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# Reading Between the Lines: Rulemaking Discretion in the Federal Railroad Administration

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## **Reading Between the Lines**

### *Rulemaking Discretion in the Federal Railroad Administration*

Law is produced by Congress, but regulation, or the rules enforced by executive branch agencies, is produced by these same agencies. Phillip Hamburger (2014, 17) notes that the most common defense for regulation justifies Congress to delegate some of its legislative duties to the executive branch. Implicitly then, Congress should be who the bureaucracy is responding to because if it is not, then Congress might have been abrogating its duties instead of delegating them and the normative case for regulations is weakened.

Consequently, many political science and public administration scholars have tried to answer the question “Who controls or influences regulatory agencies?” Various scholars have tended to claim that one channel of influence or control outweighs the others despite not comparing evidence of one channel against another. For example, McCubbins (1985) and McNollgast (1987, 1989), Baumgartner and Jones (2015), and Workman (2015) each argue that congress dominates, while others such as Kagan (2001) and Lewis (2008) tend to see the president as primary. Susan Webb Yackee (2005 and 2006) and her coauthors (McKay and Yackee 2007, Yackee and Yackee 2006, Naughton et al. 2009), have shown that members of the public and interest groups can have a significant effect on the course of rulemaking. I also add to these potential channels of influence by reintroducing an older public choice literature stemming

from Tullock ([1965] 2005), Downs (1967), Niskanen (1971), and Breton and Wintrobe (1982) where I argue that bureaucrats have substantial room for uninfluenced and uncontrolled discretion in rulemaking. I therefore point to the bureaucrats themselves having a significant effect on the course of agency policy.<sup>1</sup>

Without direct comparisons of how these groups influence regulation, scholars can easily overstate the case of what their evidence shows because they each can point to a number of cases where their favored party did influence or control the bureaucracy. I surmount this challenge by comparing channels of influence among all 162 regulations produced by the Federal Railroad Administration (FRA) between 1980 and 2015.

Before doing so, it is necessary to simplify. Congress is, in a way, primary – it moves first.<sup>2</sup> If Congress writes a strict statute with little discretion, bureaucrats lack the ability to do anything except implement the text already predetermined by Congress.<sup>3</sup> If they implemented a text different than what Congress legislated there would be a discrepancy in the law which the courts would compel the bureaucracy to correct. Congress therefore is a first mover by determining the amount of discretion agencies possess. In mandatory rulemakings, or rulemakings where a public law instructs the agency to write a regulation on that topic, the only relevant player is Congress.<sup>4</sup>

Once Congress permits an agency to exercise discretion, Congress, the president, interest groups, and bureaucrats each may desire the production of regulations for their respective reasons, and each has mechanisms to influence rule production. Discretionary regulations or regulations where no public laws instructed the agency to issue them, give us a better measure of which party influences the bureaucracy precisely because the bureaucracy is not required to issue them.

I demonstrate that between 1980 and 2015 discretionary rulemaking accounted for roughly 42.9% of all changes in FRA's regulatory text. Further, I estimate the separate motivational channels proximately causing this regulation by looking for clear signs that one party held sway over each discretionary regulation, such as executive orders, congressional actions, or interest group petitions. I estimate that 28.4% of discretionary regulation is requested by Congress; 10.9% of discretionary regulation traces to executive orders; between 8.5% and 28.6% of discretionary regulation are answering the petitions of railroad interest groups; and between 25.3% and 45.5% of discretionary regulation was implemented without any evidence of a channel of influence. I take the absence of a stated channel as an upper bound for bureaucratic influence indicating that up to 45.5% of FRA discretionary regulation came from the actors within the bureaucracy itself.

This volume intends to cultivate an appreciation for the complexity of human decision making and the incentives that drive human behavior whether these people make up bureaucracies, Congress, interest groups or the executive branch. My results showcase that complexity in the rulemaking process as I argue no single party has dominance over FRA discretionary rulemaking which comprises over 40 percent of its rulemaking since 1980. In this way, views such as Workman's (2015) where Congress is presented as omnipresent in rulemaking may miss the mark. Instead, large portions of regulations develop within a complex interaction between interest groups, the bureaucracy, Congress, and the presidency in an area where the agency was prior granted discretion by Congress.

Additionally, some may wonder why FRA's regulatory output was analyzed and not other more prominent regulatory agencies such as the Federal Drug Administration (FDA) or Environmental Protection Agency (EPA). There are a few reasons why I believe this approach of

looking at one moderately sized regulatory agency is preferable. Most importantly, larger and more prominent regulatory agencies such as the FDA and the EPA have regulatory sets too large for manual review. Even though FRA is not the most prominent regulatory agency, its regulatory output is still large enough to place it in the top ten percent of regulatory agencies. Finally, FRA has produced economic analyses with lengthy preambles that explain and justify why it is issuing the rule since the early 1980's while many other regulatory agencies did not begin to produce rules with such preambles until 1994 following Clinton's E.O. 12866.

In what follows, I begin by briefly reviewing the different channels of influence and reintroduce the idea that bureaucrats themselves influence the rules in ways that are unconstrained. Afterwards, I document the many ways in which FRA is an average regulatory agency. Next, I present my methodology for calculating discretion and the data I used along with my results. I conclude with implications connected to the various theories of bureaucratic action.

## MODELING ADMINISTRATIVE AGENCIES

Regulatory agencies exist in a world of multiple principals: Congress, the president, interest groups, and, ultimately, the public. These administrative agencies can deviate from their principals' desires, yet each principal has tools to influence the decision making in administrative agencies (Moe 1990b). So who has the advantage in this political game? Different theories have answered: Congress (McNollgast 1987, 1989; Workman 2015; and Baumgartner and Jones 2015), the president (Lewis 2008), interest groups (Stigler 1971; Peltzman 1976; Becker 1983 and [1983] 1988; Wittman 1995; Yackee 2006, 2008, 2011; Yackee and Yackee 2006; McKay and Yackee 2007; Naughton et al. 2009; and Haeder and Yackee 2015), and the bureaucrats

themselves (Tullock [1965] 2005; Downs 1967; Niskanen 1971). Yet the ways in which these various theories may complement or substitute for one-another is not always clear.

In this section, I review and organize these various theories. Specifically, I argue that due to the principal-agent problem Congress faces with respect to both agencies and future Congresses, it sets the amount of discretion permitted through statutes. In this way, I echo the insights of McCubbins (1985), McNollgast (1987, 1989), Moe (1990a, 1990b, and 1997), Horn (1995), and Epstein and O'Halloran (1999). However, once the initial statutes are set, bureaucrats enter a political game to publish what they can subject to constraints imposed by interest groups, the president, and Congress (Moe 1990b, 145).

I also reintroduce Tullock's ([1965] 2005), Downs' (1967), and Niskanen's (1971) analyses arguing that bureaucracies do not act as cohesive units because they are collectives of individuals who each face different incentives and hold different aspirations. While previous scholars focused on how Congress, the president, or interest groups controls or influences the bureaucracy, I argue that Congress, the president and his appointees, and interest groups are able to influence but not fully control bureaucrats. In a world of light constraints, each bureaucrat's desires can then become a key maximand in discretionary rulemaking. Under two very simple models of bureaucrat behavior, there would be a tendency to oversupply regulation leading to a separate bureaucratic influence in producing regulation independent of what Congress, the president, or interest groups would want.

