

Providing Political Guidance? Agency Politicization and “As If” Policymaking

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Abstract

Government agencies routinely make policies that affect the lives of citizens. I explore agency policymaking via guidance: sub-regulatory policies that can be issued quickly and quietly. Although guidance is not legally binding on external parties, agencies often treat it as if it were. This “as if” nature invites political opportunism, wherein guidance is exploited when agencies are politicized through presidential appointments. I demonstrate this argument empirically using a new dataset that evaluates agency guidance production at 29 agencies over a 10-year period. The results show that agencies are more likely to rely on the “quick fix” offered by guidance when they are highly politicized, and that this effect is exacerbated among the most significant forms of guidance. However, certain institutions like increased proceduralization can temper the bias toward political guidance. While often overlooked, the results suggest that guidance is an important venue for political maneuvering.

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Using authority delegated from Congress, bureaucratic agencies routinely make important policy decisions. While policymaking vehicles like notice-and-comment rule-making have received recent attention in the political science literature (e.g., Potter, 2019; Yackee, 2019), another avenue for influencing policy has gone relatively unnoticed: guidance documents. Guidance documents are policy statements issued by agencies that provide regulated parties with information about how to comply with agency programs. They take numerous forms including white papers, frequently asked questions, policy statements, advisories, circulars, bulletins, memoranda, enforcement manuals, webinars, and press releases, among others. While they are not legally binding, regulated parties often treat them as if they were. This “as if” nature creates a back door opportunity for agencies. Guidance documents are not subject to the same onerous procedural requirements and often do not receive the same public or legal scrutiny as notice-and-comment rulemaking. This means that agencies can quickly, effectively, and often quietly move the policy needle using guidance without the fuss or the rigor of notice-and-comment.

Agencies sometimes deploy guidance to make major policy changes. For instance, in May of 2016 the Office of Civil Rights (OCR) in the Department of Education issued a “Dear Colleague” letter indicating that public schools receiving federal funds should allow transgender students access to bathrooms corresponding to their chosen gender identity.¹ The policy change was the result of the agency’s reinterpretation of the landmark Title IX gender equity law, and it netted headlines around the country. As the *New York Times* wrote at the time, OCR’s letter contained an “implicit threat”: abide by the agency’s interpretation of the law or face lawsuits or the loss of federal aid (Davis and Apuzzo, 2016). Yet, the agency’s use of guidance in this way was not an isolated incident. Instead, as Shep Melnick (2018) has convincingly argued, OCR has used guidance to completely overhaul how schools, colleges, and universities implement their Title IX programs. He

¹Department of Education. 2016. “Dear Colleague Letter on Transgender Students,” May 13. Available online: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

argues that this transformative change was not accidental, but instead a strategic move intended to sidestep the agency's obligations; "by using Dear Colleague Letters rather than rules established through the process mandated by the Administrative Procedure Act, OCR avoided its obligation to justify its policies, collect relevant information, and respond to criticism" (Melnick, 2018, 20-21).

Historically, concerns about agencies misusing guidance have run deep in Washington. In 2006, the House Committee on Government Reform issued a report describing guidance as "'backdoor' regulation [that] is an abuse of power and a corruption of our Constitutional system" (Committee on Government Reform, 2006). The next year, the Office of Management and Budget (OMB) attempted to improve the guidance situation by issuing guidelines for agencies to follow when writing new guidance documents.² This reform effort failed to abate overseers' concerns, however. Indeed, in recent years the Government Accountability Office has repeatedly investigated agency use of guidance (GAO, 2015, 2018), and the Supreme Court has ruled to limit the extent of judicial deference granted to certain agency guidance documents.³ In 2018, the House Committee on Oversight and Government Reform conducted an investigation into agency use of guidance documents, concluding that this "regulatory dark matter" was of a "ubiquitous and nebulous character" (Committee on Oversight and Government Reform, 2018, 1). Following suit in 2019, the OMB issued a new memorandum clarifying that its oversight authority included review of agency guidance, effectively increasing oversight over these policy statements. Later that same year President Trump signed two executive orders further constraining agency use of guidance.⁴

²See "Final Bulletin for Agency Good Guidance Practices" January 25, 2007 72 FR 3432.

³See *Kisor v. Wilkie*, 139 S. Ct. 2400 - 2019, pertaining to judicial deference to agency guidance that interprets agency rules.

