regulating agency (OSHA), the Office of Advocacy within the SBA, and OIRA. Within sixty days of being convened, the panel must produce a report with recommendations to the regulating agency. The panel shared a draft of the rule with twenty small business owners and solicited their input. The reaction from the small businesses was largely negative. Much of the criticism focused on OSHA’s estimation of the rule's costs: the business owners believed that OSHA had underestimated them significantly. They also criticized OSHA’s requirement that a company implement an ergonomics program after the occurrence of only a single injury to a worker, and the SBREFA draft's medical removal protection provisions.²² The final panel report contained dozens of recommendations based on the small business community's reaction. The recommendations were not binding and were worded quite generally: e.g., “[t]he Panel recommends that OSHA review its cost estimates in light of these comments”; and, “[t]he Panel recommends that OSHA look at other types of triggers” (SBREFA Panel Report, 1999).

OSHA submitted the next publicly available version of the rule to OMB on July 1, 1999. The "OMB draft" contained several significant changes from the SBREFA draft, but only one appeared designed to help small businesses.²³ This was the inclusion of a "Quick Fix" provision, which would allow employers, under certain circumstances, to fix an ergonomic hazard without implementing a full ergonomics program (OMB Draft). OSHA also revised its cost estimates upwards, but otherwise, most of the panel's substantive recommendations were dealt with by extensive discussion in the preamble and solicitations for comments on alternatives, rather than by changes to the regulation (Federal Register, 64 FR 66050).

Representatives of SBA credited the SBREFA process with the addition of the Quick Fix provision. OSHA representatives, however said that the reason for the addition of Quick Fix was not nearly as clear. According to several OSHA interviewees, the agency had internally debated Quick Fix long before the SBREFA panel and would have included it in the OMB draft regardless of the panel's recommendations. The preamble to the OMB draft tends to corroborate that claim: nowhere in the section addressing the SBREFA panel's recommendations is Quick Fix mentioned (despite the fact that the SBREFA panel called for more flexibility in the rule and it would have been easy for OSHA to describe the Quick Fix as a response to these requests). It is impossible to ascertain whether the Quick Fix provision would have been incorporated in the rule without the SBREFA panel. However, given that the rule became more flexible with each subsequent version, I believe that it is reasonable to accept the view of the OSHA interview subjects and assume that some form of Quick Fix would have ended up in the final rule with or without the SBREFA panel.

ii Impact

In its comments on the proposed rule, the SBA praised the SBREFA process:

The SBREFA panel report indicated that small businesses had a vast number of concerns with the regulations under consideration at that time. Among those concerns were the confusions surrounding many of the terms and provisions of the rule. These sections in the current proposals show improvement, and with further clarity will enable small businesses to comply with the regulation effectively. It is clear from this next version of the proposal that *the panel process works* (emphasis added) and was quite helpful in highlighting major concerns of small businesses. (SBA 2000).

While the panel process did highlight the concerns of small business, SBA's claim that the process worked is much more difficult to substantiate. If the purpose of the process was to lead OSHA to modify the rule to accommodate small businesses, then only the change implementing the "Quick Fix" provision could conceivably be evidence that this occurred. As described above, however, it is unlikely that the SBREFA panel was solely responsible for its inclusion. Indeed, SBA's own comments on the proposed rule eventually published by OSHA are filled with criticism and suggestions that the proposed rule will unfairly burden small businesses. Echoing concerns raised in the SBREFA report, SBA's comments again criticized the one-incident trigger, the requirement for engineering controls, the Medical Restriction Protection provisions, and even certain aspects of Quick Fix. SBA states, "OSHA's proposal remains troubling for the millions of small businesses that will be subject to the standard."

It is unreasonable to expect that the SBREFA process would result in only rules acceptable to small businesses. However, SBA and the small business community were nearly uniform in their opposition to the ergonomics standard. If the SBREFA process had had a substantive impact on the rule, then there would have been at least some significant changes to the standard reviewed by the panel. Instead, there was only the addition of the "Quick Fix" provision, which, while certainly helpful, had an small impact on the standard's overall cost.

Arguably, the SBREFA panel requirement did serve a different purpose: the panel's recommendations were a signal to legislators representing small business interests that those

interests were not happy with OSHA's proposal. Possibly, by requiring OSHA to publicize an early draft of the rule and by getting small business owners to comment on this draft, SBREFA mobilized small business opposition to an ergonomics rule earlier than would have been the case without the panel. One could also argue, though, that since organizations representing small businesses had been lobbying against an ergonomics rule throughout the 1990s,²⁴ the SBREFA panel was not necessary to mobilize this opposition. While the SBREFA panel did accomplish the signaling function cited by advocates of procedural controls, it was probably unnecessary for this purpose.²⁵

Conclusions about whether the SBREFA panel introduced significant delay into the regulatory process are more difficult to form. Multiple interviewees said that the SBREFA panel normally takes the sixty days that the statute requires plus a couple of months of preparation. In the case of ergonomics, however, the same officials acknowledged that absent the panel requirement, the rule would not have come out any sooner, because of the short time period from the expiration of the last Congressional rider to the end of the Clinton Administration. These officials argued that if they hadn't had to conduct a SBREFA panel, OSHA would have spent more time on the rest of the rulemaking process, particularly the consideration of public comments.