### **What Bureaucrats Want From Rulemaking**

Before discussing structural constraints experienced through legislation and political constraints from presidential appointees, Congress, and interest groups, it is useful to discuss

what bureaucrats might be seeking through a rulemaking. Generally, there are three motives for a bureaucrat: (1) career advancement internal or external to the bureaucracy (e.g. Tullock [1965] 2005, Downs 1967, and Breton and Wintrobe 1982), (2) chasing psychic or emotional benefits tied to the bureaucrat's job duties (Downs 1967, 88), or (3) shirking by doing as little work as possible (Downs 1967 and Breton and Wintrobe 1982).

The first possible maximand for an individual bureaucrat is career advancement. She begins at a low level and over time wants to get better pay and more comfortable and interesting positions. Presumably, at each level of the hierarchy the competition for positions becomes progressively fiercer as they are fewer in number and more prestigious.

Career advancement requires entering a hiring or promotion process, and advancement is dependent on signals of productivity. Individuals are only promoted if they appear to be productive, which is marked by items listed on a candidate's resume. Items that are harder to accomplish will signal greater productivity.

Rulemaking is a strong signal of productivity because of the lengthy administrative processes that must be followed in order to deliver a rule. Each bureaucrat motivated by career advancement thus has a reason to produce regulation as a strong and costly signal of productivity. So long as rulemaking is used as a signal on a bureaucrat's resume in order to secure future advancements, overinvestment in rulemaking is therefore likely and bureaucrats would have an incentive to regulate independent of what Congress or the president wants.

Presumably, signals of productivity internal to the bureau should all be signals of productivity outside the bureau as well. The existence of an implicit revolving door between private and public sector employment may change the individual regulator's demand for content *internal to the rules*, but it would not affect the quantity demanded of rules in general. For

example, regulators might have an incentive to supply regulation that is favorable to special interests, but this would not decrease the individual bureaucrat's demand to author regulation. Therefore, bureaucrats face an independent incentive to supply rules even without presupposing revolving doors. The rule supplied need not be beneficial, it need only be a signal of productivity.

A second possible motivation is that bureaucrats are individually driven by enthusiastic support for an agency's mission or some other job features. In this case, each bureaucrat may believe they have been called to enforce the agency's mission, be it providing for the safety of railroads or halting anticompetitive practices. In this way, rulemaking may be an end for its own sake. Each rulemaking project becomes a way to restrict bad outcomes regardless of its social cost. This motivation would also manifest as an individual desire for ever more regulations.<sup>5</sup> In either of these two ideal types of bureaucrats overproduction of rules is the likely expectation.

The third possible motivation, shirking, does not result in an independent bureaucratic desire to produce regulation. If producing rules takes substantial effort, and a bureaucrats desire is to shirk, then we should expect bureaucrats to avoid rulemaking activities.

Actual bureaucracies contain scores of individuals each with their own motives that broadly fit into one of these three categories. Surely not every bureaucrat will be a shirker in the same way that not every bureaucrat will be chasing career advancement. Nonetheless, there will be some bureaucrats in each camp, and the first two camps tend to have the same objectives, while the third tends to not obstruct the efforts of the first two. For example, both bureaucrats who are chasing career advancement and those who seek fulfillment through the agency's mission benefit with the production of an additional rule. The first benefits for the signal of productivity that will be useful to advancement, while the other benefits through the enactment



of the agency's mission. These first two groups will therefore often be allies internal to the bureaucracy in a Bootleggers and Baptist type relationship.<sup>6</sup>

### **Why Congress is a First Mover, but Often Grants Broad Discretion**

No matter how much bureaucratic agents would like to issue rules, they will be unable to do so if they lack the statutory authority to pursue that objective. Congress grants administrative agencies discretion through its laws. The amount of discretion permitted is based on Congress's dual principal-agent problems.

The first principal-agent problem Congress faces should result in less discretion all else equal. Congress cannot be sure that the agencies are acting in the way that Congress intended (McCubbins 1985; McCubbins and Schwartz 1984; and McNollgast 1987, 1989). Under this interpretation, Congress faces an incomplete contract with its administrative agencies, so Congress could author statutes in such a way to prevent bureaucratic discretion. In essence, Congress could write a more complete contract with strict statutes (McCubbins 1985).

However, Congress also faces a second principle agent problem between current congressional coalitions and future congressional coalitions (Moe 1990a, 1990b, 1997 and Horn 1995). Initial legislative coalitions cannot expect future coalitions to necessarily uphold a law presently agreed upon. Thus, some laws, such as the civil service standards, limit future congressional and presidential influence upon agencies (Moe 1997, 469).<sup>7</sup>

When Congress authors statutes, these dual principal agent problems will be in mind. Notice that they often work in opposite directions. The fear that future Congresses might renege on present agreements means that the present Congress will limit future Congresses' ability to interfere by writing broader statutes; whereas, the fear that agencies will inappropriately exercise

discretion causes Congress to write stricter laws with less room for discretion. Statutes are therefore written with an amount of permissible discretion. As I show later in this document, for the FRA 42.9% of all rulemaking was discretionary indicating that a large space for discretionary action was granted by Congress. Once this discretion is granted, Congress, the president, interest groups, and bureaucrats all vie to cause the bureaucracy produce rules for their respective reasons.

### **Congressional Influence on Regulation**

Indeed, Congress has quite a few ways to influence the production and content of regulation after the enactment of statutes. For one, Congress often actively monitors administrative agencies by conducting hearings where agency members are required to testify on their agency's actions, accomplishments, adherence to congressional mandates, or lack thereof. The Government Accountability Office (GAO) can also conduct audits of agency behavior. Individual members of Congress may comment on individual rules or schedule other background informational meetings. Through these interactions, Congress's desires are communicated and the agency will likely respond to accommodate these desires.

Nonetheless, these direct oversight mechanisms will be unable to police all of the discretionary activities by executive branch agencies. In order for oversight to be effective, Congress must be able to identify what the bureaucracy did wrong. Congress is often at a disadvantage because of the basic information asymmetry that it has with respect to what the bureaucracy produces (Niskanen 1971). Because of this informational asymmetry, hearings and audits are costly even though they are the main ways for Congress to try to remove this

asymmetry. Hearings and audits require scarce time and resources that many congressmen would prefer to allocate toward something else.

McCubbins and Schwartz (1974) argue that because congressional oversight is costly, Congress wrote the Administrative Procedures Act (APA) to create a fire alarm economizing on the oversight costs. However, a fire alarm is only effective if it can be heard. If an agency has several rules that all receive many comments, then the marginal discretionary rule could be more contentious during a period of significant commenting since the noise necessary to be heard is now higher than usual. Consider that at a certain decibel level no fire alarm may be heard over current deafening noise; similarly, a great number of comments may go *relatively* unnoticed as attention is focused on other issues. Additionally, agencies frequently manipulate the public commenting process to suit their interests. Potter (2017a) shows that the length of the public commenting process is altered based on whether the agency believes extra time would support the agency's objectives.

Some procedural laws do not just create a fire alarm; they also raise the cost of a rulemaking to the bureaucracy by requiring the rulemaking team proceed through a number of complicated steps before issuing a rule. For example, Executive Order 12866 and the Regulatory Flexibility Act require an economic and small business analysis before a regulation is issued. These take time to complete and thereby raise the cost of each rulemaking. While these procedural rules increase the return to bureaucrats seeking career advancement, they likely decrease the return to those who are chasing the mental benefits of rulemaking. Consequently, the natural alliance between climbers and those chasing the mission may be weakened.

In sum, Congress does have tools to influence an agency's discretionary action, and often uses them to that effect. However, they will not be able to influence or control all of discretionary activity as their mechanisms of control are costly or gameable.

