

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 150 bureaus. The results support the interpretation that agencies strategically delay, and that delay is not simply evidence of increased bureaucratic effort.

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 (Moe, 1989), resource constraints (Carpenter, 2002, 2004), and the complexity of the tasks that bureaucrats are often charged with tackling (Epstein and O’Halloran, 1999).

Yet, delay may be a reflection of 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. This argument centers on the ability of bureaucrats to manage two types of drift. If agencies move quickly, they can cash in on known “bureaucratic drift”; if they delay, they can potentially benefit from “coalition drift” (see McCubbins, Noll and Weingast, 1989; Shepsle, 1992).

Strategic timing undoubtedly affects policymakers’ decisions in a number of venues, from position-taking in Congress (Box-Steffensmeier, Arnold and Zorn, 1997), to judges’ decisions about when to retire (Spriggs and Wahlbeck, 1995), to when local bureaucrats schedule elections (Meredith, 2009). I examine the role of strategic timing in the context of the federal rulemaking process and the release of binding final rule decisions. In doing so, I speak to an important puzzle in the rulemaking process. As West (2004) puts it, when drafting a proposed rule, agencies attempt to “get it right the first time.” The implication is that agencies tend to avoid making changes to rules as they progress through the later

stages of the process. Yet if agencies are subject to constant political scrutiny, how are rules able to withstand calls for change? The answer, I argue, is timing.

The rulemaking process 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 (e.g., McCubbins, Noll and Weingast, 1987). Yet, bureaucrats control the administrative levers of rulemaking, including control over 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 150 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. 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.

Bureaucratic discretion and the ability to evade oversight are well established (Carpenter, 2002; Gailmard, 2002), 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 political 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. Some of this delay is inevitable, since creating a new binding rule is an administrative feat that involves many steps.¹ 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). 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. 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 final rule is published in the *Federal Register*. Typically, the rule takes effect after a short waiting period.

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 agencies. As a result of the growth of these requirements and an increase in

¹The description that follows is a simplification the notice-and-comment rulemaking process; for a full accounting of the process, see Kerwin and Furlong (2011).

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.² 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.³ 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 slightly over one year (mean=15.0 months, s.d.=15.2 months).

There is, however, 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 nine months, while the Forest Service (FS) typically takes slightly under two years.^{4,5} Existing theory, be it the ossification thesis or arguments based on

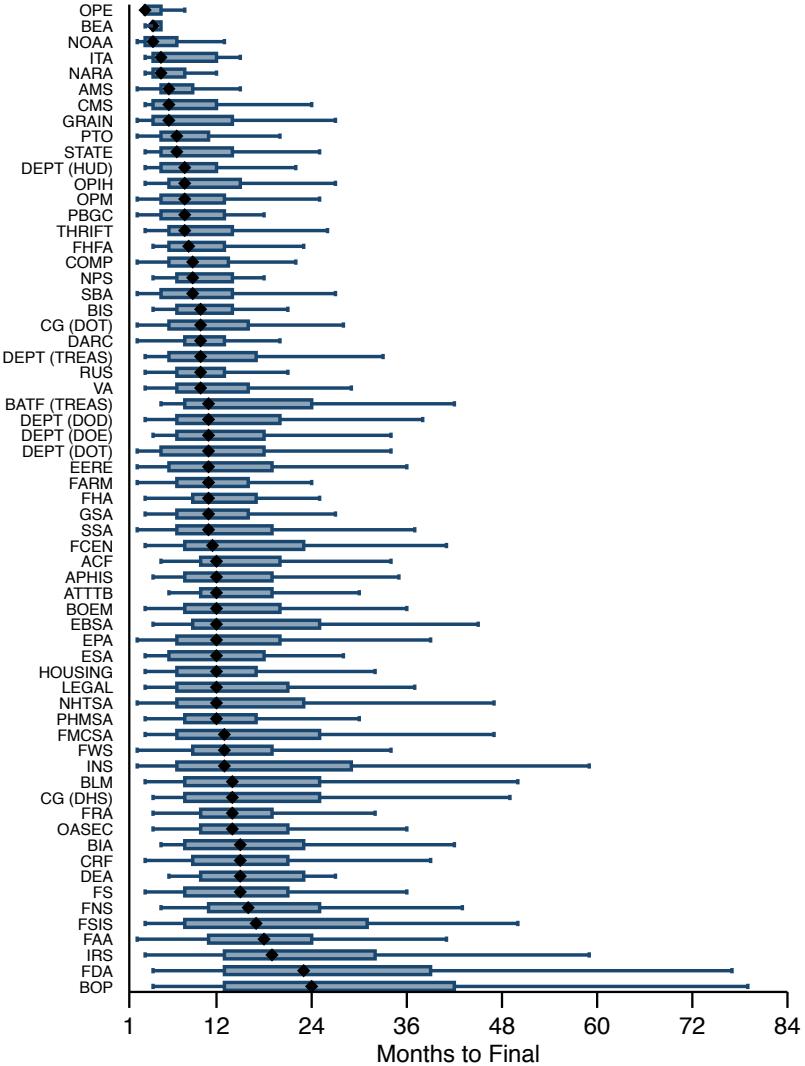
²Judicial review also constrains the process. For instance, Mashaw and Harfst (1986) argue that legal culture led the National Highway Transportation Safety Administration (NHTSA) to favor case adjudication over rulemaking in the early 1970s.