⁴Signed in October 2019, these two orders require agencies to make a number of changes to their current guidance practices, including stating explicitly that guidance is non-binding, posting all guidance to a centralized, searchable web platform, establishing a process for the public to petition to repeal guidance, and increasing overall transparency regarding guidance document usage. See "Promoting the Rule of Law Through Improved Agency Guidance Documents" (E.O. 13891; October 15, 2019, 84 FR 55235) and "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and

Yet, despite these concerns, legal scholars, who have historically been close watchers of agency guidance, have consistently wanted for empirical evidence that agencies use these documents in politically-motivated ways (Parrillo, 2019; Raso, 2009; Walters, 2019). After a comprehensive and searching study of agency guidance, law professor Nicholas Parrillo (2019, 166) concludes that “agency officials are not engaged in a bad-faith effort to coerce the public without lawful procedures.” Another empirical study on agency use of guidance states matter-of-factly that “the consternation over guidance documents raised in both the academic and policy realms is overstated” (Raso, 2009, 821).

What explains the disconnect between politicians’ perceptions about agencies misusing guidance and scholarly work arguing that there is no empirical evidence of this phenomenon? I argue that this disconnect arises in part from the slightly different foci of the actors. Scholarly research has focused on the question of rulemaking avoidance—whether agencies inappropriately use guidance when notice-and-comment rulemaking would have been more appropriate. Meanwhile, political actors focus on whether guidance is used for political purposes. These are related but distinct questions; if agencies are using guidance for political purposes, one potential implication is that rulemaking would have been more appropriate and there is a substitution effect occurring. However, this is not *always* true; guidance may be the most appropriate policymaking vehicle for a particular policy and still be used for political ends.

In this paper, I ask a slightly different question: *when* is agency guidance used for political purposes? Clearly, there are instances where guidance documents are used to accomplish political objectives; the OCR’s use of Dear Colleague letters to make major changes to the implementation of Title IX is but one example.⁵ Therefore, I take it as a given that agency guidance is *sometimes* used to accomplish an administration’s broader political agenda, and focus on the conditions that give rise to this. Importantly, my approach does

Adjudication” (E.O. 13892; October 15, 2019, 84 FR 55239).

⁵This is also a clear example where notice-and-comment rulemaking would have been more appropriate than guidance to make these policy changes.

not assume that all guidance documents are used in this way; indeed, for even the most skeptical critic, a quick scan of guidance documents on any agency website will confirm that the majority of guidance is of a mundane and administrative nature.

The focus of my argument is on how agency politicization, by which I mean the extent to which an agency's leadership is permeated by political appointees selected by the president, shapes the use of political guidance. For example, the Department of Education, OCR's parent agency, is considered one of the most politicized agencies at the federal level; it has the second highest number of political appointees among large agencies, with 3.5% of its employees drawing from the political ranks (Lewis, 2008). I argue that agency leaders who are explicitly chosen by the president through a political process have incentives to use guidance to accomplish broader political goals.

This paper first introduces guidance in more detail and then outlines how scholarship, particularly from the legal field, has analyzed how agencies use these policy documents. I then discuss how agency politicization can create incentives for agencies to use guidance in political ways. I next introduce a new dataset of more than 7,500 guidance documents from 29 federal agencies. These data are then used to explore the relationship between agency politicization and guidance production. The results show that as an agency's level of politicization increases, so does its propensity to issue guidance.

The Guidance Dilemma

Guidance documents fulfill an important need in the administrative state, providing an agency's constituents with information about the agency's current thinking about an issue. Guidance often speaks to an agency's interpretation of its own regulations or lays out its enforcement priorities for the immediate future. Sometimes these documents explain how one might best prepare to apply for a permit, license, or certification. The flexible nature of guidance means that agencies can update the policies rapidly if and

when circumstances change. Because they add certainty to an otherwise uncertain area, regulated parties often push agencies to issue them and provide certainty.

Much of agency guidance deals with the mundane minutiae of government. For example, the National Aeronautics and Space Administration (NASA) uses guidance to keep grantees up to date about requirements for its various grant programs and the Animal Plant and Health Inspection Service at the Department of Agriculture maintains guidance documents like “Animal Care: Information Sheet on Declawing and Tooth Removal,”⁶ which informs the public about regulatory requirements for maintaining wild or exotic carnivores. However, some guidance is used to advance a political agenda, and this is the type of guidance that has captivated the attention of congressional overseers and the GAO, among others.