### **Presidential Influence on Regulation**

Lewis (2008) argues that the exercise of presidential power, especially through appointment, is crucial to steering agencies. The president, through his myriad appointees, has control of the commanding heights of the bureaucracy and exerts a substantial effect on the course of agency policy (Lewis 2008). These political appointees interpret laws for the translation of policy, monitor bureaus for the president, and set internal allocations of resources and personnel (Lewis 2008, 7). By altering the number of employees and restructuring bureaus, presidents may also amplify their appointees' effect on a bureau's policy. The president reorganizes bureaus routinely, and this agency churn potentially undercuts the durability assumption crucial to McNollgast and Moe's analysis (Lewis 2002).<sup>8</sup>

The president also increasingly involves himself in an agency's regulatory agenda. The president regularly issues directives to agency heads (Kagan 2001, 2249). These directives, be they public pronouncements, memoranda or executive orders, direct agency heads to perform a specific regulatory action. Review of these regulatory actions has been centralized in the Office of Information and Regulatory Affairs (OIRA), which acts as a bottleneck where a crucial subset of rules are directly managed by the president's office (Kagan 2001, 2285). After a rule is issued the president may claim credit for the regulation as part of his policy platform (Kagan 2001, 2283). In these ways, the president has a substantial effect on a rule from initiation to completion.

Many factors do point towards the appointees of the president being able to have a direct effect on limiting the ability of bureaucrats to get the rules that they would want. For one, the number of rules produced by any agency in any given year is rather small, and the appointees do oversee rulemaking directly meaning they must permit or deny any discretionary regulatory action.

However, these features do not necessarily limit discretionary rulemaking by bureaucrats. Even though the rulemaking space is small, political appointees are often at an informational disadvantage with respect to the bureaucrats. Bureaucrats will know substantially more about the policy and will outlast the political appointee. If the appointee wants something that the bureaucracy does not, the bureaucrats may be able to delay until the appointee is no longer around or reverse the policy after the appointee leaves.

Additionally, appointees may not be interested in limiting the use of the agency's discretionary authority for regulatory action. Political appointees often have a desire to produce regulation themselves. Bureaucrats are happy to support and encourage this objective. Even if the bureaucrats and appointees regulatory priorities differ, they still may be able to find common ground for new regulation. For example, suppose there is one policy that the political appointee cares about and wants to enact, and one that the bureaucrats want that is slightly different but concerning a similar subject. The bureaucrats may be able to interject their policy with the one wanted by the political appointee. Taken together, political appointees and bureaucrats may enact more regulation than Congress would have liked. Further, the bureaucracy is undoubtedly affected by presidential appointees and presidential priorities.

## **Interest Group Influence on Regulation**

Starting with Stigler (1971) and followed by Peltzman (1974), Becker (1983 and [1983] 1988), and Wittman (1995), interest groups were seen to compete in their demands for regulation. It is important to note, however, that this whole analysis was undertaken devoid of institutions as they exist. Bureaucracy is explicitly not part of the model. Stigler (1971), Peltzman (1974), Becker ([1983] 1988) and Wittman (1995) all hypothesize a relatively clear exchange nexus of votes or campaign funds for laws, but this nexus cannot exist within the bureaucracy. There are strict ethics laws that limit what bureaucrats may be given or promised. Similarly, McKay and Yackee (2007) do not find evidence that lobbying by one party begets lobbying by another competitor in rulemaking as would be anticipated by an extension of Becker (1983) to argue for a market in regulations via public commenting. While exchanges brokered in Congress may be passed on to regulatory agencies as mandatory regulation, there is little to no arena for exchange between bureaucrats and interest groups for regulation.<sup>9</sup>

While a “market” for regulation may not exist between regulatory agencies and interest groups, Susan Webb Yackee and her various coauthors demonstrate that through the public commenting process and other mechanisms of interaction with the bureaucracy, interest groups can have a substantial effect on an agency’s regulatory output. Upon viewing the public comments, agencies will change the content of their rules (Yackee 2006 and 2008). Yackee and Yackee (2006) and McKay and Yackee (2007) further find that the side with the most comments gets the most attention, and the final rule issued will most favor that side. Naughton et al. (2009) show that early commenters affect the agency’s rulemaking agenda. Additionally, other methods of influence such as ex-parte lobbying (Yackee 2011) and lobbying the Office of Management and Budget (Haeder and Yackee 2015) are associated with changes in the outcome of rules. This

new and burgeoning literature seems to note that the more contact interest groups have with regulators the more the regulations will favor these groups.

### **Controlling Bureaucrats via Competition**

Some scholars (such as Wittman 1995 and Breton and Wintrobe 1982) contend that errant bureaucrats can be reined in indirectly via competition and competitive pressures. For competition to be fruitful in constraining the behavior of bureaucrats, the competition must induce bureaucrats to produce what its potential customers would want. In other words, competition must take place over desired outcomes. Unfortunately, competition over the outcomes of rulemaking is unlikely. Rules are nonrival, meaning additional rules can perennially be added without a deterioration in the next rule's effect (Buchanan [1975] 2000).

Nonetheless, inputs are rivalrous, so competition could occur over the inputs to the rulemaking process. Congress could allocate resources based on how beneficial a given bureaucracy's rulemaking was in a previous period. However, a few crucial features of the bureaucracy and rulemaking mitigate against this possibility. First, simply keeping constant the number of bureaucrats would still tend to increase the number of rules because an additional rule is nonrivalrous. Second, and most importantly, if competition occurs it is likely to occur over rivalrous inputs, the process of competition would result in economizing on the number of rules produced per regulator and each regulator's relative speed of production. In other words, competition between agencies would result in agencies becoming relatively more expedient at producing rules, which does not mean fewer rules would be produced.

I began this section by reintroducing the public choice theory of the bureaucracy and applied it specifically to the action of rulemaking instead of administrative agencies. I showed

that bureaucrats often have an independent interest in rulemaking. Upon closer inspection, Congress, the president, interest groups, and competition are unable to fully control bureaucrats. Moreover, I did not discuss how these different groups often have try to thwart each other's influence as Moe (1990b) has done so already. The final result is that Congress the president, and interest groups all influence bureaucrats who still have substantial space for independent action over and above this influence in discretionary rulemakings. In the following sections, I turn to a case study of rulemaking at FRA to provide evidence for these claims.

### FRA AND THE RULEMAKING PROCESS

As I show in this section, FRA is, in most important respects, just like other major regulatory agencies. While by no means the largest regulatory agency, FRA is nonetheless an important regulatory agency; its regulatory text, 49 CFR 200-299, is not small in comparison to other agencies. FRA's regulatory text contains 652,967 words, or roughly 0.73 percent of all text in the CFR (Al-Ubaydli and McLaughlin 2014). For comparison, the median agency's regulatory text contained only 83,572 words, and the mean agency would have a total word count of 373,308 (Al-Ubaydli and McLaughlin 2014). FRA is therefore larger than both the mean and median agency. Overall, just 34 agencies had regulatory texts that were larger than FRA's (Al-Ubaydli and McLaughlin 2014).<sup>10</sup> As the 35<sup>th</sup> largest regulatory agency, FRA is in the top 10<sup>th</sup> percentile of the 440 agencies listed by the Office of the Federal Register.