³This should not, however, be taken as “proof” that ossification exists, as a long completion time could arise from a variety of processes.

⁴Where 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.

⁵Some rules take just over a month to move from the proposed to the final stage. Others take much longer to finalize. In the period under study, the longest time to finalization came from a Food and Drug Administration (FDA) rule 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

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 bureaus 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.

agency design features, do not speak to this variation. Moreover, the possibility that pace may result from internal factors—and perhaps intentional foot-dragging on the agency's part—is generally overlooked. Put differently, much of the literature has concentrated on

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.

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 adjust the volume of rules they produce under different political circumstances (Boushey and McGrath, Forthcoming; O’Connell, 2008), and publish more controversial rules on Fridays when the news cycle is slower (Gersen and O’Connell, 2008).

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 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.⁶ 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 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

⁶OIRA does not review every rule. Rather its purview is confined to rules drafted by executive branch agencies that it deems to be “significant.” Under E.O. 12866, significance means the rule has an annual effect on the economy of \$100 million or more, or it meets other more subjective criteria, such as having “novel” legal or policy implications.

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 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).⁷ 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. As is the case for Congress, court oversight is generally contingent on interest groups monitoring agency behavior and pursuing relief through litigation. 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. As Hume (2009, 20) notes, "Administrators are repeat players with extensive litigation experience, which allows them to anticipate the concerns that reviewing courts are likely to have."

Each branch of government's authority over rulemaking is exercised in a different manner, and some actors, like the president, have more privileged position than others.

⁷Congress 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.

However, 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. “Vetoos” of agency rules are rare; yet when they occur, they “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). Setbacks like these may have long-term consequences for agency reputations, autonomy, or bureaucrats’ career trajectories.⁸ 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, 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.

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 coalition of political overseers will be responsible for evaluating

⁸For example, in 2011 the DC circuit court vacated a high profile final rule issued by the Office of Federal Student Aid (FSA), on the grounds that the bureau did not adequately justify its decisionmaking and that 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. The overturn likely contributed to OFSA’s reputation as an agency “dogged by accusations of incompetence” (Nasiripour, 2016).

the agency’s decision when the decision finally becomes public.

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 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.⁹

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 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). While midnight rulemaking is controversial, this may only be because it is more readily observed than other types of fast-tracking, as otherwise expeditious rulemaking may be perceived as routine, or even efficient.

⁹This is much more than an issue of term limits and transitions. Politics is 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.

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 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. 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 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.

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 multiple jurisdictions are involved in adjudicating agency rulemaking cases. This means that except in relatively rare cases where venue shopping is unavailable, 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, based in part on the extent to which monitoring interest groups are willing to act as litigants, the courts closely scrutinize agency behavior. At other times the courts are sleeping watchdogs. Being sued is a setback for an agency; they are rarely commended for their good behavior, but can be heavily penalized.¹⁰ Even if the agency has a strong case watchful courts may incentivize delay. As Jones and Taylor (1995, 333) note, “the mere threat of [lawsuits], due to their concomitant delays and increased workload and costs, may influence the [agency]’s decisionmaking before decisions are even made.”

