

Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking

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Abstract

The slow pace of administrative action is arguably a defining characteristic of modern bureaucracy. The reasons proffered for delay are numerous, often centering on procedural hurdles or bureaucrats' ineptitude. I offer a different perspective on delay in one important bureaucratic venue: the federal rulemaking process. I argue that agencies can speed up (fast-track) or slow down (slow-roll) the rulemaking process in order to undermine political oversight by Congress, the president, and the courts. That is, when the political climate is favorable agencies rush to lock in a rule, but when it is less favorable they wait on the chance that it will improve. I find empirical support for this proposition using an event history analysis of more than 11,000 agency rules from 152 bureaus. The results support the interpretation that agencies strategically delay, and that delay is not simply evidence of increased bureaucratic effort.

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Why are bureaucratic organizations so slow-moving? In the U.S.—and pretty much everywhere else too—the term bureaucracy is synonymous with inefficiency. Traditional explanations for the plodding pace at which government agencies make decisions and respond to public policy problems point to “red tape” and constraints imposed on agencies by the political system (McGarity, 1991; OECD, 2010; Pierce, 2011). Others implicate bureaucrats’ lack of intrinsic motivation (Gailmard and Patty, 2007), flaws in agency design that hinder efficiency (Fiorina, 1989; Moe, 1989), and the complexity of the tasks that bureaucrats are often charged with tackling (Epstein and O’Halloran, 1999).

Yet, delay reflect bureaucrats’ strategic calculations, rather than a symptom of ineptitude, malfeasance, or circumstance. That is, the speed of decisionmaking can be used as a tool to avoid political oversight and enhance the likelihood that an agency decision stands. In this paper, I argue that bureaucrats can speed up, or “fast track,” decisionmaking in order to have the transaction occur in a favorable political climate where political principals are sympathetic to the agency or the decision. Conversely, in more hostile political environments, bureaucrats may delay a decision—a practice that observers sometimes refer to as “slow rolling” (Labaton, 2004)—until the political climes improve.

While the argument applies to a broad class of agency policymaking, I examine this behavior in the context of the federal rulemaking process and the release of binding final rule decisions. The rulemaking process¹ is a critical way that bureaucrats make policy, affecting everything from vehicle fuel standards to whether the “Plan B” morning-after pill is available over-the-counter at the local pharmacy. The rules produced by this process carry the same force and effect as laws passed by Congress, but their production is notoriously protracted (Kerwin and Furlong, 2011; O’Connell, 2008; Yackee and Yackee, 2010). Rulemaking is subject to many layers of political oversight—from the president, from Congress, and from the courts—and it is considered to be a heavily constrained policymaking venue (McCubbins,

¹This process is also referred to as “notice-and-comment” or “informal rulemaking” (see Kerwin and Furlong, 2011).

Noll and Weingast, 1987; Raso, 2015). Yet, bureaucrats control the administrative levers of the rulemaking process, including the timing. This power gives agencies a critical edge in anticipating (and possibly avoiding) political oversight.

To test this argument, I use event history analysis to model the time to finalization for more than 11,000 agency proposed rules from 152 agencies over a 20-year period (1995–2014). I include novel new measures of each rule’s impact and complexity. The results show that in the face of opposition from Congress, the White House, or the courts, agencies slow the pace of rulemaking and are much less likely to issue a final rule. These effects are largely exacerbated for rules that have the largest impact. Importantly, I am able to reject two alternate explanations for agency delay in rulemaking: 1) that agency capacity deficits explain the slower pace; and 2) that agencies are sincerely delayed by the complexity of the policies they undertake in certain political environments.

The findings I present here engage with related literatures on bureaucratic autonomy and separation of powers oversight of the bureaucracy. Bureaucratic discretion and the ability to evade oversight are well established (Carpenter, 2002; Gailmard, 2002; Huber and Shipan, 2002; Yaver, 2015), but their study is often limited to formal models or to particular empirical settings. This paper’s contribution stems from its dual focus on rulemaking, an activity that nearly all federal agencies engage in, and discretion over timing, a dimension that is shared across many administrative contexts. Additionally, this study incorporates the simultaneous role of all three branches in providing oversight, thereby providing a more complete understanding of how agencies perceive their relative standing with each branch and respond accordingly. The implication is that there may be more to bureaucratic delay than meets the eye.

Timing and Delay in Rulemaking

Rules take a long time to complete and the slow pace is a much bemoaned aspect of rulemaking (see, e.g., Eisner, 1989). Since rules presumably make needed policy changes, there are economic costs associated with putting off regulatory benefits. Eisner (1989, 10) explains that “delay may result in a pollution source being permitted to continue, a safety device not being mandated, or an unnecessary piece of equipment continuing to be required.” Further, rulemaking delay introduces uncertainty into the system, as regulated parties cannot adequately plan for the future.²

Some of this delay is inevitable. Creating a new binding rule is an administrative feat that involves many steps.³ Rulemaking begins when an agency decides to issue a rule, either because of a statutory mandate, a court order, or to address a policy need that the agency itself has identified. The agency then drafts a proposed rule, a process which largely occurs behind closed doors at the agency and has been described as a “black box” (West, 2009).⁴ Once the draft is complete, the president, through a small White House unit called the Office of Information and Regulatory Affairs (OIRA), has the opportunity to review—and possibly reject—the rule.⁵ Following OIRA review, the proposed rule is published in the *Federal Register* and the public may submit comments on the proposal. After reviewing the comments, the agency drafts a final rule (which may or may not incorporate the commenters’ suggested changes), OIRA has another chance to review the rule, and the

²I use the term delay in a non-pejorative sense to mean the time it takes an agency to issue a final rule.

³The description that follows is a simplification the rulemaking process; for a full accounting of the process see Kerwin and Furlong (2011).

⁴Although we cannot observe how much time an agency spends on this stage, some speculate that it is the most time-intensive part of the entire process, as agencies conduct research, consult with stakeholders, and get buy-in from all component units within the agency (West, 2009).

⁵Under Executive Order 12866 OIRA only has the authority to review rules drafted by executive branch agencies. Technically, OIRA does not “approve” rules, but declares them “consistent with the EO” (Sunstein, 2013).

final rule is published in the *Federal Register*. Typically the rule takes effect after a waiting period of at least 30 days.

In addition to these basic procedural steps, agencies often have to conduct cost-benefit analysis and sundry impact analyses (e.g., effects on small business, tribes, paperwork, the environment, civil justice, or children). The number of such requirements has increased over time, as political principals layer new requirements on top of old in an attempt to exert influence over agency rules. As a result of the growth of these requirements and an increase in the number of procedural steps, some scholars argue that the process has become “ossified” (McGarity, 1991). In this view, agencies are so laden down by all these requirements that they cannot regulate quickly—or perhaps at all.⁶ Writing in 1991, McGarity noted that “it is much harder for an agency to promulgate a rule now than it was twenty years ago.” Today scholars are divided, with some arguing that the problem has only gotten worse (Pierce, 2011) and others contending that ossification never existed in the first place (Yackee and Yackee, 2010, 2011).