With a minimal substantive impact, an unnecessary role as a signal, and no real delaying impact, one is left with the conclusion that the role of the SBREFA panel in the ergonomics rulemaking was largely symbolic. The panel institutionalizes the belief that small businesses are a particularly important component of our market-based economy, that regulations have a disproportionate impact on small businesses, and that such businesses should have a greater voice in the creation of regulations than either large businesses or the beneficiaries of regulatory

efforts. Multiple OSHA officials noted that the unique time constraints that they were under when developing the ergonomics rule made it less likely that OSHA would be able to incorporate feedback from the panel process. Still, SBA officials maintained (and several OSHA officials confirmed) that even without those time constraints, OSHA considers the process a “check box” or a formal “hurdle” and little more.

C. OMB Review and Economic Analysis

i. History

After the SBREFA panel, the next procedural hurdles were review of the regulation and of OSHA's supporting cost-benefit analysis by OIRA. OSHA submitted the rule (the "OMB Draft") for OIRA review on July 1, 1999, and OIRA completed review on November 19, 1999.²⁶ The draft that emerged from OMB review is the proposed rule. I consider OMB review and the economic-analysis requirements together in this section, because both are required by Executive Order 12866,²⁷ and my interview subjects thought of them in tandem. While it is possible (or even likely) that requirements for executive review and for conducting economic analysis could have different impacts on the regulatory process, such a difference is impossible to detect in this case study, given that agency officials inevitably treat them as one requirement.²⁸

The proposed rule that emerged from the 1999 OIRA review contained few changes in overall structure from the OMB Draft. The most significant change was to the worker restriction protection (WRP) provisions. Previously, if a worker could not continue at his job because of an MSD, he was guaranteed his full pay and benefits. When the rule was proposed, after the OIRA review, this was altered to guarantee 90 percent of his take home pay and full benefits. The proposed version of the rule contained several other less significant changes, such as

considerable additional detail about which physical work activities corresponded with ergonomic risk factors.

ii. Impact

The WRP provisions were among the most controversial provisions in the rule. All of the interview subjects acknowledged that OMB review played a role in changing WRP. OSHA officials, however, differed considerably on the likelihood that significant modifications to WRP would have occurred without OMB review. Several subjects characterized the debate within the agency and within the department on WRP as extensive. One official said he had never expected WRP to survive and that the agency had only kept the provisions in early versions of the rule²⁹ so that they would be available to give away later in court battles.³⁰ Others appeared to indicate that they used OMB's opposition to WRP to advocate for a compromise with others within the agency.³¹

To know for sure whether OMB review was essential in the scaling back of WRP, one would need to know whether the original WRP provisions would have remained in the standard absent OMB review. Given that even advocates of WRP within OSHA believed that those provisions might eventually be removed from the standard in a lawsuit, it is likely (but impossible to verify) that a final standard would not have had WRP as initially envisioned by OSHA, even without OMB input. The form of the particular compromise that was reached, however (reducing injured employees' compensation to 90 percent of their original wages), was almost certainly due to OMB review.

The role of economic analysis in the development of the ergonomics rule is less clear. Interviewees agreed that economic analysis was used both to drive decisionmaking and to justify decisions already made. Where it drove decisions, however, it did so in a general way rather than

by motivating decisions on particular provisions of the rule. Several interviewees described pressure to bring the costs down from officials worried about the high costs shown in the economic analysis. They attributed decisions to increase the flexibility of the rule to that pressure. One interview subject cited OMB review and the economic analysis requirement as playing a role in forcing OSHA to consider alternatives to its proposal, although he acknowledged that none of the alternatives considered were adopted.

The substantive impact of OMB review and the economic analysis requirement is even less clear than the impact of the SBREFA panel. The combination of these two requirements appeared to lead OSHA officials to accept provisions that lowered the cost of the standard. However, public comments also pushed OSHA toward increased flexibility, so it is unclear whether OMB review and the SBREFA panel were necessary in this regard. The largest substantive impact appears to be the 90 percent compromise on the WRP provisions, but we will never know if an eventual court settlement would have led, as one OSHA interviewee predicted, to the abandonment of WRP altogether. The substantive impact of these requirements on the ergonomics program is ambiguous.

My interviews did clearly indicate that OMB review served the function of alerting political officials in the White House to regulatory issues. OSHA officials revealed that this worked in two different ways. According to two interview subjects, OSHA policy officials discussed the rule with White House officials prior to and during OMB review to ensure that OMB got the message that “the President wanted this.” Another subject described how OSHA policy officials would quickly go to White House officials if there were disagreements on the staff level between OSHA and OMB.