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. On the other hand, if the courts are quiet, the agency can speed up the rulemaking process to capitalize on the current repose.

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

Data and Methods

I use event history models to assess the time to finalization for agency proposed rules. This approach estimates the “hazard rate,” or the likelihood that an agency will finalize

¹⁰While agencies have a high affirmance rate in the courts, they by no means win every case (e.g., Mashaw and Harfst, 1986).

proposed rule i at time t , given a set of covariates about the rule that may be fixed across time or time-varying. 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.¹¹ 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, 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.¹²

¹¹This 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. 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.

¹²Ideally, 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 (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

I test my hypotheses on an original dataset of more than 11,000 proposed rules issued by 150 bureaus between 1995 and 2014.¹³ 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*.¹⁴ 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 office's response to a final rule on how OIRA treated the rule at the proposed rule stage.¹⁵ 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).¹⁶ 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

there is more public scrutiny.

¹³This 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 A2 in the Appendix for a list of bureaus.

¹⁴Section A in the Appendix describes the data collection process.

¹⁵To 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.

¹⁶Technically, 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 capacity lead to longer reviews. For a discussion of how capacity concerns affect the results, see the *Robustness* section.

altogether) to more than 700 days.¹⁷ 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.¹⁸ 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).¹⁹ For a liberal agency like the EPA, for example, it is calculated by averaging the *Opposition Size Unity* score for the House and the Senate, as follows:

$$Opposition\ Size\ Unity_{lib} = \frac{\text{Republican size } x \text{ Republican cohesion}}{\text{Democrat size } x \text{ Democrat cohesion}} \quad (1)$$

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

¹⁷Because of the skewed nature of the review length, I add one day and take the natural log of the number of days.

¹⁸Clinton 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.

¹⁹The size-unity ratio is substantively similar to Hurley, Brady and Cooper’s (1977) Legislative Potential for 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.

agencies.

To assess the level of court scrutiny over the agency ($H3$), I look at the volume of court cases involving the agency.²⁰ 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).²¹ Moreover, the DC circuit is widely considered the most important for agency cases (Hume, 2009). 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.²² 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.²³

The data used in the PCA include six features of each rule that are drawn from the

²⁰I consider cases where department (not necessarily the bureau) was involved in litigation.

²¹There are other advantages to focusing on the appellate level. For example, focusing on the circuit court avoids selection problems that appear at the district and the Supreme Court levels. Additionally the appellate courts hear enough agency cases for each agency to develop expectations, and the cases it decides carry considerable weight in terms of setting precedent.

²²This measure builds on agency *perceptions* about the likelihood that groups will use the judiciary as a means to pursue relief (i.e., it involves litigant strategy). For a measure based on the ideology of the reviewing court, see Table C6 in the Appendix

²³See Section B in the Appendix for details regarding the PCA.

Unified Agenda and the *New York Times*. 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 bureau.²⁴ All factors load positively (as expected) on their respective dimensions. Both *Impact* and *Complexity* are normalized between 0 and 1 to ease interpretability, with higher values 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 court orders or legislation, are an attempt to compel the agency to accelerate the pace of specific rules. Both *Judicial Deadline* and *Statutory 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.²⁵ 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,

²⁴Previous research suggests that longer abstracts may be associated with more complex rules (Yackee and Yackee, 2010) and that rules that cite to more policy topics (e.g., laws) have greater breadth (Boushey and McGrath, 2015). Both of these measures are captured in comparison to the bureau's typical use, since bureaus may approach citations and abstract writing differently.

²⁵Bureau-level employment figures are from the Office of Personnel Management.

but rather due to a lack of capacity which prevents bureaucrats from dealing with their workload in a timely manner.

The models also 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 this, I look at the amount of money interest groups spent on political influence in areas related to the agency's policy domain.²⁶ *Group Spending* is the logged amount of annual political spending targeted toward the agency's policy area. Lastly, I incorporate presidential administration fixed effects to control for variation specific to each administration. 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 finalize the 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-specific factors.²⁷ 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

²⁶To do this, I match interest group spending by industry to Policy Agendas topic codes and then map topic codes back to the bureau's substantive policy area, adapting the method developed by Curry (2015). See Table A3 for mapping between industries, topics, and bureaus. Group data are from the Center for Responsive Politics.