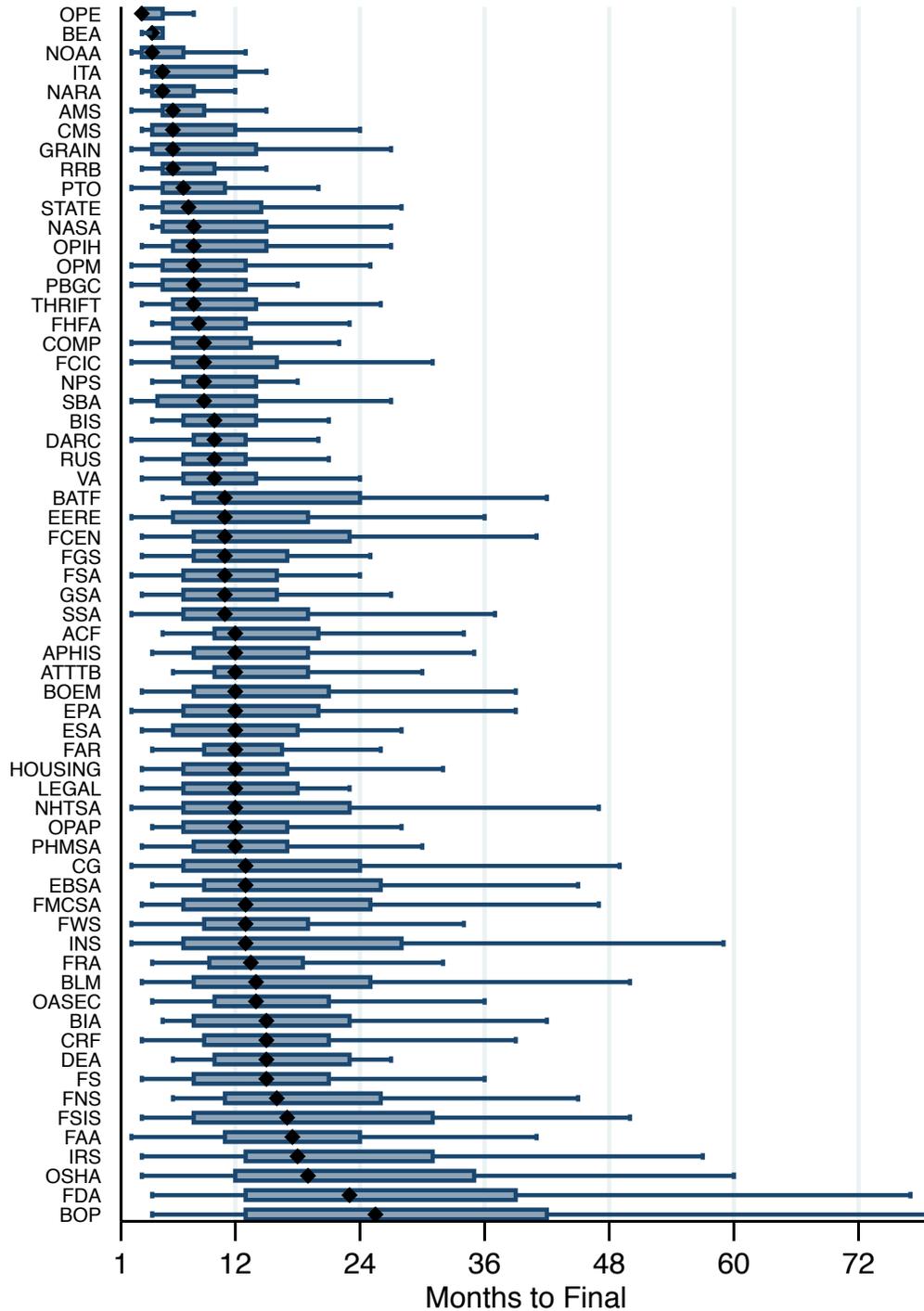
The ossification argument is rooted in the idea that the slow pace of rulemaking is a function of burdens imposed externally onto the agency. Its key prediction is that the average time to issue a rule should be quite lengthy, a conjecture which is borne out empirically.⁷ As shown in Figure 1 the average time for issuing a final rule—as calculated by the time from when the proposed rule is published to when the draft final rule leaves the agency—is a little over a year (mean=16.0 months, s.d.=18.9 months).⁸

⁶In addition to procedural constraints, judicial review also constrains the process. For instance, Mashaw and Harfst (1986) argue that legal culture led the National Highway Transportation Safety Administration (NHTSA) to favor case adjudication over rulemaking in the early 1970s.

⁷This should not, however, be taken as “proof” that ossification exists, as a long completion time could arise from a variety of processes.

⁸Unless otherwise noted, I count the time to complete a rule as beginning when the proposed rule is published in the *Federal Register* and ending when the draft final rule is submitted to OIRA or, for rules that OIRA declines to review, when the final rule is published in the *Federal Register*. This excludes the unobserved time that an agency spends drafting the proposal, a point to which I return in the “Robustness” section of

Figure 1: Time to Rule Finalization For Select Bureaus, 1995–2014



Note: Symbols indicate the median time to finalization for each bureau. Boxes indicate the 25%-75% range of the data and bars indicate the minimum and maximum values (excluding outliers). To aid visualization, only bureau that produced at least 30 rules during the time period under study are shown. Bureau names are abbreviated; for a full accounting of bureaus and names see Table A2 in the Appendix.

There is, however, also considerable variation around the mean time to finalization both within and across agencies. For instance, even though they are both bureaus within the Department of Agriculture (USDA), the Agricultural Marketing Service (AMS) finalizes rules, on average in about eight months, while the Forest Service (FS) typically takes close to two years.^{9,10} Existing theory, be it the ossification thesis or arguments based on agency design features, do not speak to this variation. Moreover, the possibility that pace may result from internal factors—and perhaps intentional delay or foot-dragging on the agency’s part—is generally overlooked. Put differently, much of the literature has concentrated on the lengthy average time it takes to finalize a rule, but few have considered the variation around that mean (and specifically the idea that the variation might be strategic). This is surprising since a growing body of work suggests that agencies are strategic about many aspects of the rulemaking process (e.g., Nou, 2013). For example, agencies strategically invite public feedback on their proposals (Potter, 2015), adjust the volume of rules they produce under different political circumstances (Boushey and McGrath, 2015*a*; O’Connell, 2008), and publish more controversial rules on Fridays when the news cycle is slower (Gersen and O’Connell, 2008).

this paper.

⁹Where appropriate, I use the term “bureau” to refer to lower-level organizational units such as AMS, and “department” to refer to the higher organizational unit, such as the USDA.

¹⁰Some rules take only two months to move from the proposed to the final stage. Others take much longer to finalize. In the period under study, the longest rule to finalize was a rule issued by the Food and Drug Administration (FDA) that set good manufacturing practices for infant formula. It was proposed in 1996, and finalized in 2014 (205 months, or approximately 17 years later). While this is an outlier, nearly 10% of the rules in the dataset took longer than three years to move from the proposed to the final stage. In other words, it is not out of the ordinary for an agency to have a rule in the queue for a long period of time.

Political Oversight of Rulemaking

Because agencies make important—and binding—policy through rulemaking, political overseers keep a watchful eye over the process. Each branch of government—the president, Congress, and the courts—plays a role in overseeing agency rulemaking. As chief executive, the president has perhaps the most direct role in overseeing executive agency rulemaking. Through OIRA review, the president has the opportunity to ensure that both the draft proposed rule and the draft final rule align with his (someday her) policy priorities. OIRA does not review every rule drafted by executive branch agencies, but rather selects for review those rules that have largest or most “novel” policy impact.¹¹ If OIRA and the agency disagree over a policy, OIRA can “return” (i.e., veto) the rule to the agency. However, such returns are rare; more frequently OIRA puts pressure on the agency to incorporate desired changes into its draft (see Sunstein, 2013). Nonetheless, neither the president nor OIRA is able to perfectly control the rulemaking process (see Bolton, Potter and Thrower, 2016; Krause and Dupay, 2009).

