CONFERENCE ON THE STATE OF RULEMAKING IN THE FEDERAL GOVERNMENT

Sponsored by the Center for the Study of Rulemaking at American University

March 16, 2005

Invitation Only

Butler Board Room in the Butler Pavilion/Sports Center
Campus Map

Conference Proceedings

Opening Presentation
Panel 1
Panel 2
Panel 3
Panel 4
Panel 5
Panel 6

DR. KERWIN: Let's start with Jim Tozzi first.

Q: It seems to me that ossification is a result of a fossil-like mechanism in existence, and that fossil-like mechanism is the APA. I say this because we're approaching the 60th birthday of the APA, and when I got in the regulatory business it was 15 years young. At that point in time there was no doubt that the end of the public comment period and the final rulemaking was synonymous. Things moved very fast when you end the comment period, and you got a rulemaking.

What has happened now some 40 or 50 years later, there's no doubt there's a big extension between the end of the public comment period and when the rule goes out. And what has occurred is that there's a lot of stakeholders that want to play in the rulemaking process between the end of the notice and comment period and when the rule comes out. That occurs for two basic reasons. First, technology has brought instant data to all of us constantly, and the e-docket process is going to make it even more profound. Second, the agencies, as a number of you said, are bypassing the APA, even legally because stand-alone reports are not subject to APA review. They have huge regulatory implications.

So I think the question before the group is, stakeholders want to play in the regulatory process after the notice and comment. A lot of these statutes that you say are ossification really allow stakeholders to participate in the rulemaking process after the notice and comment period. And I think to – so what you call ossification I would call rejuvenation.

DR. KERWIN: Tom, it looks like you want to comment.

TOM MCGARITY: Sure. Well, I think you're right empirically that lot of the time consumed – I don't know if that's ossification or whatever – between the notice of proposed rulemaking, let's start that as a beginning point; maybe even between the time that the agency sort of lists it on its regulatory agenda and the time that a final rule is promulgated and survives judicial review, a huge portion of that is the time between the end of the notice and comment period and the publication of the final rule. That is a large hunk of the time; always has been since the 1970s. Part of that was documented up above in the earlier presentation.

I don't think that is largely attributable to people taking second hits at the rule. I'm not sure that's what you meant, but if what you meant was people are coming in and they're lobbying the agency after the end of the comment period and slowing things down there, I attribute it much more to the difficulty that the agency has in analyzing the comments and in responding to each and every one, knowing that they're going to be subject to what I call a blunderbuss attack on judicial review, and since all important rules are judicially reviewable you don't know what some industry or environmental group is going to find with your response to a particular comment, so you're going to answer each one in huge detail, and I think that takes a lot of time.

DR. KERWIN: Okay. I'm going to take two more. And let's see, Sally, and then the individual behind her.

Okay. Sally, you want to go first?

Q SALLY KATZEN: Thank you. And I'd like to address most of my comments to the person who invoked my name most frequently, John – (laughter) – for whom I have a lot of respect. But I have a couple of questions.

The net benefit table that you showed, the slide, am I correct that that is based on the quantified costs and benefits?

JOHN MORRALL: Yes.

Q: And that being the case then, those regulations that were justified on qualitative grounds or included as part of their justification qualitative grounds, are simply missing?

JOHN MORRALL: Well, not quite. If there was some quantification of costs or benefits, they would have been included. But not the –

Q: But if –

JOHN MORRALL: – qualified amount of benefits.

Q: If it's qualified.

JOHN MORRALL: If you can't measure it –

Q: And therefore –

JOHN MORRALL: – you can't include it.

Q: Therefore, that is simply costs and benefits that have been quantified and then monetized, period, and wipes out all of the other factors that might be considered. I think that's important to note. And I would say that it was not just the Clinton years in which there were a lot of qualitative benefits derived from the regulations, but having reviewed your reports to Congress I note that virtually every homeland security regulation that has been cleared by this administration has been missing either benefits or costs, and that you have not imposed the cost-benefit analysis on homeland security regulations, which may be why you asked the intuitive questions, do you think they're any good.

Finally, let me just note that the decline in the reported incidents of repetitive stress injuries may be a factor of the fact that OSHA has discontinued — collecting information – (laughter) – on that, having eliminated the paperwork requirement because there are no standards, and therefore we don't know what the incidents might be.

Thank you. (Laughter.)

DR. KERWIN: John, you want to respond?

JOHN MORRALL: Well, the last point, no, that's not quite correct. The ergonomic data does go up through 2003, and I took it off their website, and it is being reported. Obviously, you can't measure things you can't measure and so I suppose I should have pointed out that there are qualitative benefits as well as qualitative costs. I think those are the main reasons. This is just what can be measured. And just as there are imperfect problems with accounting federal register pages or accounting changes in the code of federal regulations, this is what we have, this is the data that's been provided.

About homeland security, very, very briefly, we have tried our best to get agencies to quantify costs and benefits, and they've been working hard at doing it. They're much better at quantifying the costs obviously. If you can – and we've asked in our report to Congress if anybody can come up with ways to quantify the benefits of some of these homeland security actions which are often compelled by public opinion and Congress, please give us comments. We have asked for that. It's very difficult to quantify these very small, narrow risks, so that is a big problem, and I think it does show though that regulatory impact analysis and strong regulatory oversight, when it can be used, can provide beneficial results, and when it's not used, look what happens.

DR. KERWIN: Okay. One last one.

Q: Comment for Sidney Shapiro. You mentioned the CPSA, the consumer Product Safety Act, sort of like the regulatory scourge of hell for regulators. And having spent the early part of my career there, a lot of the cost-benefit analyses were based on qualitative arguments, both the costs and the benefits, and those arguments were based on reasoning based on economic theory, so economists can also reason, and attorneys don't have a monopoly on reasoning.

Also, one thing I think Dr. Morrall would probably want to defend this a little bit better, if you look at A4, while the A4 circular does ask you to try to quantify if possible, they're trying – they don't want you to do what I call a Virginia Tech and come up with some hokey numbers. If you can do a qualitative argument, they'd prefer you to do that. But he should defend that one. I just wanted to do that as a point of order on the CPSA.

DR. KERWIN: Fair enough.

Sid?

SID SHAPIRO: Was that more comment than a question I take it?

Q: I'm not going to stand in front of all these people and their lunch. (Laughter.)

DR. KERWIN: There is a panel that follows the lunch in the room where we're having lunch and then we'll be back up here. But I have folks outside this door to your right – to my right, your left, that'll direct you down to Mary Graydon Center Rooms 5 and 6. That's the University Center. If you get lost, just ask for Graydon Center and people will direct you.

(End of panel.)