FRA is a component agency within the Department of Transportation that was created by the Department of Transportation Act of 1966.<sup>11</sup> The "Federal Railroad Safety Act of 1970" vested FRA with authority to proscribe regulations as necessary for all areas of railroad safety. Regulatory responsibility for railroads is not exclusive to FRA; it is one of the two main railroad



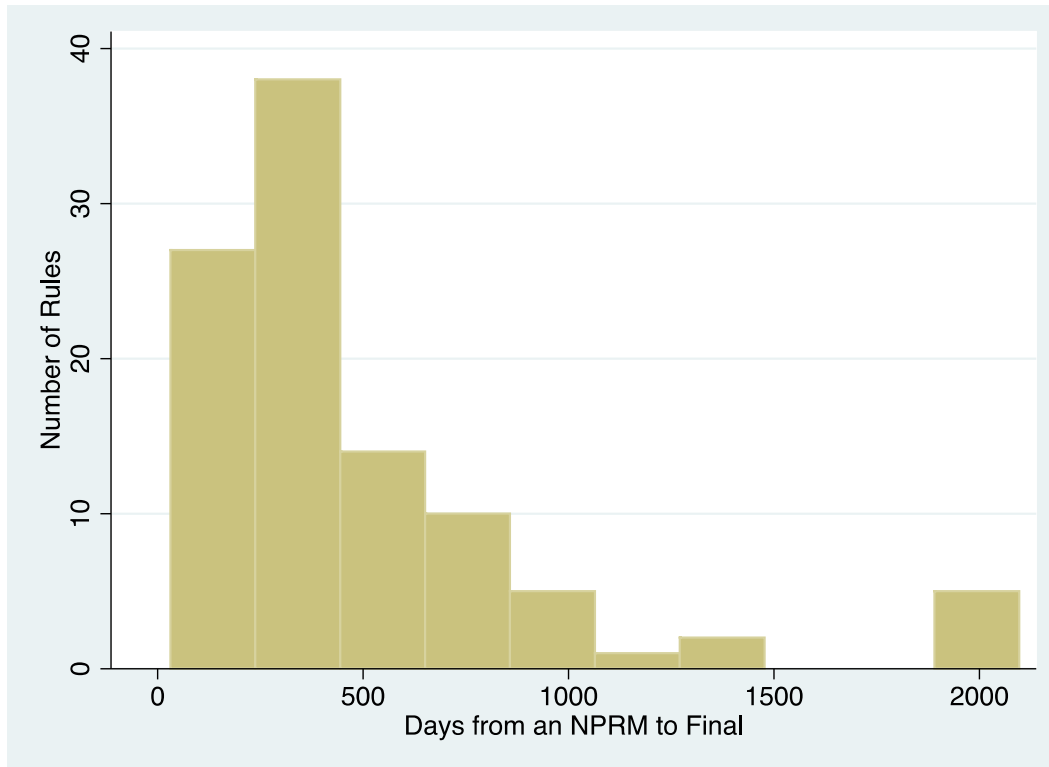
regulatory agencies.<sup>12</sup> In some areas, FRA may share its regulatory authority with the Occupational Safety and Health Administration or the Pipeline and Hazardous Materials Safety Administration. In others, FRA may have overlapping regulatory jurisdictions with the Environmental Protection Agency, the Transportation Security Administration, or the Surface Transportation Board. Nonetheless, FRA is the dominant safety regulator for railroads and railroad related activities.

Regulatory agencies may collaborate with interested parties and issue proposed rulemakings based on these negotiations provided they are properly documented, and the subsequent proposed rule goes through the notice and comment process. One significant difference between FRA and other regulatory agencies is its relationship with the Railroad Safety Advisory Committee (RSAC). RSAC is a formally chartered and structured Federal Advisory Committee established in March of 1996 that provides a forum for collaborative rulemaking and program development.<sup>13</sup> RSAC includes representatives from all of FRA's major stakeholders including, railroads, labor organizations, suppliers, manufactures, and other interested parties.<sup>14</sup>

Since the first rule was negotiated within RSAC, a total 103 final rules have been issued. Of these 103 rules, 35 rules, or 34 percent, were tasked to RSAC. Most agencies issue only a few rules through negotiated rulemaking (or a process like negotiated rulemaking), making FRA a clear outlier on these margins (Kerwin and Furlong 2011, 209). However, being an outlier on these margins is actually a benefit for this analysis. Rules negotiated through RSAC are more clearly influenced by interest groups than regulations issued through the normal rulemaking process providing a more clear measure of the potential interest group influence.

In most other ways, FRA is similar to other regulatory agencies. FRA issues rules as quickly as other regulatory agencies. FRA's mean time from NPRM to final rule was 493.<sup>39</sup>

days, or 16.44 months, and its median was 360.5, or 12.01 months. Figure X.1, below, charts this distribution. These are within the range generated by Potter (2017b) who showed across 9,000 rules over 20 years that the mean time for bringing a rule from NPRM to final rule is a little over one year (14.7 months). FRA’s mean and median time to final rule are included within the confidence interval generated by Potter (2017b).



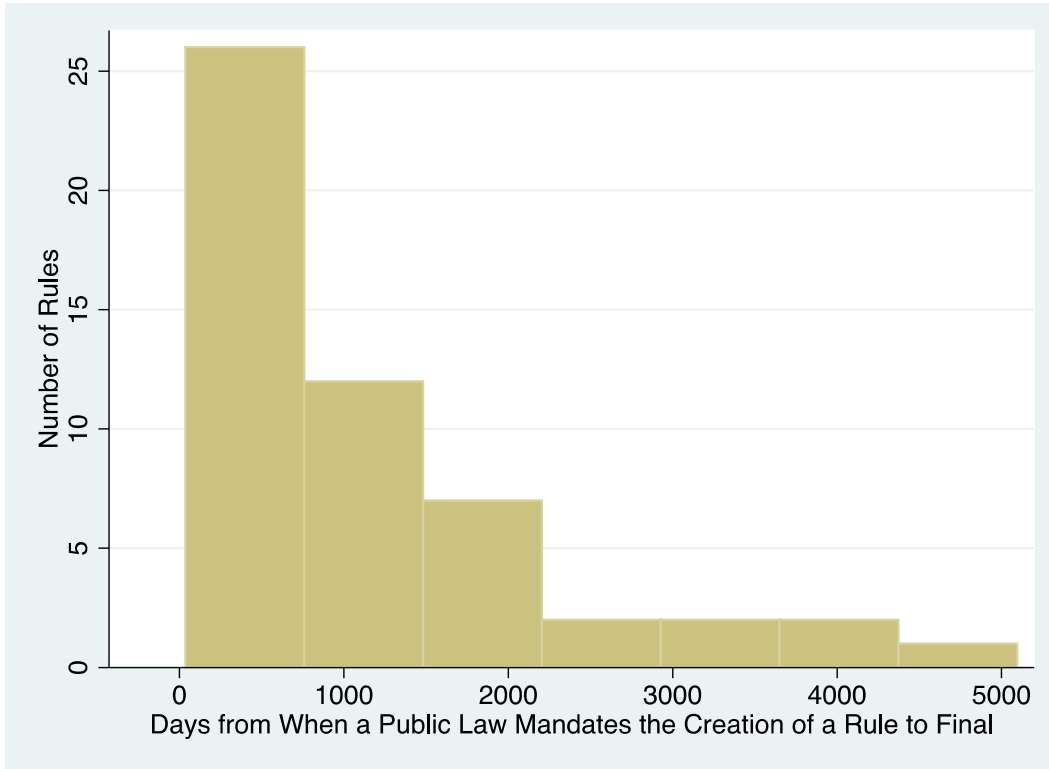
**Figure X.1. FRA Days from NPRM to Final**

Under various measures of length of time from inception to final rule, FRA’s regulatory project duration is similar to other agencies. Measures of inception of rulemaking for FRA include: statutes calling for a rule, Advanced Notices of Proposed Rulemaking (ANPRM), and when RSAC takes a task. The date a task enters RSAC and the issuance of an ANPRM are both very early stages in a rulemaking process. Rules emanating from statutes should not begin production before statutes are issued. Note, not all rules will be statutorily required, be tasked to