Congress has a more indirect, but still powerful, role in overseeing agency rulemaking. Typically, members of Congress (MCs) learn about a proposed or final rule after its publication in the *Federal Register* (i.e., they do not have the president’s ex ante review power). However, MCs rarely scour the pages of the *Federal Register* to learn about new rules; instead, they rely on interest groups and constituents to do the monitoring and to let them know if relevant issues arise (McCubbins, Noll and Weingast, 1987; McCubbins and

¹¹Under Executive Order 12866, OIRA may review any rule that it deems “significant,” where significance is defined as any rule that meets at least one of the following criteria: 1) “have an annual effect on the economy of \$100 million or more”; 2) “create a serious inconsistency or otherwise interfere with an action taken or planned by another agency”; 3) “materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof”; or 4) “raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

Schwartz, 1984). If an agency issues a proposed or final rule that an MC disagrees with, that MC has several options available to influence the agency. If the rule is at the proposed rule stage, the MC can submit a comment to the agency’s docket during the public comment stage (Hall and Miler, 2008) or hold a hearing about the rule. If the MC wishes to stop, or overturn the rule, they can work to pass a law overwriting the agency’s rule altogether. While this action requires overcoming Congress’s well-documented collective action problems, MCs can more easily overturn agency rules by adding a limitation rider barring the rule to a “must-pass” appropriations bill (MacDonald, 2010).¹² Of course, all of these outlets are in addition to Congress’s standing power to punish agencies through budget cuts, hostile hearings, and the like.

Finally, the courts reactively oversee the rulemaking process when stakeholders bring suit against the agency. While lawsuits at the proposed rule stage are occasionally possible, courts typically become involved once an agency rule is finalized. Although courts tend to be deferential to the agency in rulemaking cases, they can and do overturn rules, often at considerable cost to the agency. This possibility keeps bureaucrats attuned to the judiciary throughout the process.

While each branch of government’s authority over rulemaking is exercised in a different manner, the key insight here is that each branch has the power to overturn an agency rule or, at a minimum, raise the agency’s cost of doing business. While “vetoes” of agency rules are rare, they do occur and when they do they are very costly for agencies. Rule reversals “upend months, usually years, of work” and send agencies “back to the drawing board in settings where resources are already constrained and budgets consistently threatened” (Nou, 2013, 1756-7).¹³ Setbacks like these have long-term consequences for agency reputations,

¹²Congress also has a specific veto power under the Congressional Review Act (CRA) to overturn final rules.

This law gives Congress the power to annul a final rule if both chambers pass a joint resolution and the president signs it. However, in practice the CRA has only been used once (Shapiro, 2007).

¹³For example, in 2011 the DC circuit court vacated a high profile final rule issued by the Department of Education (ED), on the grounds that the agency did not adequately justify its decisionmaking and that

autonomy, and bureaucrats' career trajectories. Yet, reversals and rebukes of agency rules are more likely in some settings than in others, suggesting that agencies may be able to anticipate, and possibly stave off, some forms of oversight.

Pacing the Rulemaking Process

While political principals oversee the rulemaking process, agencies themselves control the procedural levers, including deciding when a final rule should be issued. And, since what might be perceived as a rash or ill-conceived policy in one context may be regarded entirely differently in another political context, timing is important. This means that sometimes an agency may have an incentive to slow-roll a rule, while at other times it may be more advantageous to the agency to speed up the rulemaking process so as to “lock in” gains during politically advantageous moments.

In considering when to issue a potentially controversial policy proposal, delay can have considerable upside. When the contemporary political environment is disadvantageous, waiting to issue a decision allows for more attractive possibilities to develop; exogenous events may shift political priorities in ways that make the agency's decision less salient to political overseers. More significantly, the overseers themselves may change. Slow-rolling can mean that a new constellation of political overseers may be responsible for evaluating the agency's decision when the decision finally becomes public.¹⁴

Consider a draft final rule that is particularly contentious. Perhaps OIRA signaled political opposition to the proposed rule during its review. Interest groups may also have become animated during the public comment period and gotten Congress involved. The

the final rule was “arbitrary and capricious.” ED was then forced to start the rulemaking process anew, issuing a new proposed and, eventually (three years later), a new final rule.

¹⁴Delay may not always be used toward strategic ends; additional time can enable the agency to “get its ducks in a row,” by conducting research and shoring up weaknesses in a draft policy. I consider this aspect of delay in a later section of the paper.

release of the final rule is an important point in the life of this rule; it is when the agency fully reveals its final policy and, if a political principal remains dissatisfied, war can be waged. However, until the final rule is released, no one outside the agency knows what the final policy will be. The agency may resolve issues in a way that a principal finds satisfactory, or it may stick with its original proposal. As long as this ambiguity remains, the agency deflects interventions by claiming to be “working on it.”

Central to the logic of delay is the reality that the time horizon of bureaucrats is typically longer than that of political overseers. Recall that agencies can, if they choose, take years to finalize a proposed rule. So, if an agency wants to write a rule and expects that they may face opposition, they can play the waiting game until the climate improves either because the principal actually changes or because overseers and the interest groups who monitor agencies move on to other things.¹⁵

Conversely, if the political environment is favorable for the agency, they will issue the rule quickly in order to capitalize on the situation. An oft-cited example of agency fast-tracking of rules is the so-called “midnight rulemaking” phenomenon, where, at the tail end of a presidential administration, agencies rush to complete rules that are supported by the outgoing president (O’Connell, 2011; Stiglitz, 2013). While midnight rulemaking is controversial, it may also be more readily observed than other types of fast-tracking, as an agency issuing a rule in a relatively expeditious manner may be perceived as routine, rarely meriting headlines.

In order to strategically time rules, agencies must have information about the predispositions of political principals. While they cannot perfectly predict, agencies can anticipate when a political principal might be more, or less, likely to overturn a rule (or punish the

¹⁵This is much more than an issue of term limits and transitions. Politics are unpredictable. For example, few would have predicted Senator Jim Jeffords’ (R-VT) 2001 decision to caucus with the Democrats, which caused a switch in party control of the Senate. President Kennedy’s untimely death and Nixon’s Watergate scandal were also unforeseeable, and had considerable consequences for priorities in Washington.

agency in some other way). At the very least, they are able to discern when the present moment is so adverse as to make delaying for an uncertain future preferable. However, given that the forms of oversight are exercised differently among the branches, the types of information available to agencies about principals' preferences also varies.

With respect to the president, rulemaking oversight is direct.¹⁶ By the time that the agency is gearing up to issue a final rule the agency has a good sense about where OIRA stands vis-à-vis the rule in question. At the proposed rule stage, OIRA gave the agency feedback on the rule: either by declining to review the rule altogether, or choosing to review choosing to review the rule and giving it a more or less difficult review. This information provides the agency with insight into OIRA's stance on the rule, and if that stance is less than favorable, then there should be no rush to send the rule back to the same hostile reviewers.

H1. Delay is more likely when OIRA and the agency disagreed about the rule at the proposed rule stage.