²⁷This 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)	-0.030*** (0.006)	-0.027* (0.012)	-0.043* (0.018)
Opp Size Unity	-	-0.159** (0.058)	-0.162** (0.059)	-0.076 (0.118)	0.043 (0.192)
Court Cases	-	-0.015* (0.006)	-0.013* (0.006)	-0.017 (0.012)	-0.042* (0.019)
Impact			-0.454*** (0.114)	0.783*** (0.219)	1.145*** (0.307)
Complexity			-0.357 (0.197)	0.280 (0.298)	-0.220 (0.520)
Judicial Deadline			0.196*** (0.050)	0.197* (0.077)	0.056 (0.110)
Statutory Deadline			0.127*** (0.033)	0.049 (0.059)	0.057 (0.086)
Group Spending			-0.021 (0.033)	0.004 (0.078)	-0.0002 (0.137)
Employment			-0.001 (0.001)	-0.004 (0.003)	-0.016 (0.009)
President Fixed Effects	✓	✓	✓	✓	✓
Bureau Stratification	✓	✓	✓	✓	✓
Num events	11,022	11,022	2,750	1,097	
Num obs.	205,160	205,160	52,540	20,385	
PH test	0.15	0.23	0.59	0.97	

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.

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 25%ile and 10%ile

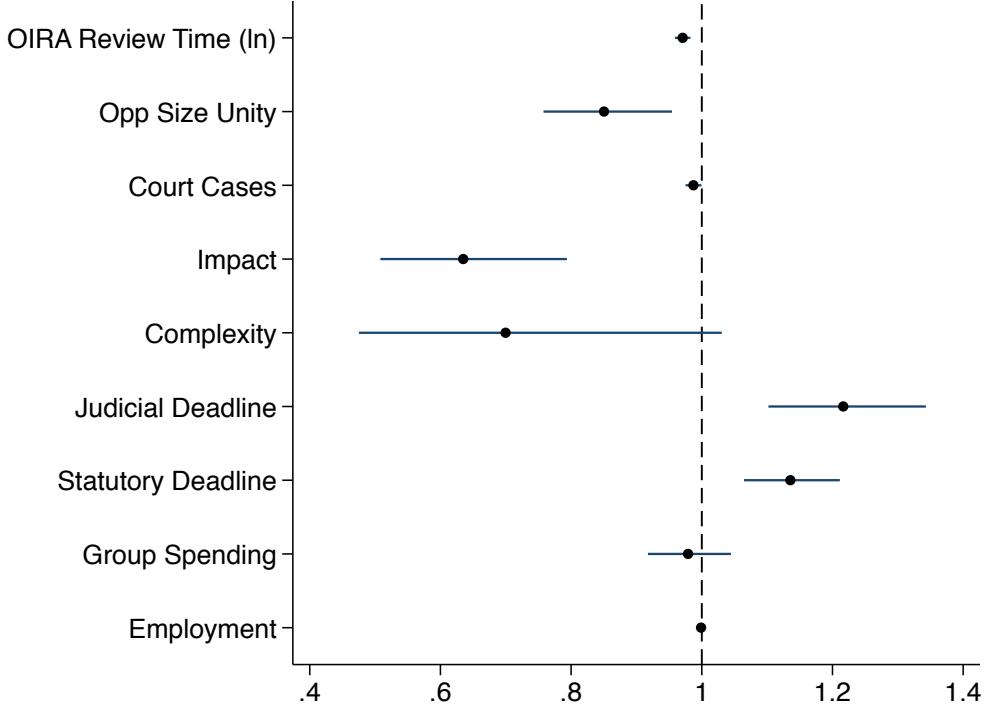
of *Impact* values). Like laws, many rules deal with mundane matters of the administrative state. Subsetting the data in this way allows for an examination of strategic behavior among rules that are the most substantively important.

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,

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.

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,²⁸ 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 (HR = 0.98), this again should be considered in light of the unit. For every additional case that the agency has in the appellate court that month, the incidence of rule finalization decreases by 1.3%. 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.

²⁸For instance, the non-significance may be attributable to the limited variation in this variable which biases these estimates toward zero.