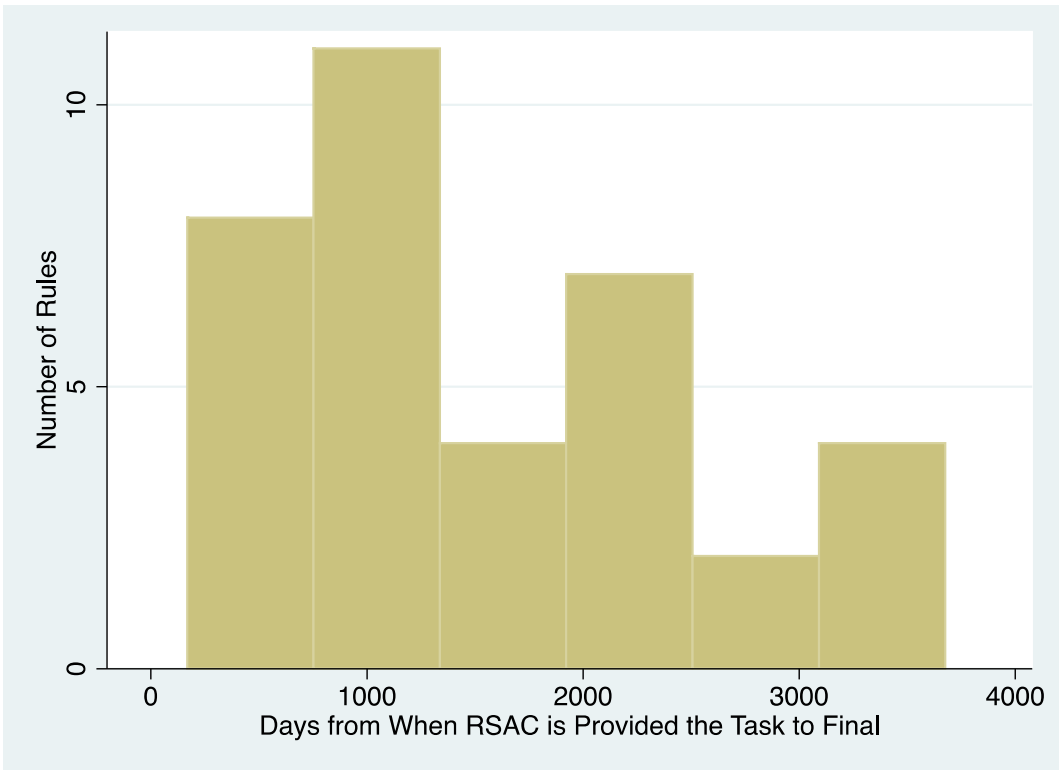
RSAC, or issue an ANPRM. A little over half of all rules issued trace to statutes; only rules issued since 1996 may have participated in RSAC; and ANPRMs are infrequent. While each of these is an imperfect measure for the total length of time it takes to complete a rulemaking project, together they paint a picture of the average time to complete a rulemaking project from the beginning.

The median number of days from statute to final rule, RSAC task acceptance to final rule, and ANPRM to final rule are 761.5 days, 1285.5 days, and 1165 days, respectively. Their distributions are included in Figures X.2, X.3, and X.4 below, respectively. Kerwin and Furlong (2011, 108) report the findings of a GAO study that few rules were issued in more than six years

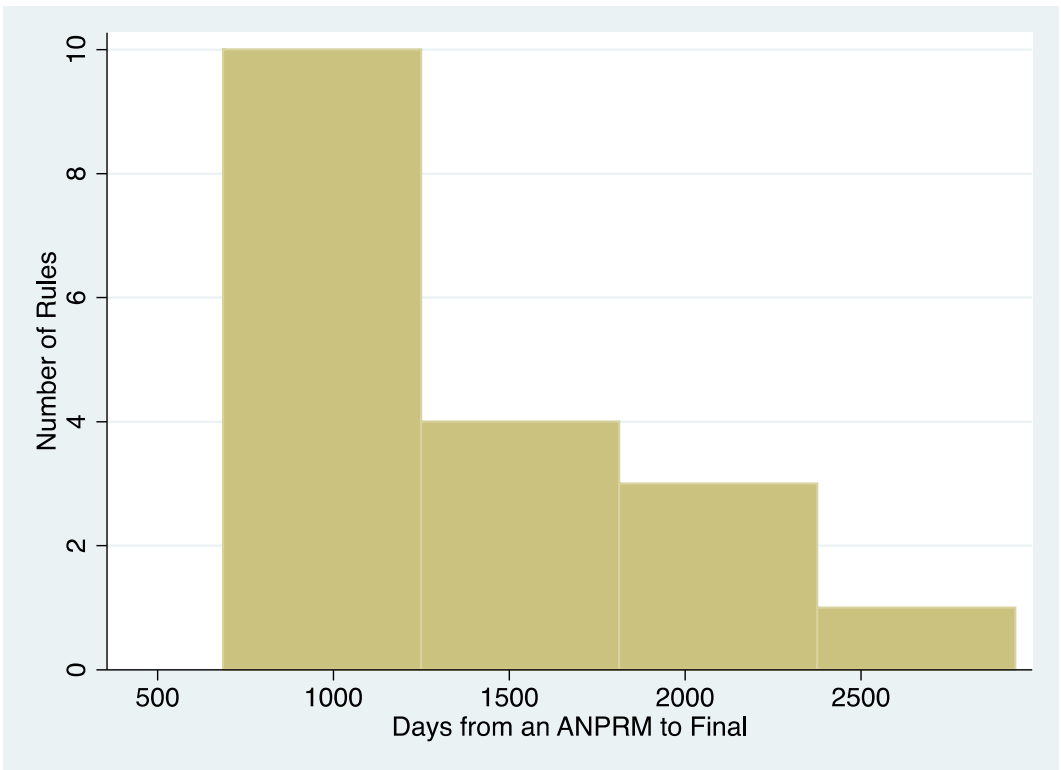
or 2190 days from commencement of the rulemaking process. Some of FRA's rules show longer development timeframes, but generally most rules do seem to be finalized within six years.



**Figure X.2. Days from Statute to Final Rule Issuance**



**Figure X.3. Days from RSAC Task Acceptance to Final Rule Issuance**



#### **Figure X.4. Days from ANPRM to Final Rule Issuance**

Alternative rulemaking methods may avoid public commenting and other oversight mechanisms by OMB. In some instances, agencies may issue either Interim Final Rules (IFRs) or Direct Final Rules (DFRs); both limit the ability for public comment (Brito and Dudley 2012, 38). About one sixth of “major” rules were published without a commenting period (GAO 1998, 2), and a similar number of FRA’s rules issued did not include a comment period.

Discretionary results at FRA may be similar to those at other executive branch agencies to the extent that FRA functions similarly to them. As I show above, FRA is the 35<sup>th</sup> largest regulatory agencies and in the top 10<sup>th</sup> percentile of rulemaking agencies. Its rulemaking pace is comparable to most other regulatory agencies, and, the rate at which FRA issues rules without a notice and comment period is similar to the results found in other studies.