With respect to Congress, agencies have less specific information about key actors' preferences for individual rules since congressional oversight is further removed than presidential oversight. As such, partisan cues serve as a heuristic for how rules may be perceived. While agencies themselves are not partisan, scholars agree that some agencies serve a more liberal mission and others a more conservative one (e.g., Clinton and Lewis, 2008). Accordingly, agencies with more liberal missions might proceed with greater caution when Republicans are relatively strong and vice versa.

¹⁶I focus on rulemaking by executive branch agencies, over which OIRA has review authority. This means that rules written by independent agencies like the Federal Communications Commission (FCC) are excluded. However, rulemaking at these agencies generally follows a different process (e.g., FCC commissioners vote on draft rules, but there is no equivalent process at executive agencies), and is subject to different political pressures.

H2. Delay is more likely when the agency’s partisan opposition in Congress is stronger.

Unlike the president and Congress, an agency cannot “wait out” the courts, since turnover on the bench does not occur at regular intervals and is not predictable. From the agency’s perspective, the courts are also less predictable; information about judicial preferences is noisy, since multiple tiers of courts and multiples jurisdictions are involved in adjudicating agency rulemaking cases. This means that except in relatively rare cases where venue shopping is unavailable (see Canes-Wrone, 2003), it can be difficult for an agency to discern clear signals from the noise.

Yet, the same logic regarding strategic timing applies to the courts. In some periods, the courts closely scrutinize agency behavior, while at other times they are sleeping watchdogs. Being sued is a setback for an agency; they are rarely commended for their good behavior, but can be heavily penalized.¹⁷ When the agency is repeatedly being hauled into the courtroom, they may move slower until the court’s attentiveness diminishes, or groups bring suits less frequently. With a reduced pace, the agency can digest what is happening in the courts, and pay greater attention to specific types of issues or new doctrines that may be emerging.¹⁸ On the other hand, if the courts are quiet, the agency can speed up the rulemaking process to capitalize the current repose.

H3. Delay is more likely when courts are more closely scrutinizing the agency.

¹⁷While agencies have a high affirmance rate in the courts, they by no means win every case (Eskridge and Baer, 2007; Mashaw and Harfst, 1986).

¹⁸Mashaw and Harfst (1986, 296) explain that faced with an adverse legal environment, an agency’s “lawyers, economists, and engineers can be assigned to ‘flyspeck’ the rulemaking record” in order to make “anything issued by the agency completely defensible.”

Data and Methods

I use event history models to assess the time to finalization for agency proposed rules. This approach is frequently used to in medical studies to model how long a patient survives given some set of factors. The model estimates the “hazard rate,” usually the likelihood that the patient will die, at a particular point in time given a set of covariates about the patient that may be fixed across time (e.g., race) or time-varying (e.g., weight). While “failure” in those models is typically the patient’s death, in the present case failure is the finalization of the proposed rule. Specifically, the hazard rate in this case indicates the likelihood that the agency will finalize proposed rule i at time t .

I rely on the nonparametric Cox model, which does not make strong assumptions about the shape of the distribution of duration times and readily incorporates time-varying covariates.¹⁹ The unit of analysis is a rule-month, where each month that the rule remains unfinalized is an observation.

An important question when conducting an event history analysis of agency rule production is when the clock should start and when it should stop (i.e., when a rule should be considered to be proposed and when it is considered finalized). While initially it may seem that the clock should start when the agency publishes a proposed rule in the *Federal Register* and stop when the final rule is published in the *Federal Register*, this approach ignores the role of OIRA review at the final rule stage. OIRA reviews a subset of what it deems to be the most important rules at the final rule stage and declines review for the remaining rules. The duration of OIRA review varies from just a few days to several months or longer (Bolton,

¹⁹This latter point is particularly important for this analysis. Many event history models include one observation per case, typically measured at the initiation of a case and held constant for the duration of that case (e.g., Gersen and O’Connell, 2008). Here the question is how agencies respond to changes in the political environment, meaning that I rely on several of the key covariates to change during the course of each rulemaking case.

Potter and Thrower, 2016). Since the duration of this review is outside of the agency’s control, I consider submission to OIRA to be the end of the agency’s strategic timing efforts (for rules that OIRA reviews). In other words, I start the clock with the publication of the proposed rule and stop it when the final rule leaves the agency’s control, either because OIRA selected it for review or, for rules that OIRA declined to review, because it was sent to the *Federal Register* for publication.²⁰

I test my hypotheses on an original dataset of more than 11,000 proposed rules issued by 152 agencies between 1995 and 2014.²¹ This is the universe of proposed rules issued by executive branch agencies according to the *Unified Agenda of Regulatory and Deregulatory Actions*, a semiannual accounting of agency rulemaking published in the *Federal Register*.²² I focus on executive branch agencies to consider only rules over which the president has oversight through OIRA.

Political Covariates

The first hypothesis speaks to how agencies respond to anticipated support or hostility from OIRA (i.e., presidential oversight). I base the agency’s expectation about that

²⁰Ideally, I would start the clock when the agency first put pen to paper to start working on a rule. Unfortunately, this point in time is not systematically recorded across agencies and rules. Rules are not all driven from the top-down (e.g., from statutes) and agencies have considerable discretion in choosing when to initiate a new rule (Acs, 2015; West and Raso, 2013); this suggests there may be considerable variation in initiation points. To the extent that the current setup misses these early stages of development, it biases against my findings, since agencies may delay at the early stages of the process rather than the later stages when there is more public scrutiny.

²¹This follows recent scholarship that focuses on the bureau—rather than the department—as the appropriate unit to study bureaucratic behavior (e.g., Selin, 2015). See Table ?? in the Appendix for a list of bureaus included in the study.

²²Section A1 in the Appendix describes the data collection process.

office’s response to a final rule on how OIRA treated the rule at the proposed rule stage.²³ Specifically, I look at whether OIRA chose to review the proposed rule and, if so, how long that review lasted. Recent work suggests that OIRA reviews rules more frequently when there is conflict between the agency and the president (Acs and Cameron, 2013), and also that those reviews tend to last longer when OIRA and the agency disagree about the substance of the rule (Heinzerling, 2014).²⁴ I count every day that the proposed rule was under review at OIRA—this ranges from 0 days (when OIRA declined to review the proposed rule altogether) to more than 700 days.²⁵ Importantly, this review occurs *before* the clock starts (i.e., it is not included in the “clock time” for the event history analysis) and, accordingly, does not vary during the period of analysis. I expect agencies to move more slowly as the logged OIRA review time increases (*H1*).

The second hypothesis relates to agency expectations about congressional support or opposition. To capture this expectation, I use Clinton and Lewis’s (2008) survey-based measures of agency ideology to separate agencies with a conservative mission from those with a liberal mission.²⁶ I then create a size-unity ratio for the agency’s opposition party in Congress (i.e., the size unity score of the Democratic (Republican) party for conservative (liberal) agencies).²⁷ For a liberal agency like the EPA, for example, it is calculated by

²³To be sure, the information that agencies rely on in evaluating political principals comes from disparate sources, and may be better for some institutions (e.g., the presidency) than for others (e.g., the courts). As a result, the measures introduced in this section are intended to capture the broad brush strokes of principal-agent interactions and are likely not comparable across institutions.

²⁴Technically, OIRA has 90 days to review an agency rule, but this standard is often not followed in practice. Bolton, Potter and Thrower (2016) find evidence that both political conflict and limits on OIRA’s resources lead to longer reviews.