It makes sense that, as interviewees reported, OMB review serves the purpose of keeping the White House informed, particularly before issuance of the proposed rule. Prior to publication of a proposed rule, the President and his staff have no other way of learning about particular issues in a regulation. They will likely have opinions about the rule as a whole but without the OIRA staff studying the details of the regulation, particular issues are likely to escape their attention. Once a proposed rule is issued, the notice and comment process ensures that interest groups will keep the White House informed about the details of agency actions. Prior to the issuance of the proposed rule, OMB review is the only signal to the White House about the specific requirements an agency is planning to propose.

As with the SBREFA panel, it is difficult to ascribe any delay in the ergonomics rulemaking to OMB review. OSHA officials acknowledged that they continued to work on the rule while it was at OMB for review, making their own changes in addition to those negotiated with OMB. Absent OMB review, the final rule would not have come out any sooner than its eventual publication date of November 2000, interviewees reported. As with the SBREFA panel, without OMB review, the agency would likely have spent more time examining comments or provided a longer comment period.

OSHA officials gave different views as to whether OMB review typically (in the case of OSHA rules other than ergonomics) imposes significant delays on the regulatory process. One official argued that the rule OSHA typically submits to OMB³² is a finished product and that if it weren't for OMB review, publication would occur at that point. Another official "could not imagine the process without OMB" and argued that OMB helps OSHA put out a quality regulatory document.

OMB review and economic analysis do appear to have played more than a merely symbolic role. Very likely, OMB review had a substantive effect on the ergonomics rule, though not nearly as great an effect as many of OMB's supporters and critics imagine. The economic analysis requirement appeared to help justify additional flexibility in the rule, although public comment pushed in the same direction. Most clear is the role of OMB review as a signal to political overseers. By fostering debate between two different agencies (OMB and OSHA) with differing perspectives on regulatory policy, Executive Order 12866 guarantees that significant issues will be brought to the attention of the President's staff before being made public.

D. Notice and Comment

i. History

On November 23, 1999, after OMB review, the proposed rule was published and opened for public comment. The public comment period was initially to last until February 1, 2000 (seventy days), but after receiving several petitions to extend the comment period, OSHA extended it by 30 days, to March 2, 2000. OSHA then held nine weeks of public hearings, giving interested parties an opportunity to present their concerns with the proposed standard.³³ OSHA received nearly 11,000 comments on the proposed ergonomics rule, the second largest number of comments on any proposed rule in the agency's history.

As noted above, requirements for participation in agency decisionmaking have existed for many years (Kerwin 2003). By requiring agencies to propose rules, accept comments on those rules, and consider those comments, Congress set up a mechanism for the public to influence the rulemaking process. An agency's response to comments helps courts determine whether the agency has been "arbitrary and capricious" in its regulatory decision (McGarity 1992). Notice and comment has been praised as an important administrative innovation enhancing

accountability and promoting participation in policymaking (Davis 1969); it has also been criticized as Kabuki theatre, a sham process in which agencies make up their minds and give only superficial attention to the comments they receive (Elliott 1992).

There were many changes in the ergonomics rule between its proposed and final versions. While many of the changes were clarifications, others were much more significant. Firms with manufacturing and material handling jobs were no longer placed in a special category and required to implement a partial ergonomics program regardless of whether an employee suffered an injury. OSHA included in the final rule a “basic screening tool” to help businesses decide whether an injury in their workplace triggered the requirements of the standard. The agency also gave employers four ways to conduct a job-hazard analysis. Finally, OSHA created a dispute resolution mechanism for medical disputes between employers and employees and tightened the Quick Fix provisions (Federal Register 65 FR 68262).

The changes appeared in the final rule despite the very limited time that OSHA had to respond to public comments. The public hearings on the proposed rule did not conclude until June of 2000, and by November 2000, the final standard had been published. Between 1988 and 2000, OSHA took an average of four years to move from proposal to final rule.³⁴ Critics of the standard argued (among many other things) that OSHA gave short shrift to public comments. “[S]imply put,” opined Senator Mike Enzi (R-WY), “OSHA rushed through the rulemaking process” (New York Times, March 7, 2001). OSHA interviewees confirmed that their consideration of public comment was rushed: one called it a “Herculean task,” and another acknowledged, “there was not enough time to do justice to the record.”

ii. Impact

Both a detailed comparison of the final and proposed rules and my interviews with OSHA officials support a conclusion that despite the limited time period for consideration of public comments, the process did play an important role in agency decisionmaking on the ergonomics rule. The first piece of evidence is OSHA's explicit acknowledgement, in the preamble to the final rule, that many of the changes between the proposed and final rule were due to [or were associated with] public comments. For example, one of the most commonly expressed public complaints about the proposed rule was that it was unnecessarily vague and that companies would not know if they had complied with the standard. The provision of a basic screening tool and the suggested ways to conduct a job hazard analysis were responses to these criticisms (Federal Register, 65 FR 68313 and 68340).³⁵ The new dispute resolution provision, too, represented OSHA's attempt to respond to comments from both employers and employees asking the agency to clarify which doctor's opinion would be conclusive if a dispute arose (Federal Register, 65 FR 68377).