#### **AN EMPIRICAL ANALYSIS OF DISCRETION**

To my knowledge, mine is the first comprehensive estimate of the amount of discretion for a federal regulatory agency. There are two important precursors to my study, Epstein and O’Halloran (1999) and Ellig (2016). Epstein and O’Halloran (1999) measure the amount of discretion contained within the major provisions of 257 major laws passed within the post war era. Epstein and O’Halloran (1999) do not look at anything agencies actually did in response to Congress. By contrast, this chapter focuses on the actions of one regulatory agency and does measure the agency’s percentage of discretion and does not measure discretionary legal provisions passed by Congress.<sup>15</sup>

Ellig (2016) calculated the amount of discretion in economically significant rulemakings reviewed by OIRA issued between 2008 and 2013. This chapter differs in that Ellig (2016) was primarily focused on explaining the quality of regulatory impact analyses, so he looked only at economically significant regulations reviewed by OIRA between 2008 and 2013, which may not be a representative sample of rulemaking in general. Additionally, Ellig's (2016) time period is more compressed. Instead, this chapter focuses directly on the amount of discretionary rulemaking and differences between discretionary and nondiscretionary rulemaking. It also includes a much longer period of rulemakings for a single agency so that changes due to presidential administrations may become clearer.

## **Methodology**

To calculate how much discretion there was in FRA's regulations, I needed a comprehensive list of rules issued by FRA. To find all rules issued by FRA, I used both Regdata (Al-Ubadyli and McLaughlin 2014) and I created a manual estimate of the word count of each part of FRA's regulatory text, 49 CFR 200–99.<sup>16</sup> From these two sources showing changes in the CFR wordcount, I found 162 rules issued between 1980 and 2015. I then labeled each regulation as discretionary or mandatory based on the preamble of the final rule and any statutes cited.

Between 1980 and 2015, approximately 42.9% of all measured word count changes in regulatory text were discretionary. For the same period, 88 out of 163 rules, or 54% of all final rules issued, were discretionary. I argued at the onset that Congress sets an initial amount of permitted discretion through the constitutive statutes. Were this true, the share of discretion as a percentage of total rulemaking should be roughly constant over a long timeframe, provided new statutes shrinking or broadening the power of an agency are not issued. Indeed, this is consistent with what I find. In Figure X.5, I generated a three, five, and ten year moving average of the

share of discretionary rulemaking to total rulemaking, and these moving averages are remarkably stable around 40 percent of the absolute changes in word count.<sup>17</sup> The trend line in the 3-year average discretion is roughly flat.<sup>18</sup> Recall from above that my measures of the duration of rulemaking projects indicate they often take between four and ten years, thus five and ten year moving averages capture the average length of a rulemaking project.



**Figure X.5. Share of Discretionary Changes in Word Count by Year**

Practically, discretionary rulemaking should be able to be divided between channels of influence. Some rules will be motivated by demands from the President and Congress, others from



demands by interest groups, and still others by the bureaucracy itself. To separate discretionary rules into these four groups, I required somewhat clear signals that a rule is of one type versus another. I searched each rule for keywords that would signal whether the president, congress, or interest groups motivated this rulemaking. Anything without clear signals of influence, I assigned to the bureaucracy.

For signs of congressionally motivated discretionary rulemakings, I searched the rule for any discussion of interactions with Congress. Interactions could include: presenting the regulation to Congress, the rule itself being a response to GAO audits, and laws that required FRA to study whether it should issue a rulemaking. I labeled rules as presidentially motivated when the rule mentioned an executive order (from the President) or emergency order (from the FRA Administrator). The main railroad trade associations and unions would periodically petition FRA to conduct a rulemaking. Any time a petition for rulemaking was sent to FRA, I labeled the rules as motivated by interest groups.

If the rules did not fit in one of the above boxes, but they passed through RSAC, I labeled them as RSAC. So, if a rule that was negotiated in RSAC was generated from a petition for rulemaking, it would be rated as interest group. Alternatively, if a rule was encouraged by a GAO audit and went through the RSAC process, I labeled it as Congress. RSAC rules were separated because it is not clear what channel influences RSAC negotiated rules directly. On the one hand, interest groups have a substantial effect on the outcome of the rule since unions and railroads make up two-thirds of RSAC. However, it is not clear whether these rules were motivated by the bureaucracy, by the administrator, or by the industry since FRA sets the agenda by deciding whether or not to give a task to RSAC. FRA may also withdraw tasks when RSAC outcomes are inconclusive or not what FRA wanted, and FRA has done so, albeit, infrequently.

The remaining rules without any identified signals are an estimate for rulemakings motivated by the bureaucracy. This estimate is best thought of as an upper-bound. I am certainly including rules that are motivated by the president's FRA Administrator, Congress, or interest groups. FRA may be strategically hiding the party that desires this rule, or it may simply be the chief party who believes the rule should exist. Regrettably, I have no finer method for ensuring that the promulgation of these rules was motivated by individual bureaucrats, so I include non-designated rulemakings as my upper-bound of bureaucrat motivated rulemaking.

Given it is difficult to know whether RSAC rules were motivated by the bureaucracy or interest groups, I generated estimates under 3 alternate assumptions. Either RSAC would be all bureaucratic motivated rules, all interest group motivated, or they would split the value of the rules. For the first two instances, I added the value of all RSAC rules to my estimate of bureaucrat motivated rules and to my estimate of interest group motivated rules. These generated high estimates of interest-group-motivated and bureaucrat-motivated rules respectively. In the third case, I added half the value of the RSAC rules to the interest group and bureaucracy base estimates to generate a mid-estimate.

Below in Table X.1, I provide these various estimates of the amount of regulation motivated by each group. Notice that my high estimate of bureaucrat motivated regulations accounts for 45.5% of all discretionary regulations and 19.5% of all regulations. My low estimate indicates that bureaucrats motivate 25.3% of discretionary, or 10.9%, of all rules. Based on this data, Congress is certainly a player, but it is far from clearly dominate in discretionary rulemaking.