²⁵Because of the skewed nature of the review length, I add one day and take the natural log of the number of days.

²⁶Clinton and Lewis’s (2008) agency scores draw on a survey of experts who rated the ideology of agencies. They aggregate these responses using a multi-rater item response model to create an estimate of each agency’s ideology.

²⁷The size-unity ratio is substantively similar to Hurley, Brady and Cooper’s (1977) Legislative Potential for

averaging the *Opposition Size Unity* score for the House and the Senate, as follows:²⁸

$$\textit{Opposition Size Unity}_{it} = \frac{\textit{Republican size} \times \textit{Republican cohesion}}{\textit{Democrat size} \times \textit{Democrat cohesion}} \quad (1)$$

The resulting time-varying measure speaks to how strong the agency’s partisan opposition in Congress is at a given point in time. It takes on values greater than one when the agency’s partisan opposition is strong, and values less than one when the opposition is weak. Although this measure is not specific to the rule, it proxies for information that agencies are likely to have and, further, it is information that is useful in thinking about how capable congressional actors are of overcoming their collective action problems and punishing agencies.

To assess the level of court scrutiny over the agency (*H3*), I look at the volume of court cases involving the agency.²⁹ I focus on the DC circuit court, since federal administrators tend to be most aware of these court decisions and take them seriously (Hume, 2009).³⁰ Moreover, the DC circuit is widely considered the most important for agency cases (Hume,

Policy Change (LPPC), but is easier to interpret. I count an agency as conservative if its Clinton-Lewis score is greater than zero, and liberal otherwise.

²⁸Similar results are obtained using the farthest away chamber.

²⁹I consider cases where department (not necessarily the bureau) was involved in litigation. There are a few reasons for this decision. First, agency-level cases often focus on narrower issues and the most important of those cases tend to also include the department as a party in the case. Second, even in agencies with large and important bureaus (e.g., the Food and Drug Administration within the Department of Health and Human Services), the department-level general counsel is the “go to” for the most critical cases and serves as a coordinating unit among bureaus.

³⁰There are other advantages to focusing on the appellate level. For example, focusing on the circuit court avoids selection problems that appear at the district level (e.g., some types of agency cases proceed directly to the appellate level and skip the district courts) and the Supreme Court level (i.e., the high court grants cert to the cases it wants to hear, introducing obvious selection issues). Additionally the appellate courts hear enough agency cases for each agency to develop expectations, but also the cases it decides carry considerable weight in terms of setting precedent.

2009; Revesz, 1997). To create a measure of the agency’s expectations about the courts, I used *LexisNexis* to identify every DC circuit court case in which an agency was a party in every month. *Court Cases* is a monthly moving average of the number of appellate court cases involving the agency over the previous 12 months. It ranges from 0 to 19 cases. As stated in *H3*, *Court Cases* is expected to be associated with an increased time to rule finalization.

Rule Covariates

Rules vary in their substantive importance and in terms of the level of underlying complexity of the policy in question. While many studies include a litany of control variables to address a rule’s characteristics, I employ principal components analysis (PCA) to reduce these variables into two uncorrelated latent dimensions. In this case, reducing the dimensionality of the data allows for more sophisticated treatment of the data in subsequent analyses.³¹

The data used in the PCA include six features of each rule that are drawn from the *Unified Agenda* and the *New York Times*.³² The first component, *Impact*, loads from measures that reflect the extent to which the rule is expected to have an effect on different societal groups, including whether the rule had a large economic impact, whether it affected small businesses, whether it affected other governmental units, and whether the *New York Times* covered the proposed rule’s publication. The *Complexity* dimension addresses whether the rule tackled a difficult policy problem and loads from measures that assess whether the number of statutory authorities cited in the rule and the number of words included in the rule’s abstract are above or below the mean for that agency.³³ All factors load positively

³¹An examination of the eigenvalues greater than one reveals that there are indeed two distinct dimensions to these data. See Table A3 in the Appendix for details regarding the PCA.

³²Because these data include discrete measures, I apply the polychoric PCA approach suggested by Kolenikov and Angeles (2009).

³³Previous research suggests that longer abstracts may be associated with more complex rules (Haeder and

(as expected) on their respective dimensions. Both *Impact* and *Complexity* are normalized between 0 and 1 to ease interpretability, with higher values respectively indicating that the rule had a greater impact or was more complex.

I also control for whether Congress or the courts instituted a deadline for the agency to issue the final rule. Deadlines, which can be embedded in legislation or court orders, are an attempt to compel the agency to accelerate the pace of specific rules. Both *Statutory Deadline* and *Judicial Deadline* are fixed (i.e., not time-varying) and are expected to accelerate the pace of rule completion.

Agency Covariates

I also include a time-varying variable related to the resources the agency has at its disposal at a particular point in time. *Employment* is the number of employees at the bureau (in thousands) in each year.³⁴ I control for agency resources to address the rival explanation that the reason agencies move so slowly in rulemaking is not because of strategic behavior (as I posit), but rather due to a lack of capacity which prevents them from dealing with their workload in a timely manner.

Finally, I include a measure of the level of interest group attention to the agency's policy area on the logic that increased group attention may affect how agencies prioritize decisions (see Carpenter, 2002). To gauge group interest, I look at the amount of money interest groups spent on political influence in areas related to the agency's policy domain.³⁵ *Group*

Yackee, 2015; Yackee and Yackee, 2010) and that rules that cite to more policy topics (e.g., laws) have greater breadth (Boushey and McGrath, 2015*b*). Both of these measures are captured in comparison to the bureau's typical use, since bureaus may approach citations and abstract writing differently.

³⁴Bureau-level employment figures are from the Office of Personnel Management.

³⁵To do this, I match interest group spending by industry to Policy Agendas topic codes and then map topic codes back to the agency's substantive policy area adapting the method developed by Curry (2015). Interest group spending data are from the Center for Responsive Politics.

Spending is the logged amount of annual political spending targeted toward the agency’s policy area. See Table A1 for descriptive statistics for all variables.

Results

Table 1 presents the results of the event history analysis. Table entries are Cox proportional hazard coefficients, where a positive coefficient means that the hazard rate is increasing and the rule’s expected duration is decreasing (i.e., the rule will be published more quickly). A negative coefficient implies the converse: a decreasing hazard rate and an increase in expected duration (i.e., it will take longer for agency to issue the final rule). These models are stratified on the bureau, which allows the baseline hazard to vary for each bureau. In essence, stratification allows the researcher to control for unobserved bureau-level factors.³⁶ I report the results of global chi-square tests of the proportional hazards assumption for each Cox model and am able to reject the null hypothesis of no violation. For all models, robust standard errors clustered on the rule are included in parentheses.

Model 1 in Table 1 shows a parsimonious model, while Model 2 reports the full model including control variables. Models 3 and 4 repeat the same analysis, but on subsets of rules with high *Impact* scores (i.e., rules that are, respectively, in the upper 25thile and 10thile of *Impact* values). Like laws, many rules deal with mundane matters of the administrative state. Subsetting the data in this way allows for an examination of strategic behavior among rules that are the most substantively important.

³⁶This is akin to including bureau fixed effects, although it does not produce bureau-level coefficients.