Consider a 2011 policy memorandum issued by the National Park Service (NPS) that encouraged park superintendents to eliminate the sale of bottled water in national parks. Parks that adopted this change would instead offer water refilling stations for patrons to refill reusable water bottles. The intent of this guidance document—shown in Figure 1—was to reduce the agency’s environmental impact and promote sustainability, goals that were in keeping with President Obama’s broader environmental and sustainability agenda. Over the course of the next several years, 23 out of 417 national parks, including Grand Canyon National Park and Zion National Park, implemented restrictions on bottled water sales (Aubrey, 2017).

Following Trump’s inauguration in 2017, the NPS revoked the bottled water memo, indicating that “it should be up to our visitors to decide how best to keep themselves and their families hydrated” (Aubrey, 2017). The move was part of a larger push by Trump to rollback environmental policies enacted during the Obama administration,⁷ and it

⁶Department of Agriculture. 2006. “Information Sheet on Declawing and Tooth Removal.” Available online: https://www.aphis.usda.gov/animal_welfare/downloads/big_cat/declaw_tooth.pdf.

⁷Revoking this policy was particularly controversial, as one month after the agency announced the revocation it quietly issued a report indicating that the policy had been successful. The report concluded that

was relatively easy to accomplish since repealing guidance does not invoke any special procedural steps; sometimes agencies notify the affected parties that the policy is no longer in force, but at other times the policy is simply revoked without any fanfare.

Figure 1: Guidance Document Example: National Park Service



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

A5623 (0130)

DEC 14 2011

Policy Memorandum 11-03

To: Regional Directors

From: Director *Janette S. Jarvis*

Subject: Disposable Plastic Water Bottle Recycling and Reduction

A. Background

When considered on a life-cycle basis, the use of disposable plastic water bottles has significant environmental impact compared to the use of local tap water and refillable bottles. These impacts may be magnified in remote national parks because of the additional transportation, waste disposal, energy use, and litter removal factors inherent in these locations.

The issues surrounding plastic water bottles are complex. Banning the sale of water bottles in national parks has great symbolism, but runs counter to our healthy food initiative as it eliminates the healthiest choice for bottled drinks, leaving sugary drinks as a primary alternative. A ban could pose challenges for diabetics and others with health issues who come to a park expecting bottled water to be readily available. For parks without access to running water, filling stations for reusable bottles are impractical. A ban could affect visitor safety; proper hydration is key to planning a safe two-hour hike or a multi-day backcountry excursion. Even reasonably priced reusable water bottles may be out of reach for some visitors, especially those with large families.

For these reasons, the National Park Service will implement a disposable plastic water bottle recycling and reduction policy, with an option to eliminate sales on a park-by-park basis following an extensive review and with the prior approval of the regional director.

Notes: This figure shows an excerpt from the first page of a guidance document issued by the NPS in 2011. Consistent with the Obama administration's environmental agenda, the policy memorandum indicates that the agency will "implement a disposable plastic water bottle recycling and reduction policy." Retrieved online at https://www.nps.gov/policy/plastic.pdf?mod=article_inline.

The NPS's use of guidance to affect park bottled water policy illustrates two key features of guidance. First, it is a case of what I deem "political guidance," which is

"eliminating sales of water bottles prevented up to 112,000 pounds of plastic from being sold and discarded each year, along with up to 140 metric tons of carbon dioxide emissions. In addition, between 276 cubic yards and 419 cubic yards of landfill space stood to be saved" (Fears, 2017).

defined by a counterfactual that is typically unobserved: would the agency have issued the guidance under an administration of an alternate political party? The evidence is clear on this point, since Trump's NPS quickly revoked the Obama-era action. Second, since it was a policy that only applied within the agency (i.e., the agency was not applying the policy to external actors), it is a case where guidance was arguably the most appropriate policymaking venue. The Administrative Procedure Act carves out an exception from the notice-and-comment rulemaking process for policies "relating to agency management or personnel,"⁸ suggesting that from a procedural perspective guidance was fitting. Nevertheless, it was still political guidance.