As with other controls, the mere presence of changes is insufficient evidence to conclude that the control played a substantive role. My interview subjects at OSHA agreed on the importance of the notice and comment process in both ergonomics and in other rulemakings. One said "the comment process is the key to keeping us honest;" this official also felt that the public comment process was the key to ensuring that OSHA analyzed the economic impacts of its actions. Another official said, "I love notice and comment, it is extremely valuable." The combination of the number of changes directly responding to criticisms of the rule found in comments and the response of interview subjects points to a substantive role for public comments in the ergonomics rulemaking.

Although the interviewees asserted that notice and comment played an important role in their decisions, they also (as noted above) cited the severe time constraints under which they wrote the final rule. It is possible that notice and comment would have had an even larger influence on the content of the final rule, had the timing been different. While industry critics of the rule would likely never have been happy with any requirement for an ergonomics program,³⁶ having more time to review the standard would have allowed OSHA to clarify provisions and perhaps introduce additional flexibility.³⁷

In addition to having a substantive impact on the ergonomics rulemaking, the notice and comment process accomplished other goals. By requiring the agency to give notice of its regulatory intentions via a proposed rule, notice and comment gives affected interests a chance to inform not only the agency of their views, but also Congress and the President.³⁸ In fact, the requirement for a notice of proposed rulemaking is such a powerful opportunity for interest groups to signal their reaction to an agency regulatory proposal that it calls into question the need for other procedural signals. While the SBREFA panel gives small businesses and SBA a special opportunity to comment on a rulemaking, these entities are by no means excluded from the notice and comment process.³⁹ The second round of OMB review gives the staff of the White House the opportunity to analyze and apply its expertise to a regulation. However, this review is probably not necessary to give the executive the opportunity to hear what outside interests think about a rule once it has been publicly proposed, because stakeholders, having seen the notice of proposed rulemaking, can perform this signaling function.⁴⁰

Few would argue that the notice and comment process does not introduce delay into the regulatory process. However, few have argued that such delay is unnecessary or inappropriate. None of the critics who claim that procedural controls have ossified rulemaking (e.g., McGarity

1992) cite notice and comment as a problematic source of delay.⁴¹ On the ergonomics rulemaking, both OSHA officials in my interviews and critics of the rule thought OSHA should have taken more time to review the 11,000 comments they received. OSHA officials also cited the diversion of resources from other regulatory efforts within the agency in order to respond to the public comments. On ergonomics, we can conclude that the delay typically imposed by notice and comment (as noted above it typically takes OSHA years to develop a final rule after the public comment period closes) was experienced instead by the agency as this diversion of resources.⁴²

E. The Congressional Review Act and the end of the ergonomics rule.

On January 8, 2001, eight and a half years after the rulemaking had been initiated, and twelve days before the conclusion of the Clinton Administration, the ergonomics rule went into effect. Because the rule had staggered “compliance dates,” there was very little that businesses actually had to do during the rule's first year.⁴³ As it turned out, they would never have to do anything. On March 6, using the CRA, the Senate by a vote of 56-44 passed a resolution repealing the regulation. The House followed the next day, and, on March 20, President Bush signed the repeal (BNA, March 21, 2001). Attempts to create an ergonomics regulation had effectively ended.⁴⁴

The CRA, passed in 1996, gives Congress the authority to consider a joint resolution to overturn regulatory efforts within sixty session days of the promulgation of the final rule. In the Senate, such a joint resolution is subject to expedited procedures that prevent the possibility of a filibuster and other procedural mechanisms used to delay legislation.⁴⁵ The CRA should be thought of differently than the procedural controls discussed above. It is not procedural in the sense that it does not require particular actions of bureaucrats during the regulatory

decisionmaking process.⁴⁶ Furthermore, while the CRA makes it easier for Congress to pass a joint resolution it does not confer upon Congress any powers it did not have previously. Congress can always pass a law (or attach a rider to an appropriations bill) to stop a regulation from going into effect. Despite these differences, it is important to address the role of the statute here because any history of the ergonomics rule would be incomplete without it.

Whether or not the CRA was necessary to invalidate the ergonomics rule, however, is an open and unanswerable question. Absent the CRA, a Congress hostile to the ergonomics regulation could still have passed a law invalidating it. Congress could also have included riders on OSHA appropriations bills that would have prevented enforcement of the regulation. The Bush Administration, given its rhetoric regarding the standard,⁴⁷ would likely have attempted to retract or modify it administratively, although it is uncertain whether the courts would have allowed such an approach.⁴⁸

Interestingly, one of the key factors in the Congressional debate on the joint resolution of disapproval was the question of whether it would be possible for OSHA to write another ergonomics rule once the resolution passed. Opponents of the resolution (and hence supporters of the rule) argued that a resolution would kill all OSHA efforts to use regulation to reduce ergonomic injuries. Senator Clinton (D-NY) said of the resolution, "It does more than rescind the worker safety standard. It does ensure that the Labor Department can never again put forth an ergonomics standard" (Congressional Record March 6, 2001). Supporters (including reluctant supporters such as Senator Specter (R-PA)) of the resolution argued that OSHA could regulate again with Senator Bond going so far to argue, "By disapproving this version of the regulation under the CRA, we will merely be saying that OSHA cannot rely on the same regulation again.