Turning to the control variables, *Impact* and *Complexity* are both associated with slower completion times (although the *Complexity* variable is only statistically significant at the 90% level). In a given month, the difference between the rule with the highest impact is associated with a 37% reduction in the risk of finalization, while the most complex rule is associated with a 30% lower risk compared to the least complex rule.²⁹ 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 advance them quickly, a finding consistent with research on rule prioritization (Yackee and Yackee, 2010) and with the notion of “fast-tracking.”

The results show that rulemaking deadlines lead agencies to move more quickly. Compared to rules with no deadlines, a judicial deadline for issuing a final rule increases the hazard of issuing a final rule by about 21%, while a statutory deadline has a smaller effect (13%). These findings bolster previous work showing that deadlines influence which projects agencies consider to be priorities (e.g., Gersen and O’Connell, 2008), but they should be interpreted with caution. Deadlines may be subject to different political influences than other rules (see Gersen and O’Connell, 2008; MacDonald and McGrath, 2016); to the extent that this occurs, it may introduce bias into the estimates.³⁰

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 resource shortages as a reason that agencies are unable to move

²⁹Because these variables are scaled between 0 and 1, the hazard ratios can be interpreted as the difference in the effect moving from the minimum to the maximum value.

³⁰See page A28 in the Appendix for a discussion of this potential bias.

at a rapid clip, and personnel are perhaps the most crucial resource. These results fail to provide any support for the alternate hypothesis that the reason that agency rules move so slowly is due to capacity deficits.

Overall, the argument is less strongly supported among *High Impact* and *Very High Impact* rules. The measure that is rule specific—*OIRA Review Time (ln)*—is statistically significant across all sets of rules and the magnitude of this effect is consistent. However, the measures for Congress and the courts—which are specific to the agency but not the rule—and the deadline variables do not consistently achieve statistical significance in Models 3 and 4. There are several possible interpretations of this lack of statistical significance, but the consistent OIRA effect may be indicative of the president’s privileged role in overseeing the bureaucracy (see Clinton, Lewis and Selin, 2014). Another possibility is that, agencies simply have less room to strategically maneuver for rules with higher visibility. Finally, it may be the case that for the most important rules agencies invest in obtaining specific information about principals’ preferences, thereby reducing reliance on broad heuristics.

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 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” (known as an Advance Notice of Proposed Rulemaking or ANPRM) before the proposed rule.³¹ The substantive effects for the political covariates are largely consistent in direction

³¹This follows the approach pioneered by Yackee and Yackee (2010).

with the findings reported here, although they do not all achieve statistical significance likely owing to the much smaller sample size (see Table C1). I also 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 C2).

Next, Bolton, Potter and Thrower (2016) argue that the duration of OIRA's review is affected by both political conflict *and* OIRA's capacity. This suggests that *OIRA Review Time* may be measured with error, leading to a downward bias in the coefficient for *OIRA Review Time*. To show that this measurement error is not driving the results I reestimate the models using the key measures of capacity employed by those authors (Table C3). To demonstrate that the results do not hang on the particular measures of the political covariates employed here, I use alternate measures of conflict with the president (Table C3), Congress (Tables C4), and the courts (Table C6). I also consider the role of uncertainty in the Clinton and Lewis scores (Table C5), drop rules with a deadline and departments that have lots of deadlines (since deadlines may externally enforce timing, see Table C7), and include congress (Table C8) and year (Table C9) fixed effects in lieu of presidential administration fixed effects. I discuss each of these tests in more detail in the Appendix, but the substantive results follow the same patterns reported here.

Lastly, I consider two alternate estimation strategies. First, in Table C10 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 C11). 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.

Parsing Delay

The previous sections demonstrated that agencies are less likely to issue a final rule when contemporary political coalitions are disinclined toward the agency or the rule. I argue that this form of strategic timing is a means to an end, providing an avenue by which agencies can preserve the content of rules such that the final policy more closely matches their preferences. However, there are at least two alternate mechanisms that could give rise to this finding, and I now consider each in turn.

First, delay in the rulemaking process could be “sincere delay,” meaning that agencies work harder to get the policy right when they face an opposed principal. 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 (e.g., by improving analyses). To distinguish between strategic and sincere delay, 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—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. Put differently, if delay is merely about improving quality, then complex rules should be the most delayed since improving their quality will take the most effort. It is, presumably, easier and quicker to calibrate less complex rules.