Table 1: Cox Proportional Hazard Models of Time to Rule Finalization, 1995–2014

	Expected Sign	All Rules (1)	All Rules (2)	High Impact ^a Rules (3)	Very High Impact ^b Rules (4)
OIRA Review Time (ln)	-	-0.031*** (0.006)	-0.029*** (0.006)	-0.022 (0.012)	-0.040* (0.018)
Opp Size Unity	-	-0.179** (0.055)	-0.157** (0.055)	-0.040 (0.115)	0.062 (0.188)
Court Cases	-	-0.015* (0.006)	-0.015* (0.006)	-0.024* (0.012)	-0.049** (0.018)
Impact			-0.451*** (0.114)	0.767*** (0.221)	1.155*** (0.310)
Complexity			-0.382 (0.198)	0.252 (0.301)	-0.221 (0.523)
Judicial Deadline			0.231*** (0.050)	0.227** (0.078)	0.073 (0.112)
Statutory Deadline			0.124*** (0.033)	0.051 (0.059)	0.042 (0.086)
Group Spending			-0.026 (0.024)	0.144** (0.054)	0.117 (0.093)
Employment			-0.0002 (0.001)	-0.003 (0.003)	-0.016 (0.009)
Num events		11,028	11,028	2,765	1,103
Num obs.		205,520	205,520	53,077	20,386
PH test		0.28	0.35	0.50	0.93

Note: Table entries are coefficients obtained from proportional Cox models stratified at the bureau level. A positive coefficient means that the hazard rate is increasing and the rule’s expected duration is decreasing. Negative coefficients indicate a longer duration. Robust standard errors clustered on the rule are in parentheses. Statistical significance: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

a: Denotes rules in the upper 25%ile of *Impact* scores.

b: Denotes rules in the upper 10%ile of *Impact* scores.

The models consistently support the expectation that agencies avoid issuing rules when the political climate is less favorable. To understand the substantive magnitude of these effects, I plot the hazard ratio graphically in Figure 2. The dots in this figure represent

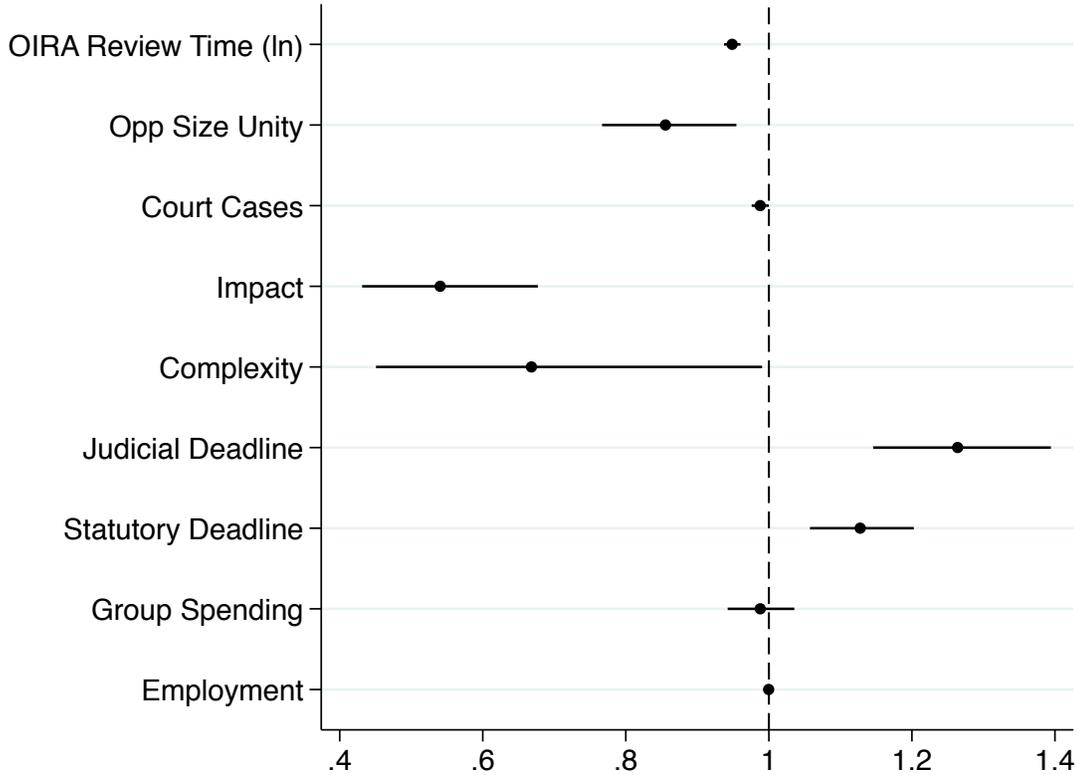
the estimated hazard ratio for each coefficient and the horizontal lines denote 95% confidence intervals. The hazard ratio can be understood as increasing or decreasing the probability of a rule being finalized in a given month. The baseline for comparison is 1; a hazard ratio of 2 indicates that a one-unit increase in the independent variable will make the rule two times more likely to be finalized in a month. A ratio of .5 suggests that a rule is half as likely to be finalized. As the probability of being finalized increases (decreases), rules are expected to proceed through the process more quickly (slowly).

The first hypothesis (*H1*) posited that if there was conflict between the agency and the president during OIRA’s review of the proposed rule, progress toward finalizing the rule will be slower. The negative and statistically significant coefficient on the *OIRA Review Time* variable supports this proposition. While the magnitude of the hazard ratio is not large, this is explained by the measurement of the variable: logged days. An unlogged specification (not shown) suggests this effect is substantively large: for every additional day of OIRA review, the risk of rule finalization in a given month falls by about 0.3%, meaning that an additional 20 days of OIRA review is associated with a 6% reduction in the hazard of finalization.

Consistent with Hypothesis 2, agencies are much slower to finalize rules when congressional opposition is relatively strong. The coefficient for *Opp Size Unity* is negative and statistically significant for all rules, but not among rules with high and very high *Impact* scores. This suggests that anticipation of congressional reaction may slow some rules, but that the effect is not concentrated among the high or low impact rules. It is difficult to interpret the substantive meaning behind this differential effect, but it may be that for particularly high impact rules, agencies have better information about congressional preferences and do not have to rely on crude proxies such as partisan strength.

The hypothesis regarding the courts (*H3*) is also substantiated. The coefficient for the *Court Cases* variable is negative, as expected. While the hazard ratio appears small

Figure 2: Predicted Hazard Ratios



Note: Hazard ratios for Model 2 in Table 1. Estimates with confidence intervals crossing the reference line at 1 are not statistically significant at the 95% level.

(HR = 0.98), this again should be considered in light of the unit of measurement. For every additional case that the agency has in the appellate court that month, the incidence of rule finalization decreases by 1.5%. Given that the standard deviation for the *Court Cases* is 2.6 cases, this suggests that the courts play an important role in shaping how agencies approach rule issuance.

Turning to the control variables, *Impact* and *Complexity* are both associated with slower rule completion times. In a given month, the difference between the rule with the highest impact is associated with a 36% reduction in the risk of finalization, while the most complex rule is associated with a 32% lower risk compared to the least complex rule.³⁷

³⁷Because these variables are scaled between 0 and 1, the hazard ratios can be interpreted as the difference

These effects make sense since rules with a greater impact may require more consultation and rules that are more complex may require greater technical scrutiny, both of which require additional time. It is worth noting that among the subset of high and very high impact rules (Models 3 and 4), those rules with the largest *Impact* scores actually move faster and are more than two (Model 3) to three (Model 4) times more likely to be finalized in a given month compared to rules with low *Impact* values. This suggests that agencies are able to prioritize some very high impact rules and move them quickly through the process, a finding consistent with past research on rule prioritization (Yackee and Yackee, 2010) and with the notion of “fast-tracking.”