Indeed when we strike down the regulation, it will help OSHA by expediting the regulatory process" (Congressional Record March 6, 2001).

Because of the unique circumstances surrounding ergonomics, we cannot generalize from the impact of the CRA on ergonomics to a conclusion that the CRA has a significant impact on the regulatory process. The Congress that passed the joint resolution was controlled by a party hostile to the rule. Control of the Presidency had changed parties within the sixty session days during which a joint resolution can be considered. Had either of these conditions not been present, the joint resolution would not have been passed and signed. Even *with* these conditions, Congress did not attempt to overturn any of the numerous other major regulations issued by the Clinton Administration in its waning months, preferring instead to allow the Bush Administration to decide whether to initiate rulemakings to reverse these regulations.⁴⁹ The most that can be said about the CRA is that it is a very blunt tool that affects rulemaking in very rare circumstances.⁵⁰ In this sense, it is much like the legislative veto, which, as argued by Korn (1996), did not have nearly the impact on policy that either its advocates or opponents ascribed to it.

IV Conclusion

The most important contribution that the ergonomics case study can make is in casting doubt on current theories about the administrative state. In describing procedures embedded in particular statutes governing agencies, McNollgast (1987) argues that the purpose of such procedures is to create a decisionmaking environment in which agencies will more likely decide policy in a way favored by the enacting coalition. Epstein and O'Halloran cite the increased use of these procedures in post World War II statutes as evidence of continued Congressional

oversight of the executive branch. While the focus in this paper is on procedures that apply across agencies, the purpose of these procedures, like those in particular statutes, has generally been assumed to influence bureaucrats toward particular decisions. The question that this case study attempts to address is to what degree are agency rulemaking decisions affected by these controls.

The procedures encountered during the course of the ergonomics rulemaking appeared to impact bureaucratic decisions only to a limited extent. One such procedure, the SBREFA panel, appeared to have no substantive effect on the ergonomics rule. While economic analysis by OIRA led to consideration of alternatives to OSHA's proposal, these alternatives were not adopted. OMB review led to one significant change in the rule, but it is unclear whether this change would have occurred anyway. Only the notice and comment process appeared to have had a significant substantive impact on the rule. While the purpose of procedural controls may be to guide bureaucratic decisions, they do not always appear to successfully serve this function. More empirical work is needed to determine when (if ever) particular procedures work as intended by those who put them in place.

The ergonomics case study is also relevant to the issue of whether, as critics of procedural controls contend (McGarity 1992), those controls delay the rulemaking process. In the case of ergonomics, the controls did not cause significant delay. The SBREFA panel, two OMB reviews, an economic analysis, and the notice and comment process (including nine weeks of hearings) all took place within 21 months. While OSHA diverted resources from other regulatory efforts, it is clear that when political will exists, procedures do not cripple the regulatory process. In the case of the ergonomics rulemaking the procedures examined here (with the exception of notice and comment) likely did not even delay the issuance of the final

rule. What made a much bigger difference was the substantive oversight exercised by Congress, first in delaying the rule with riders for three years and then overturning it using the Congressional Review Act.

While the ergonomics case casts doubt on some prevailing theories regarding procedural controls, it also raises interesting issues that merit further empirical examination. The most notable example is the functioning of the notice and comment process. Contrary to findings by Golden (1998) and West (2004), notice and comment had an impact on the ergonomics rulemaking. Was this because of the greater salience of this rule compared to those studied by Golden and West? Was it because OSHA was certain to be sued over the ergonomics rule, giving it a greater incentive to pay attention to comments? Or is this particular case an exception to a broader rule that public comments make little difference in agency rulemaking decisions? Broader empirical studies could help answer these questions.

The ergonomics case also provides insight into the functioning of other procedural controls. OMB review, particularly at the proposed-rule stage, served mainly as a fire alarm for the President. Its substantive role was less substantial than predicted by many observers. The SBREFA panel appeared to have only symbolic value, and the economic-analysis requirement apparently had a limited impact. These observations all to some degree reflect the adaptation by bureaucrats and existing coalitions of politicians to a rulemaking environment full of procedural controls. These adaptations have important implications for the designers of procedural requirements in the rulemaking process. It is only by observing how such procedures affect bureaucratic behavior in practice that we will be able to better evaluate whether such procedures are worthwhile. The ergonomics regulation, by providing these observations and casting doubt

on some theories of the function of procedural controls, provides a guidepost for other broader work on the effectiveness of these procedures.

Endnotes

¹ An alternative is argued by Morris Fiorina (1989) who maintains that Congress delegates to bureaucracies to avoid making difficult decisions that have political costs.

² They have also become more prevalent in particular statutes (Epstein and O'Halloran 2000)

³ 5 U.S.C. 551-559

⁴E.O. 12291 was eventually replaced by Executive Order 12866, which continued to require OIRA review and regulatory impact analyses.

⁵P.L. 104-4.

⁶ P.L. 104-121.