Models 5 and 6 in Table 2 present the results of this analysis. These interactions are not statistically significant. While these results are not dispositive, they suggest that sincere delay is not systematically occurring across the sample of rules (i.e., it is not the pure mechanism that explains the majority of the delay). It does not imply that quality improvements *never* occur, rather that they are not the primary driver behind these results.

A second possibility is that the observed delay could be explained by agencies using

the additional time to learn about the preferences of political principals and adjust the rule accordingly. While empirically distinguishing between these possibilities is not clear-cut, the idea that agencies are consistently changing proposed rules to suit principals is out of step with a key empirical finding in the literature. Numerous studies find that agencies make very few changes as a rule moves from the proposed to the final stage (e.g., Heinzerling, 2014; Wagner, Barnes and Peters, 2011; West, 2004, 2009). This literature points to the “pre-rule” stage as the time when agencies invest in quality and settle on policy content, and not to the publicly observable portions of the process that are the focus of the analysis here.

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.³² Each new administrator brings a fresh perspective to regulatory review. Even within the same administration, different Administrators can emphasize different issues and agencies. If agencies are strategically timing rules, they should respond to changes in OIRA leadership. The implication is that having a new OIRA Administrator should essentially wipe the slate clean, meaning that agencies should speed up the process for rules that were the source of tension between the agency and OIRA at the proposed rule stage.

To test this, I create a time-varying indicator variable, *Same Administrator*, that takes a value of “1” during months when the same OIRA Administrator that reviewed the proposed rule is in charge, 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 these interaction terms are negative and statistically significant suggesting that having a new OIRA administrator leads to a change in regulatory pace.³³

³²Each of the last three presidents has had at least two OIRA administrators, with turnover occurring at irregular intervals.

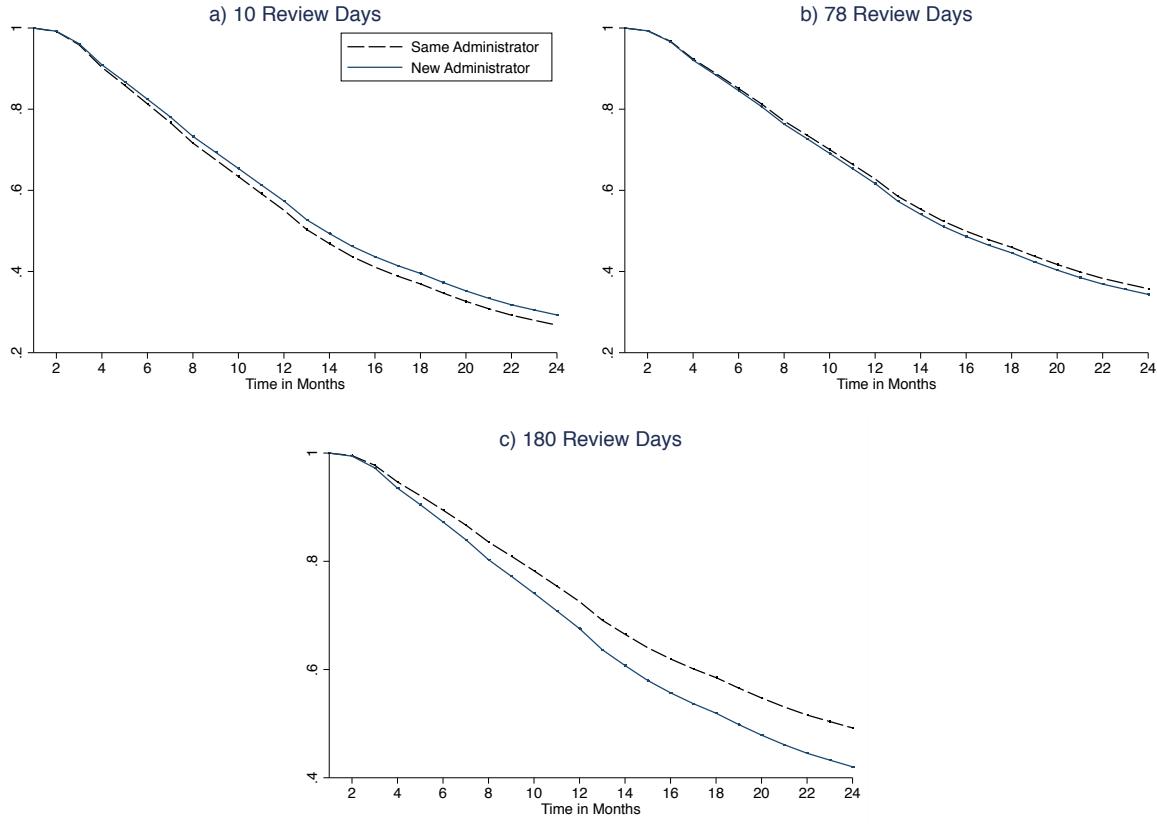
³³Some of this effect undoubtedly owes to new presidential administrations. However, the inclusion of administration fixed effects suggests that much of this boost is attributable to having a new OIRA Administrator.