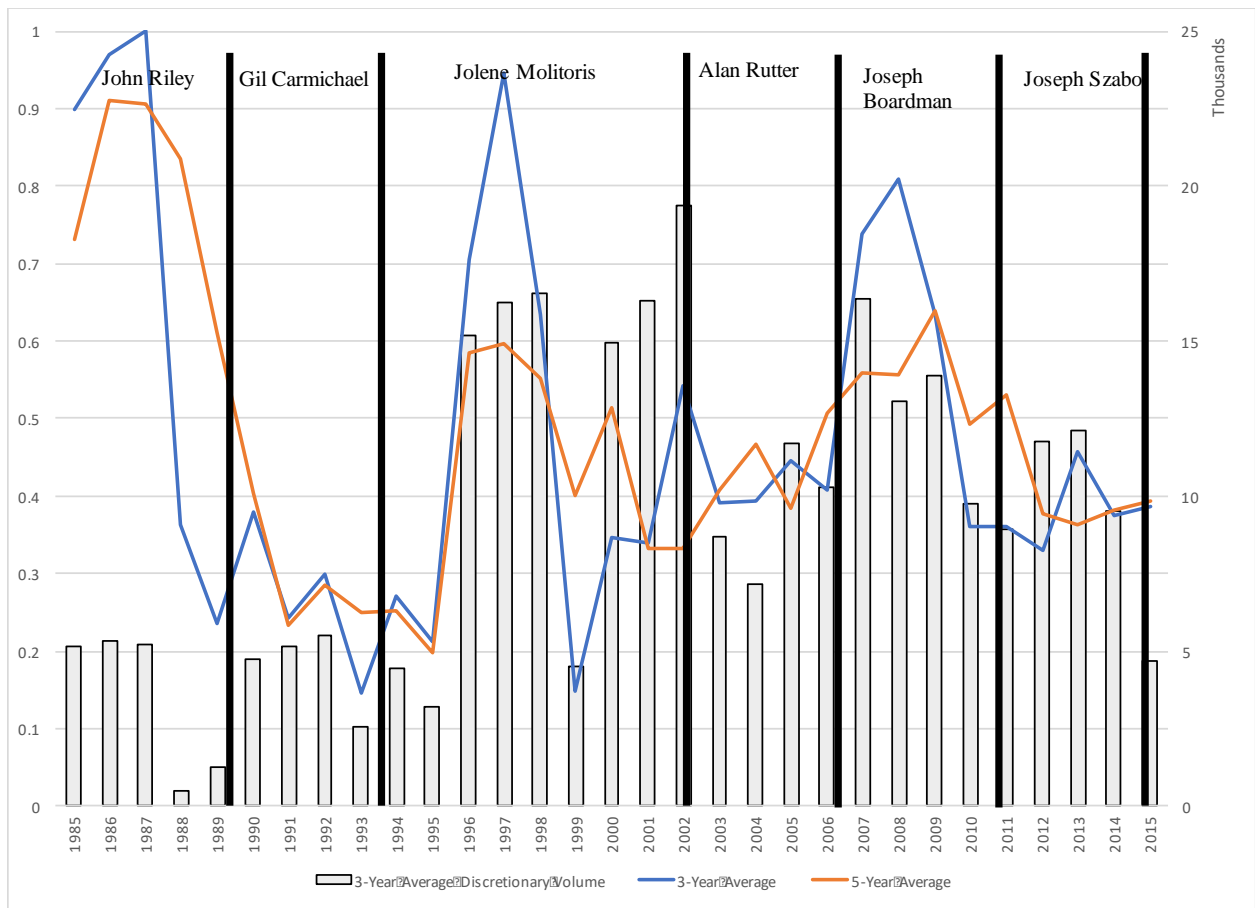
**Table X.1: Motivations in Discretionary Rulemaking**

<b>Group</b>	<b>Number of Rules</b>	<b>Share of Rules</b>	<b>Word Count Changes</b>	<b>Share of Discretionary Changes</b>	<b>Share of Total Changes</b>
<b>Congress</b>	14	15.9 %	81,967	28.4 %	12.2 %
<b>President</b>	8	9.1 %	31,472	10.9 %	4.7 %
<b>High Estimate Interest Groups</b>	21	23.9 %	82,607	28.6 %	12.3 %
<b>Mid-Estimate Interest Group</b>	14.5	16.5 %	53,534	18.6 %	8.0 %
<b>Low Estimate Interest Groups</b>	8	9.1 %	24,461	8.5 %	3.6 %
<b>High Estimate Bureaucracy</b>	39	44.3 %	131,149	45.5 %	19.5 %
<b>Mid-Estimate Bureaucracy</b>	32.5	36.9 %	102,076	35.4 %	15.2 %
<b>Low Estimate Bureaucracy</b>	26	29.5 %	73,003	25.3 %	10.9 %
<b>RSAC</b>	13	14.8 %	58,146	20.2 %	8.6 %
<b>RPR<sup>19</sup></b>	8	9.1 %	15,297	5.3 %	2.3 %
<b>Administrative<sup>20</sup></b>	11	12.5 %	4,108	1.4 %	0.6 %
<b>Total</b>	88		288,454		

My approach for separating channels of discretion is not perfect at separating presidentially motivated discretion from the remainder which I presume to be an upper limit of rulemaking motivated by the bureaucracy. Actions by the FRA administrator, a political appointee, would not frequently show up in executive orders. More likely, administrator utilized discretion would appear as a greater than average amount of rulemaking under a given administrator. In effect, different administrators should result in differences in the volume of discretionary rulemaking. Indeed, there does appear to be some difference in the average amount of discretion between the terms of each FRA Administrator, as indicated in Figure X.6 below. The black bars represent the beginning and end of each administrator’s term. The light gray bars measure the three-year average volume of discretionary rulemaking.

This does indicate that the Administrator does have an effect; however, how this effect materializes is unclear. For example, assume the Administrator decided whether to be permissive or not permissive of additional regulation. Individual bureaucrats could then propose new regulations and get them approved. Thus, while the administrator permitted it, the costs of bureaucrats exercising their discretion have been lowered. Another possibility is that the administrator came into FRA with a specific regulatory program in mind. If so, those regulations should properly be titled the administrator's. Each would be going on simultaneously and so it is beyond my ability to separate these two distinct motivations.

**Figure X.6: Discretionary Rulemaking by Administrator**



## CONCLUSION

Policymaking requires humility and the acknowledgement that the both politics and economics are complex. Policymakers face both knowledge and incentive problems. In this chapter, I have focused on the internal incentive problems in producing regulation. As I have argued in theory and suggested in empirics, bureaucrats have space for independent action and do influence the outcome of rulemaking. Neither Congress, nor the president, are dominant in this process. They are merely two players within a four player game: Congress, the president and his appointees, bureaucrats, and interest groups. I estimate discretion at 42.9% of all rulemaking, and bureaucrats are responsible for producing up to 45.5% of this discretion. Even my low estimate implies bureaucrats produce up to 25.3% of discretionary text changes or 10.9% of total changes in regulatory text.

As I noted in the introduction, the vestige of Congress's legislative authority in executive branch agencies rests on the theory of discretion. In other words, agencies are permitted to regulate because it would be too costly for Congress to do so itself. However, discretion comes with its own costs. Agents can and do deviate from the principals wishes. Many regulators view regulation as an end in itself, and other regulators desire regulation for their own prestige and career prospects. As a result, regulatory agencies likely produce too much regulation.

Additionally, regulatory agencies provide immense power to presidents. Presidents have large set of administrative rules that they can change as president. Presidents are also able to produce rules even if Congress is unable to come to an agreement. Thereby, presidents are able to enact legislative changes without legislation. Unsurprisingly then, presidents politicize the bureaucracy (Lewis 2008).

Congress could reverse these effects arising from discretionary authority by reigning in executive branch authority. Congress can remove authority the same way that it has granted it in the past: by writing new statutes. In this way, Congress could become dominate in the rulemaking process once again by only permitting rulemaking with Congress's express permission.

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## NOTES

<sup>1</sup> The British comedy television program *Yes Minister* was influenced heavily by this earlier literature and shows the bureaucracy thwarting the intentions of politicians in order to devise policies that suit the bureaucrats own interest.

<sup>2</sup> It is worth noting that the congressional dominance literature has tended to view congress as dominant even outside of direct instructions to regulatory agencies. McCubbins (1985) and McNollgast (1987, 1989) argue that the Administrative Procedure Act (APA) is used to police agencies ensuring that they act in line with congressional intent, while Baumgartner and Jones (2015) and Workman (2015) argue that hearings and other forms of congressional inquiry directly influence regulatory creation.

<sup>3</sup> Technically this is not fully true. The agency could choose to not issue a rule and hope that it does not get sued for noncompliance with the statute. No data is available on the size of this type of strategic noncompliance from agencies. Nonetheless, this type of behavior occurs.

<sup>4</sup> Occasionally, a rule would cite a vague statutory requirement. To determine whether the given rule was mandatory or discretionary, I looked at the specific language of the statutory requirement in these instances. For documentation on which rules I labeled as discretionary or mandatory or for other questions about my broader methodology please contact me at [stephenjonesyoung@gmail.com](mailto:stephenjonesyoung@gmail.com).

<sup>5</sup> Bureaucrats who are motivated by improving the overall welfare might be interested in stopping regulations that they deem as foolish. However, these regulators not interested in regulating are probably few and will likely face difficulties in career advancement as they will share neither the norms nor signals of productivity necessary to be successful inside the agency.