⁷ In reviewing this literature, Huber and Shipan (2002) note, "it is not surprising that efforts to uncover an explicit link between procedures and outcomes have produced mixed results."

⁸ McGarity and others have also argued that such delay is the underlying intent of policymakers who impose the procedural controls. There has been little work correlating the ideology of those imposing the controls and which of these functions they may be intended to serve. Others including Eisner (1989) have bemoaned the delay that has been imposed on the regulatory process.

⁹ I differentiate delay from other substantive impacts of procedural controls. I do this primarily because while it is speculated that delay is a motive of the coalition imposing the control, it is never the stated intent. Whether it is to better inform the regulatory process (as with

participation requirements), produce rules less burdensome for small businesses (Regulatory Flexibility Act) or rules that are more economically efficient (as with requirements for economic analysis), there is always another substantive reason given for imposing the control.

¹⁰ The small number of rules subject to SBREFA, the difficulty of gathering data on OMB review, and the fact that the CRA has only been used successfully once in its history, are all further arguments for a single case study approach. Of the procedures examined here, only public comment easily lends itself to large-n studies.

¹¹ McNollgast (1989) use the passage of the 1977 Clean Air Act amendments as an example of the imposition of procedural controls. EPA rules under the Clean Air Act have been both highly complex and had enormous impacts on the regulated community much like the ergonomics rule.

¹² This is evidenced by the debate in Congress over SBREFA. Sen. Domenici noted, “In particular the small business owners identified OSHA and the EPA as the federal agencies which promulgate the most unreasonable and burdensome regulations. (Congressional Record March 14, 1996). Sen. Daschle said, “The federal government has a responsibility to protect worker health and safety, public health, and the environment. In that effort, agencies issue regulations but experience shows that many of these regulations look good on paper but don’t work in the real world. This bill acknowledges that fact, and demonstrates our determination to both confront and correct mistakes.” (Congressional Record March 14, 1996). The debates on SBREFA and also on UMRA in February 1995 contain numerous references, to the economic impact of regulations, particularly those that affect the environment and public health.

In the debate on the joint resolution disapproving the ergonomics regulation Senator Jeffords noted, "Passage of the CRA was an exercise by Congress of its oversight and legislative

responsibility. It was intended to compel bureaucrats to consider the economic effect of their regulations and to reclaim some of Congress' policymaking which had been ceded to the executive branch (Congressional Record March 6, 2001)."

¹³ It may also be of considerable interest to see the unintended consequences of procedural controls on the many lower profile regulations issued by the federal government. However before scholars embark on that challenging endeavor, it would serve us well to understand whether controls are having their intended effects first.

¹⁴ This does not include the a previous draft version of the rule issued in 1995, which did not go through any of these procedural hurdles and therefore is not considered in this study.

¹⁵ OSHA submitted the first version of the rule to the SBREFA panel in February 1999(the "SBREFA draft"). In July 1999, OSHA submitted the second version, incorporating the results of the SBREFA panel, to OMB (the "OMB draft"). The third version, incorporating the results of the OMB review, was published as a "proposed rule" in November 1999. OSHA published the final rule, which took into account public comments, in November 2000.

¹⁶ Five of the interviews were with high-level OSHA and DOL officials intimately involved with the rulemaking. Two interviews were with SBA officials involved with the SBREFA panel process. All interviewees were promised confidentiality.

¹⁷ The General Duty Clause says:

A. Each Employer:

- shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;

- shall comply with occupational safety and health standards promulgated under this Act.

B. Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this Act which are applicable to his own actions and conduct.

P.L. 91-596 Section 5.

¹⁸ An Emergency Temporary Standard is allowed under the OSH Act when “(A) . . . employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) . . . such emergency standard is necessary to protect employees from such danger. Id. at Section 6(c)(1).

¹⁹One interview subject said, “The political people didn’t understand how hard it would be.”

²⁰ SBREFA was an amendment to the Regulatory Flexibility Act passed by the 104th Congress in 1995 and thus was a new requirement to which the previous draft standard had not been subject. See also note 6.

²¹ MSD management included the controversial Work Restriction Protection (WRP) provisions, which required employers to compensate employees at 100 percent of their salary for time missed due to an MSD.

²² These were later renamed the "Worker Restriction Protection" provisions (see note 21, above).

²³One example of a change going in the opposite direction from those recommended in the SBREFA report was an expansion of the "trigger." In the rule's new version, if a worker at a

firm with manufacturing or material handling jobs experienced persistent symptoms of a musculoskeletal disorder, the employer was required to implement an ergonomics program.

²⁴ This lobbying was likely prompted by the ANPRM issued in 1992 and the draft proposal circulated in 1995.

²⁵ One OSHA interviewee recalled that the agency had hoped the SBREFA panel could be used to send positive signals about the rule, but that this hope had clearly not been realized: “If the process had neutralized the opposition, it would have been helpful but it didn’t do that.”