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* (0.018)	-0.003 (0.030)	-0.016 (0.009)	-0.005 (0.017)
OIRA Review Time (ln) × Complexity	0.081 (0.092)	-0.121 (0.138)		
Same Administrator × Same Administrator			-0.026* (0.011)	-0.043* (0.020)
Opp Size Unity	-0.354 (0.189)	0.427 (0.331)	-0.138* (0.060)	-0.040 (0.120)
Opp Size Unity × Complexity	1.015 (0.944)	-2.477 (1.500)		
Court Cases	-0.008 (0.014)	0.012 (0.024)	-0.014* (0.006)	-0.021 (0.012)
Court Cases × Complexity	-0.024 (0.072)	-0.150 (0.109)		
Complexity	-1.438 (1.038)	3.400* (1.649)	-0.378 (0.197)	0.211 (0.298)
Same Administrator			0.084** (0.026)	0.165** (0.056)
Controls	✓	✓	✓	✓
President Fixed Effects	✓	✓	✓	✓
Bureau Stratification	✓	✓	✓	✓
Num events	11,022	2,750	11,022	2,750
Num obs.	205,160	52,540	205,160	52,540
PH test	0.44	0.75	0.47	0.63

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: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

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). Probabilities were generated from Model 7 with an unlogged *OIRA Review Time* to ease interpretation. 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 E.O.—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 hold for the current regime—affect 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. This is important because underlying this variation is strategic behavior which has the potential to affect policy outcomes.

I find that agencies have considerable mastery of the administrative process and are thereby able to opportunistically time finalization to capitalize on supportive coalitions, or wait for (possibly greater) drift from a future coalition. With respect to all three branches,

there is evidence that agency bureaucrats “fast track” or “slow roll” rules. 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 is as a dynamic one (Krause, 1999), whereby bureaucratic agents play a distinct role in shaping policy. While political principals set up the broad architecture of notice-and-comment (McCubbins, Noll and Weingast, 1987), it is bureaucratic actors who are responsible for carrying the process out. Because bureaucrats seek to avoid costly overturns or reprimands, they can time 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 than they initially appear.

The findings presented here also help to explain an established finding that agencies abstain from making changes as a rule progresses from the proposed to the final rule stage. This literature points to the “pre-rule” stage (i.e., the point when the agency is drafting the proposed rule) as the time when agencies invest in quality and settle on policy content. This paper’s argument suggests a mechanism by which, in equilibrium, agencies may achieve this policy insulation despite the presence of political oversight. Strategic timing may, however, affect the quality of the policies produced through the process. In particular, fast tracked-rules may suffer from lower quality if they are hastily produced.

This study highlights the importance of considering bureaucrats’ incentives in policy-making. Future work should consider how these incentives may be tempered by structural factors. For instance, agencies that are more dependent on the executive (Selin, 2015) may be less able to strategically time their decisions. High rates of leadership turnover may

also foster shorter time horizons and lead to more fast-tracking (Krause and Corder, 2007). Additionally, bureaucrats' incentives may be complicated by strategically-imposed statutory or judicial deadlines or the interaction of multiple principals supporting or opposing the agency's goals. Given the sophisticated and interlocking nature of these factors, research exploring how bureaucrats respond to these features constitutes an agenda in its own right.

Finally, while rulemaking is an important policymaking venue, it is but one of many policymaking activities subject to strategic timing effects. Agencies may fast-track or slow-roll implementation decisions, such as choosing when to implement an executive order or to release a case adjudication or major enforcement action. 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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