<sup>6</sup> For more on the Bootleggers and Baptist theory of regulation see Smith and Yandle (2014).

<sup>7</sup> While Moe (1990a) formally incorporates bureaucrats as independent actors influencing their own structural constraints in future periods, my emphasis is on the output of regulations and whether bureaucrats are able to stray from concordance with legislative intent. In effect, my analysis concerns the question of what is the *marginal product* of a given bureaucrat while Moe focused on the *inframarginal effect* of bureaucrats on the structure of their own bureaus. Moe's own analysis in fact indicates that bureaucrats are generally left unconstrained by future Congresses, which implies there is significant space for bureaucratic discretion *on the margin*. Moe (1990b, 145) notes as much: "At the margins, groups and politicians cannot stop bureaucrats from shirking and thus making structural changes that promote their own autonomy."

<sup>8</sup> Lewis (2002) does however ignore the fact that total regulators and regulation rarely decline, which should indicate that agencies are not dying but simply being renamed.

<sup>9</sup> Regular contact between stakeholders and regulators may provide voice, but voice need not induce efficient results. Quasi-negotiated rulemaking, in so far as all stakeholders unanimously agree to a rule, would result in efficient results (see eg. Buchanan and Tullock [1962] 2004 and Buchanan 1962). However, negotiated rulemaking does not cover all rules, and some relevant groups may be excluded from the negotiation process (such as consumer groups) because the costs of organization of such a group would be too great relative to the gains to be had from organization.

10 These figures are derived from Regdata 2.2. The rest of my citations to Regdata are from Regdata 3.0 figures. I used Regdata 2.2 because a list of parts corresponding to agencies was not yet available in Regdata 3.0.

11 The first railroad safety regulations were issued by the Interstate Commerce Commission (ICC) and derived from the Safety Appliance Act in 1893. ICC's jurisdiction over railroad safety (specifically hours of service, equipment, and inspection standards) was transferred to FRA with the Federal Rail Safety Act of 1970.

12 The Surface Transportation Board is the other rail road regulator. The Surface Transportation Board has broad economic regulatory oversight of railroads, including: rates, service, construction, acquisition of rail lines, abonnement of rail lines, carrier mergers, and interchange of traffic among carriers.

13 RSAC's stated purpose is to "seek agreement of the facts and data underlying any real or perceived safety problems; identify cost effective solutions based on the agreed-upon facts; and identify regulatory options where necessary to implement those solutions. In determining whether regulations are necessary, the Committee shall take into account 1(a) of Executive Order 12866" (RSAC 2016a). FRA's policy is to use RSAC's consensus recommendations as the basis for proposed and final agency actions where it is possible to do so (RSAC 2016a). It does this by assigning a task to RSAC. For example, task number 08-07 developed the recommendations for the Conductor Certification rule issued in November of 2011. RSAC may accept, reject, or recommend a restructuring of the task (RSAC 2016a). Once the task is assigned, FRA sets a target date for recommendations to become finalized (RSAC 2016a). While FRA is not bound to the recommendations developed through RSAC, FRA will often base Notices of Proposed Rulemakings (NPRMs) and final rules on the recommendations of RSAC (FRA 2005: 11054).

14 RSAC's members include: American Association of Private Railroad Car Owners (AAPRCO), American Association of State Highway & Transportation Officials (AASHTO), American Chemistry Council, American Petroleum Institute, American Public Transportation Association (APTA), American Short Line and Regional Railroad Association, (ASLRRA), American Train Dispatchers Association, Association of American Railroads (AAR) Association of State Rail Safety Managers, Association of Tourist Railroads and Railway Museums (ATRRM), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED), Brotherhood of Railroad Signalmen (BRS), Federal Railroad Administration, Federal Transit Administration, Fertilizer Institute, Institute of Makers of Explosives, International Association of Machinists and Aerospace Workers, International Brotherhood of Electrical Workers (IBEW), Labor council for Latin American Advancement, League of Railway Industry Women, Metropolitan Transit Authority (MTA), National Association of Railroad Passengers (NARP), National Association of Railway Business Women, National Conference of Firemen and Oilers, National Railroad Construction and Maintenance Association, National Railroad Passenger Corporation (AMTRAK), National Transportation Safety Board (NTSB), Railway Supply Institute (RSI), Safe Travel America, Secretaria de Comunicaciones y Transporte, SMART Transportation, Transport Canada, Transport Workers Union of America (TWU), Transportation Communications International Union, Transportation Security Administration (RSAC 2016b).

15 Unfortunately, Epstein and O'Halloran (1999) do not include any measures of discretion for laws that would affect FRA specifically making direct comparisons between my work and theirs difficult. They do include the average share's of discretion by congressional committee. The Public Works and Transportation committee is the one most likely to author laws that affect

FRA. Epstein and O'Halloran (1999: 6) measure this committee's average discretion as 20 percent, while I measure discretion at FRA as around 40 percent. It is not clear that these measures of discretion are necessarily comparable because the average major discretionary provision may not translate into one specific regulation, while a nondiscretionary statute might. For example, a law instructing an agency to write a law about a specific safety problem is likely to result in one rule. By contrast, a highly discretionary provision, such as an instruction to care for the safety of an industry, could result in hundreds of regulations as there are many facets of what caring for safety could entail. Thus, measures of the amount of discretion contained in legal provisions may not accord with the observed amount of discretion in regulation.

<sup>16</sup> While both my manual estimate and Regdata measure the same thing (word count of each part 49 CFR 200–99), both estimates were necessary because there were errors in both datasets. My manual estimate would include text that was not strictly part of the regulatory code, such as editorial notes, timestamps, or titles. Additionally, when copying a part, the text does not copy perfectly; words are arbitrarily separated or combined. Regdata does exclude these pieces of text that are not part of the regulatory code and does not arbitrarily separate or combine words, but Regdata 3.0 has some discrepancies at the part level, where it would misclassify sections of text reassigning them to a new part. These misclassifications would show up as a negative change in one part and a positive change in another part, when no real change was occurring. For example, in 2009 Regdata recorded 2,569 words deleted from part 49 CFR 235 and an addition to part 49 CFR 236 of 2,569 words. This end part mis-specification occurred somewhat frequently in Regdata. Previous research utilizing Regdata aggregated data at the industry level so has not run into this issue as neighboring parts likely regulate the same industry, and once the parts were aggregated the end-part issues would cancel out. Regdata was able to be salvaged with minor corrections for the purposes of this analysis, but it was not as easy to correct my manual estimate. Thus, I generally rely on Regdata (with my manual edits) for analysis.

<sup>17</sup> When I refer to shares of discretion, I use the total of the absolute value of word count changes. This preserves negative changes – or deletions from the regulatory text – as valid inquiry data and ensures a less biased result.

<sup>18</sup> The reason the share of discretionary regulation as a percentage of regulation varies so greatly within short time frames is because the choice of when to issue a final rule is strategic see (Potter 2017b).

<sup>19</sup> Responses to Petitions for Reconsideration (RPR) are issued so that agencies can modify final rules based on requests by interest groups. The only RPRs that were labeled discretionary were RPRs modifying discretionary rules even though all RPRs were technically discretionary. I do not include RPRs in my measure of interest group influence.

<sup>20</sup> There was another group of discretionary rules that I labeled as administrative because they modify agency proceedings and are unconnected to congressional requirements (notably direct final rulemaking proceedings, emergency relief dockets, and inflation adjustments).

Administrative rules are listed as a separate category and not included as influenced by any party.