²⁶ This paper focuses on OMB review at the proposed stage. OSHA also submitted the final rule to OIRA for review on November 3, 2000, and review was completed six days later, on November 9. I don't discuss that review period here. OMB reviewed the final rule in six days, and there were no meaningful changes during that time. Interviewees acknowledged that OMB worked with OSHA informally during preparation of the final rule, but there are no public documents available to allow evaluation of any informal influence.

²⁷ The Unfunded Mandates Reform Act of 1995 also requires economic analysis. Because executive orders have required analysis for much longer, however, agencies (as exemplified by my interview subjects) associate the requirement far more with OMB review than with the statute. OSHA is also required by statute to demonstrate the feasibility of its standards, and it uses the economic analysis required by the executive order[s] to fulfill this function.

²⁸ Shapiro (2005) examines the impact of coupling executive review with analysis and argues that executive review has the much larger impact on regulatory policy.

²⁹ This gives rise to another hypothesis about the impacts of procedural controls. It is possible that controls such as OMB review or judicial review, which agencies view as hostile to their mission, lead agencies to “overpropose” or propose regulations more stringent than they

would be willing to accept in order to negotiate down to their preferred option. Evaluation of such a hypothesis is beyond the scope of this study.

³⁰ The interview subject said, “I thought that WRP would disappear in a lawsuit once it was in the final standard. You want to hold tight to some things so you have them to give up later.”

³¹ “We prevailed by arguing that without this change, we won’t be able to get OMB to buy in.”

³² The official emphasized that this was not the case in during the ergonomics rulemaking.

³³ OSHA received 18,337 pages of testimony from 714 witnesses at the hearings (Federal Register, 65 FR 68264).

³⁴ See <http://www.epf.org/news/nrelease.asp?nrid=99> last viewed June 7, 2005.

³⁵ Ironically, this appeared to have no effect on these criticisms: the lawsuits filed subsequent to the final rule’s publication criticized the rule for being both too vague and too prescriptive.

³⁶ This is best evidenced by industry opposition to voluntary guidelines on ergonomics issued by the Bush Administration in 2002 (Wall Street Journal, December 26, 2002).

³⁷ One interview subject noted that reproposing the standard and again seeking comment was discussed within the agency but that policy officials wanted the rule finalized prior to the conclusion of the Clinton Administration.

³⁸ The Office of Management and Budget regularly meets with affected parties regarding final rules,(a record of such meetings on both proposed and final rules can be found at <http://www.whitehouse.gov/omb/oira/meetings.html>) clear evidence that the notice and comment

process gives interest groups an opportunity to let the White House know its feelings about a rule.

³⁹ Indeed, as noted above, SBA submitted comments on the ergonomics rule, as did many small businesses.

⁴⁰ As noted above, OMB review acts as a crucial signal to the President before a proposed rule is issued. It is only after the proposed rule is issued that interest groups can play a similar role.

⁴¹ Judicial review is cited as a source of delay and one component of a rigorous judicial review is a review of how agencies responded to public comments.

⁴² One could also argue that the long time between the ANPRM and the proposed rule was due to ensuring that the document would survive judicial review. As I note below, I believe the adverse reaction the 1995 draft and the subsequent Congressional riders were a more important factor.

⁴³ The earliest requirements were not scheduled to go into effect until October 15, 2001.

⁴⁴ The CRA prohibits agencies from promulgating standards that are substantially similar to the one that has been repealed. P.L.104-121, Sec 801(b)(2).

⁴⁵ P.L 104-121, Sec 802(d).

⁴⁶ It does require the regulating agency to submit the rule to Congress once completed.

⁴⁷ In its statement of administration policy on the joint resolution, the Bush Administration said the rule would “cost employers, large and small, billions of dollars annually while providing uncertain benefits.” (Washington Post, March 6, 2001).

⁴⁸ See, e.g., *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

⁴⁹ The Bush Administration issued the "Card Memorandum" suspending the effective dates of all Clinton Administration rules not yet effective. These included controversial major rules on: Medical Privacy issued by the Department of Health and Human Services (Federal Register December 28, 2000 65 FR 82461), Arsenic in Water by the Environmental Protection Agency (Federal Register January 22, 2001 66 FR 6975), Organic labelling by the Department of Agriculture (Federal Register December 21, 2000 65 FR 80547). It is possible that Congress may have assumed that many of these rules would be reversed by the Bush Administration which had delayed their effective dates using the Card memo. If so this belief was badly mistaken as the Bush Administration has reversed very few of the Clinton Administration "midnight" rules.

⁵⁰In the eight years since the CRA was passed, Congress has used it to overturn only one regulation: ergonomics.

Bibliography

Regulations, Laws, and Newspaper Articles

Small Business Regulatory Enforcement Fairness Act of 1996 Public Law 104-121

Executive Order 12866, "Regulatory Planning and Review"

Federal Register

57 FR 34192

64 FR 66050

65 FR 68262

Congressional Record February 3, 1995 page H2089.

Congressional Record March 14, 1996 pages S2310-2320.

Congressional Record March 28, 1996 pages H3005-H3020

Congressional Record March 6, 2001. pages: S1832- S1888.

Congressional Record March 7, 2001. Pages H684-H707.

Comments by the Small Business Administration on the proposed ergonomics rule March 2, 2000.