The results show that rulemaking deadlines are effective at getting agencies to move more quickly. Compared to rules with no deadlines, having a judicial deadline for issuing a final rule increases the hazard of issuing a final rule by about 26%, while having a statutory deadline has a slightly smaller effect (13%). This finding bolsters previous work that finds that deadlines are powerful tools to motivate agencies and influence which projects are considered priorities (Gersen and O’Connell, 2008; Lavertu and Yackee, 2012). Neither *Group Spending* nor *Employment* has a discernible effect on the pace of rule completion. The lack of a clear finding with respect to *Employment* is particularly interesting since many observers offer a lack of resources as a reason that agencies are unable to move at a rapid clip, and personnel are perhaps the most crucial resource. This result allows us to reject the alternate hypothesis that the reason that agency rules move so slowly is due to capacity deficits.

Robustness

These results are robust to a number of alternate specifications, which I reserve for the Appendix. I begin by dealing with a potential concern about selection bias. As discussed

in the effect moving from the minimum to the maximum value of each variable.

previously, I am unable to observe when the agency first initiates the rulemaking process (i.e., I only observe when the proposed rule is published in the *Federal Register*). Although this arguably makes a harder case for detecting the effects of strategic timing, I nonetheless look at a subset of rules where it is possible to observe agency proposed rules earlier in the process. To do this, I narrow the analysis to rules where the agency published a “pre-rule” (i.e., an Advance Notice of Proposed Rulemaking or ANPRM) before the proposed rule.³⁸ The substantive effects for the political covariates are largely consistent in direction with the findings reported here, although they do not all achieve statistical significance likely owing to the much smaller sample size ($N = 383$).

Next, I consider an alternate dependent variable, starting the clock at proposed rule publication and stopping it for all rules when the final rule is published in the *Federal Register* (Table A5). To show that the results do not hang on the particular measures employed here, in Table A6 I use alternate operationalizations of each of the political variables. In lieu of OIRA review time, I use a widely-used measure of ideological distance between the president and the agency developed by Clinton and Lewis (2008). For the agency’s relationship with Congress, I rely on the number of seats held by the agency’s opposition and, for the judiciary, I look at the agency’s losses in court. The substantive results are unaffected by each of these modifications.

Lastly, I consider two alternate estimation strategies. First, in Table A7 I employ a logit model with first-, second-, and third-order polynomials of the time at risk rather than a Cox model (Carter and Signorino, 2010). Second, I address the hierarchical nature of the data (i.e., rules nested within bureaus nested within departments) with a mixed effects multilevel survival model (see Table A8). Both estimation strategies result in similar findings to those reported here, suggesting that the effects of agency slow-rolling and fast-tracking are not sensitive to any one way of analyzing the data.

³⁸This follows the approach pioneered by Yackee and Yackee (2010).

Parsing Delay

The previous sections demonstrated that agencies are significantly less likely to issue a final rule when the courts, Congress, or the president are disinclined toward the agency or the rule. While these findings suggest strategic delay, they are also consistent with an alternate mechanism: sincere delay. In the context of an opposed principal, sincere delay simply means that agencies work harder to get the policy right. So, rather than delay serving as an attempt to sidestep political oversight, sincere delay posits that when agencies are constrained by the political environment, they respond by working harder to please principals.

To distinguish between these competing mechanisms, I interact *Complexity* with each of the key political variables. If agencies are sincerely delaying, I anticipate that under political adversity agencies should take longer—and be less likely to finalize rules—for the rules that are the most difficult. Complex policies require more effort and if agencies are sincerely delaying they should redouble efforts to “get hard policies right” when they expect serious political scrutiny. Models 5 and 6 in Table 2 present the results of this analysis. None of these interactions are statistically significant. While these results are not dispositive, they suggest that sincere delay is not a systematic explanation for the earlier findings.

There are additional empirical implications that can be leveraged in support of the strategic delay mechanism. Changes in OIRA leadership, specifically the politically-appointed OIRA Administrator, occur with some frequency within presidential administrations.³⁹ Each new administrator brings a fresh perspective to regulatory review. If agencies are strategically timing rules, they should respond to changes in OIRA leadership, which, from a rulemaking perspective, can be just as meaningful as a change in administrations and are more proximate to agency concerns. The implication is that having a new OIRA Administrator should essentially wipe the slate clean, meaning that agencies should speed

³⁹Each of the last three presidents has had at least two OIRA administrators, with turnover occurring at irregular intervals.

up the process for rules that were the source of tension between the agency and OIRA at the proposed rule stage.

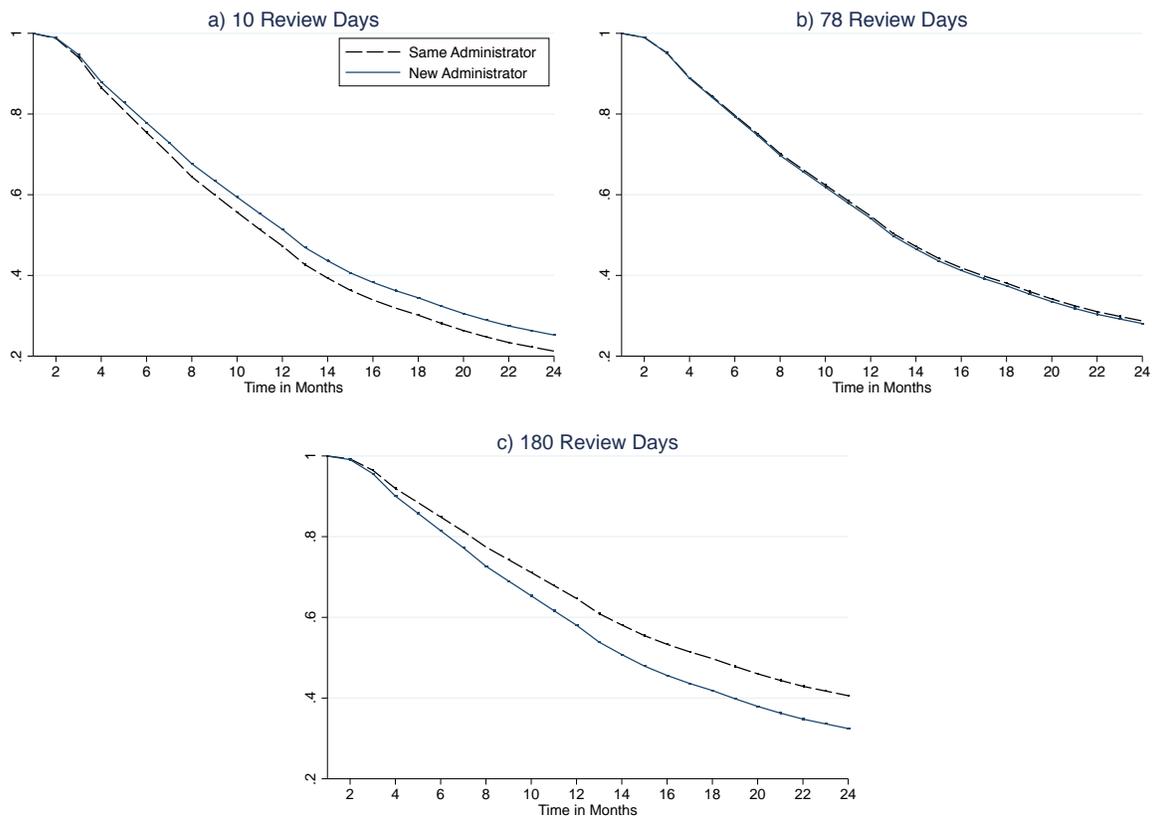
Table 2: Additional Tests of Strategic Delay, Cox Proportional Hazard Models, 1995–2014