The choice between using guidance to make a policy or using notice-and-comment rulemaking has implications on three dimensions: "the process the agency follows, the legal effect of the instrument, and the availability and nature of judicial examination of the agency's action" (Magill, 2004, 1384). In terms of process, rulemaking is considerably more costly for the agency to produce. Typically, creating a new rule involves gathering research, writing a draft policy, getting internal clearance within the agency and (potentially) from the OMB, consulting with stakeholders (informally and formally through a public comment period), issuing a final policy, and then completing a waiting period before the policy can take effect. This process can take many years to complete (Potter, 2019). In contrast, guidance generally does not carry consultation requirements⁹ and can be issued in relatively short order (Seidenfeld, 2011).¹⁰

In terms of legal effect, rules and guidance are critically different. Once finalized, an agency regulation carries the full force and effect of law. Regulated parties are thus legally bound to comply with the agency's policy, and the agency can enforce against

⁸See 5 USC §553(a).

⁹However, the two executive orders signed by Trump recently affect consultation requirements for some types of guidance.

¹⁰Withdrawing each type of policy generally requires undergoing the same process used to create it. Rules must be repealed through the same rigorous notice-and-comment process, whereas guidance is repealed by announcement or, occasionally, by simple revocation without an accompanying announcement.

failure to comply. Guidance, on the other hand, is advisory in nature. Legal scholars debate whether there is a “coercive power” to guidance (i.e., whether regulated parties feel compelled to comply with them irrespective of whether the policy is technically binding), with most concluding that there is such a power (Anthony, 1991; Melnick, 2018; Parrillo, 2019; Sunstein, 2019). As Magill (2004, 1397) puts it: “even when the agency acts in an advisory capacity, its views have unquestionable real-world consequences.”

Finally, in terms of treatment during judicial review, agency regulations receive a more deferential treatment by the courts than do guidance documents (Magill, 2004). Simply put, regulations are much more likely to withstand judicial scrutiny.

These differences aside, the option to issue guidance introduces the possibility of strategic maneuvering by agencies. Compared to rulemaking, guidance is less visible, less accountable, and less transparent. As Parrillo (2019, 168) explains, “guidance can be produced and altered much faster, in higher volume, and with less accountability than legislative rules can.” Raso (2015, 79) further notes that, “agencies may [prefer rulemaking] avoidance to save staff time and analytic resources... Such time and resource limits may be accentuated given the burgeoning number of rulemaking procedures.”

The potential for opportunism (i.e., substitution of guidance for regulation) is problematic for several reasons. First, because guidance documents can be easily revoked, they are less durable than rules and relying on them can foster policy instability (Raso, 2009). Second, guidance is more difficult to enforce and can create programmatic compliance issues. Third, because guidance documents are generally made unilaterally by agencies (i.e., with limited consultation outside the agency),¹¹ their use may not be viewed as legitimate among regulated parties and therefore contribute to declining trust in government.

Concerns over agencies using guidance inappropriately have led to several empir-

¹¹The Food and Drug Administration is an exception because Congress has required the agency to solicit public comment on its guidance documents. Additionally, E.O. 13891, President Trump’s recent order on guidance, will require a public comment period for significant guidance.

ical studies of whether agencies substitute guidance for regulations. In a searching and careful analysis, Raso (2009) studies guidance use at five agencies and finds no consistent pattern in the ratio of guidance to agency rules in the presence of a number of political factors, including divided government, the length of time the president has served in office, and the number of court challenges the agency faced, among others. He concludes that agency guidance use is sincere rather than strategic.¹² In a more recent study, Parrillo (2019) conducts 135 interviews with agency personnel and stakeholders about their perceptions of guidance use. He finds that while regulated parties do treat guidance as if it were binding, there is little evidence that agencies issue guidance in “bad faith.” Instead, he concurs with Raso that agencies are not abusing the guidance process. Walters (2019) asks a related question about whether agencies write their regulations vaguely in order to leave space for more flexible guidance documents to pick up the slack down the road. Like the others, he also reports null effects with respect to strategically manipulation by agencies.

By focusing on the tradeoff between guidance and rulemaking, studies like this overlook that guidance can be political, irrespective of whether it should or should not have been a rulemaking. This approach to studying guidance presupposes that there is a bright line between policies that *should* be made through notice-and-comment rulemaking and those that should be made through guidance. In practice, however, this distinction is often quite blurry. While there are clear cases where policy must be made via rulemaking (e.g., due to a legal requirement), there are many instances where a policy could reasonably be made through either rulemaking or guidance. For instance, the Office of Postsecondary Education at the Department of Education issues regulations each year to update the criteria by which it will evaluate grant proposals; other agencies—like the aforementioned NASA—use guidance to govern grantmaking activities. Without more

¹²However, in a separate context, Raso (2015) finds that agencies do act strategically to avoid taking on extra procedural steps during notice-and-comment rulemaking.

context, it is difficult to judge whether one approach is superior to another. Further, the political content of guidance is itself subjective—particularly at a moment of heightened political polarization; at the time of NPS’s 2011 bottled water guidance the topic may have seemed benign to many, but Trump’s repeal highlights how it may have been perceived by others as a partisan move. In the next section, I discuss how political pressures may shape the need for political guidance.