Draft ergonomics rule submitted to the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel February 1999.

Report of the Small Business Advocacy Review Panel on the Draft Proposed Ergonomics Program Rule May 1999.

Draft ergonomics program rule submitted to the Office of Management and Budget July 1, 1999.

“Bush Signs Congressional Resolution Killing OSHA’s Ergonomics Rulemaking” BNA Labor Reporter March 21, 2001

Greenhouse, Steven. 2001. “House Begins Workplace Debate After Senate Rejects Rules” *New York Times*, March 7, 2001.

References

Balla, Steven. 1998. Administrative Procedures and Political Control of the Bureaucracy. *American Political Science Review* 92:663.

Bawn, Kathleen. 1995. Political Control vs. Expertise: Congressional Choices About Administrative Procedures. *American Political Science Review* 89:62.

Carlson, James and Mark Hyde. 2003. *Doing Empirical Political Research* Boston: Houghton Mifflin Company.

Coglianesse, Cary. 1997. Assessing Consensus: The Promise and Performance of Negotiated Rulemaking. *Duke Law Journal* 46:1255.

--- 2003. The Internet and Public Participation in Rulemaking. presented at Democracy and the Digital Age Conference at Yale Law School April 4-6, 2003.

Croley, Steven. 2003. White House Review of Federal Agency Rulemaking: An Empirical Investigation. *University of Chicago Law Review* 70: 821.

Davis, Kenneth Culp. 1969. *Discretionary Justice: A Preliminary Inquiry*. Urbana: University of Illinois Press.

Eisner, Neil. 1989. Agency Delay in Informal Rulemaking. *Administrative Law Review*. 3:7.

Elliot, E. Donald. 1992. Reinventing Rulemaking. *Duke Law Journal* 41:1490.

Epstein, David, and Sharyn O’Halloran. 1999. *Delegating Powers*. Cambridge: Cambridge University Press.

Ferejohn, John. and Charles Shipan. 1990. Congressional Influence on Bureaucracy. *Journal of Law Economics and Organization* 6:1

Golden, Marissa Martino. 1998. Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard? *Journal of Public Administration Research and Theory* 8:245.

Harter, Philip. 2000. Assessing the Assessors: The Actual Performance of Negotiated Rulemaking. *New York University Environmental Law Journal* 9:32.

Heclo, Hugh. 1977. *A Government of Strangers* Washington D.C.: The Brookings Institution.

Horn, Murray. 1995. *The Political Economy of Public Administration* Cambridge: Cambridge University Press.

Horn, Murray. and Kenneth Shepsle. 1989. Comment on McNollgast *Virginia Law Review* 75:499.

Huber, John D., and Charles R. Shipan. 2002. *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy*. Cambridge: Cambridge University Press.

Kerwin, Cornelius. 2003. *Rulemaking: How Government Agencies Write Law and Make Policy*. Washington D.C.: CQ Press.

Korn, Jessica. 1996. *The Power of Separation* Princeton NJ: Princeton University Press.

Kreps, David. 1990. *A Course In Microeconomic Theory* Princeton NJ: Princeton University Press.

Lupia, Arthur and Matthew McCubbins. 1994. Designing Bureaucratic Accountability. *Law and Contemporary Problems* 57:91.

McCubbins, Matthew, Roger Noll, and Barry Weingast. 1987. Administrative Procedures as Instruments of Political Control. *Journal of Law Economics and Organization* 3:243.

---1989. Structure and Process, Politics and Policy: Administrative Arrangements and Political Control. *Virginia Law Review* 75:431

---1999. The Political Origins of the Administrative Procedure Act. *Journal of Law Economics and Organization* 15:180.

McCubbins, Matthew, and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science* 28:165.

McGarity, Thomas. 1991. *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* Cambridge: Cambridge University Press.

--- 1992. Some Thoughts on Deossifying the Rulemaking Process. *Duke Law Journal* 41:1385.

Moe, Terry. 1989. The Politics of Bureaucratic Structure. In *Can the Government Govern?* edited by John Chubb and Paul Peterson (ed) 267 Washington DC: The Brookings Institution.

Posner, Eric. 2001. Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective. *University of Chicago Law Review* 68:1137.

Robinson, Glen O. 1989. Comment on McNollgast. *Virginia Law Review* 75:483.

Shapiro, Stuart. 2002. Speedbumps and Roadblocks: Procedural Controls and Regulatory Change. *Journal of Public Administration Research and Theory* 12:29.

---2005. Unequal Partners: Cost Benefit Analysis and Executive Review of Regulations. *Environmental Law Reporter* 35:10431.

Spence, David. 1999. Agency Discretion and the Dynamics of Procedural Reform. *Public Administration Review* 59:425.

Sunstein, Cass. 2002. *Risk and Reason: Safety, Law, and the Environment*. Cambridge: Cambridge University Press.

West, William. 1997. Searching for a Theory of Bureaucratic Structure. *Journal of Public Administration Research and Theory* 7:591.

--- 2004. Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis. *Public Administration Review* 64:66.

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