	All rules (5)	High impact rules (6)	All rules (7)	High impact rules (8)
OIRA Review Time (ln)	-0.045* (0.019)	0.005 (0.030)	-0.017 (0.009)	0.001 (0.017)
OIRA Review Time (ln) × Complexity	0.087 (0.092)	-0.135 (0.139)		
OIRA Review Time (ln) × Same Administrator			-0.022* (0.011)	-0.044* (0.020)
Opp Size Unity	-0.310 (0.187)	0.494 (0.333)	-0.132* (0.056)	-0.003 (0.116)
Opp Size Unity × Complexity	0.808 (0.944)	-2.646 (1.523)		
Court Cases	-0.012 (0.014)	0.002 (0.024)	-0.017** (0.006)	-0.029* (0.012)
Court Cases × Complexity	-0.016 (0.072)	-0.137 (0.109)		
Complexity	-1.277 (1.037)	3.532* (1.678)	-0.408* (0.198)	0.182 (0.302)
Same Administrator			0.074** (0.026)	0.161** (0.056)
Controls	✓	✓	✓	✓
Num events	11,028	2,765	11,028	2,765
Num obs.	205,520	53,077	204,817	52,930
PH test	0.59	0.58	0.58	0.59

Note: Table entries are coefficients obtained from proportional Cox models stratified at the bureau level. Robust standard errors clustered on the rule are in parentheses. Models include all controls from Table 1 (not shown to preserve space). Statistical significance: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

To test this, I create a time-varying indicator variable, *Same Administrator*, that takes on a value of “1” during months when the same OIRA Administrator that reviewed the proposed rule is in charge of OIRA, and “0” after a new Administrator takes office. I then interact *Same Administrator* with *OIRA Review Time*. Models 7 and 8 in Table 2 provide the results. The coefficient on this interaction terms is negative and statistically significant suggesting that the presence of a new OIRA administrator leads to a change in regulatory pace.

Figure 3: Probability of Rules Surviving Finalization under the Same and Different OIRA Administrators



Note: Survival probabilities for a final rule for which OIRA gave a quick review of the proposed rule (10 days), for which OIRA had the average review time (78 days), and for which OIRA had a relatively long review time (180 days) for rules that have the same OIRA Administrator who reviewed the proposed rule (dashed line) and a new OIRA Administrator (solid line). Because the stratified model creates agency-specific baseline hazards, estimation of a universal plot to represent all agencies is not possible. Therefore, these probabilities were generated from an unstratified and unlogged (to ease interpretability) variant of Model 7; continuous variables held at their mean and dichotomous variables held at their modal values.

To further probe this interaction Figure 3 plots the survival probabilities for a rule under three scenarios: a low (10 days), medium (78 days), and high (180 days) level of OIRA review, for the same administrator that reviewed the proposed rule and for a new OIRA administrator. Looking at Figure 3(a), it appears that the survival probability (i.e., the risk of a rule *not* being finalized) is consistently higher for a rule when a new OIRA Administrator takes office. An OIRA review of 10 days is quite short—considerably less than the 90 days allotted in the governing Executive Order—suggesting that OIRA gave the proposed rule preferable treatment with a quick review. What Figure 3(a) shows is that agencies are much more likely to try to lock in that favorable treatment in cases where the OIRA Administrator does not change. The second panel of Figure 3(b) shows the mean OIRA review time (78 days). Here, there is no appreciable difference between having an administrator change. The agency is no more—and no less—likely to finalize a rule given a change in OIRA leadership if it received the “standard treatment” at the proposed rule stage. Finally turning to the third panel, Figure 3(c), shows the results for a rule that received an above average review time of 180 days at the proposed rule stage. The opposite pattern from the first panel emerges; when a new Administrator is in place the agency is much *more* likely to finalize the rule. The probability of surviving is higher for these high conflict rules when the same Administrator that reviewed the proposed rule is still in office.

These figures, which offer a more refined test of the theory, provide strong evidence that the preferences of OIRA at the proposed rule stage—and whether they still apply to the current regime—have important effects for when an agency chooses to finalize a rule. If the agency expects favorable treatment from the current regime, they fast-track the rule (Figure 3(a)), but if they expect unfavorable treatment they are more likely to slow-roll (Figure 3(c)).

Conclusion

The federal rulemaking process is long and arduous, often taking several years to complete. Existing theories of rulemaking partially explain this lengthy process, positing ossification due to the sheer number of administrative hurdles placed on bureaucratic agencies during the process. The argument presented in this paper takes a different tack, explaining variation around this baseline. I find that agencies in fact have considerable mastery of this administrative process and are thereby able to opportunistically time finalization so as to insulate rules from the reach of principals. With respect to the president, Congress, and the courts, agency bureaucrats can “fast track” or “slow roll” rules depending on whether the environment is more or less favorable. An event history analysis of more than 11,000 agency rules shows that rules take longer to finalize when OIRA and the agency cannot agree on the proposed rule, when the agency’s opposition forces in Congress are relatively strong, and when the agency is more frequently before the courts. These findings are highly robust and support an interpretation of strategic delay in the face of political opposition, rather than sincere delay.

Overall, this argument suggests that the principal-agent relationship should be thought of as dynamic one (Krause, 1999). While political principals set up the broad architecture of the notice-and-comment process (McCubbins, Noll and Weingast, 1987), it is bureaucratic actors who are responsible for carrying out the process. Because bureaucrats seek to avoid negative political repercussions such as rule overturns or reprimands, they can time those rules to make it less likely that these events occur. While previous research has suggested that political oversight constrains the policy decisions of bureaucrats, a dynamic understanding of rulemaking suggests that bureaucrats may be less constrained in their policy decisions, since timing may free agencies up to choose more preferred policies.

While this paper has focused on the pacing of final rules, this is just one among many administrative levers that bureaucrats control when crafting a new rule. For instance,

Gersen and O’Connell (2008) discuss how agencies can publish final rules on Fridays and during congressional recesses in order to keep them out of the public’s (and Congress’s) purview. Similarly, Nou (2013) posits that agencies try to “slam” OIRA by submitting multiple rules at once to try and raise the costs of review for OIRA, although she does not explore this possibility empirically. Taken together, these tactics suggest that, by controlling the administrative reins, agencies have considerable power in this policymaking process.

Finally, while rulemaking is an important policymaking venue, it is but one of many activities that agencies engage in. Agencies may fast-track or slow-roll implementation decisions, such as choosing when to implement an executive order, or other policy decisions, such as case adjudications or major enforcement actions. Future work would do well to explore the effects of strategic timing in these domains. Delay in bureaucratic decisionmaking can be understood not just as a function of bureaucratic capability or effort, but also as a function of the political incentives that bureaucrats face.

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