Political Pressure for Guidance

At the federal level, nearly all government agencies are led by a cadre of politically-appointed leaders. Importantly, the number and type of political appointed leaders varies both across and within agencies (Lewis, 2008). While so-called “agency politicization” is associated with greater control over agencies by the president (Moe, 1985), it also ushers in a host of problems related to agency performance. Scholars have suggested a connection between increased agency politicization and declining levels of trust between careerists and appointees (Resh, 2015), reduced agency expertise (Richardson, 2019), decreased responsiveness to the legislative branch (Lowande, 2019; Wood and Lewis, 2017, but see Berry and Gersen, 2016), and lower overall performance on a variety of outcomes (Lewis, 2008; Wood and Lewis, 2017). The argument I make here is that this important political feature of agencies may also influence the volume of guidance produced by agencies.

Returning to the bottled water case, I argue that it is not coincidental that this policy ping pong occurred at the NPS. The NPS is housed within the Department of the Interior, a Cabinet-level agency that is subject to presidential control. Further, Lewis (2008, 105) finds that the NPS has one of the most politicized agency structures in terms of the number of political appointees in management positions within the agency. At the leadership level, the agency had an incentive to use guidance in a politically expedient way.

Put simply, guidance is a way for the executive branch to make policy and, in

contemporary American politics, policymaking is contested ground. For appointees, the political demand for guidance draws from at least two distinct sources of pressure: top-down pressure from the president and pressure deriving from their own career incentives.

From the president's perspective, guidance can fulfill a variety of needs. Presidents frequently need policy announcements to accompany major speeches. Guidance fits the bill; it can be crafted to a particular political situation and it can be issued quickly. News outlets like the *Washington Post* rarely distinguish between the various forms policy actions take—it can be difficult to read an article and know if the president signed an executive order or a policy memorandum or, importantly for the present purpose, whether an agency issued a regulation commanding an action or a guidance document suggesting one.

At other points, presidents will seek out ways to quietly advance a broader policy agenda; guidance again fits the bill. A long line of literature has shown how presidents use multiple forms of unilateral action—including executive orders (Howell, 2003), presidential proclamations (Rottinghaus and Maier, 2007), presidential memoranda (Lowande, 2014), and signing statements (Ostrander and Sievert, 2013)—to advance their policy agendas. Guidance is also a form of unilateral policymaking action,¹³ with a notable caveat. As with administrative rulemaking, agencies, and not the White House, create guidance documents.¹⁴ This complicates the president's ability to use guidance for their own ends. Political appointees can serve as a critical link between political needs and the issuance of guidance for political purposes. Agencies that are well staffed with the president's hand-selected leaders will be better positioned to heed the president's call. In contrast, those with fewer political appointees are likely to be less responsive to these demands. These agencies may even be less likely to receive requests from the president in the first

¹³Reeves and Rogowski (2016) argue that presidents are constrained by public opinion in their use of unilateral action. One benefit to the president of using guidance, is that since it is much less visible, they may not be constrained in the same way.

¹⁴Nonetheless, some scholars consider rulemaking a tool of the unilateral presidency; see Howell and Mayer (2005)

place, since in expectation the president may perceive a lack of responsiveness.

The career incentives of political appointees can also drive the production of political guidance. The “quick fix” offered by guidance can be attractive for appointees, who themselves tend to serve in office for relatively short spells; scholars estimate that the median tenure of politically appointed leaders is somewhere just over two years (Dull and Roberts, 2009; Wood and Marchbanks III, 2007). However, appointee tenure tends to decline in rank, so that Senate-confirmed leaders stay longer than those lower-level political positions that do not require approval by the Senate (i.e., those that are most likely to trade in guidance production) (Dull and Roberts, 2009).

When agency leaders have this “in and out” perspective, it alters their time-horizons—and thus their incentives—in important ways. As Hollibaugh (2019, 8) notes, appointed managers serve for considerably shorter periods than comparable career civil servant managers and, as a result, “appointed managers are less likely to be able to credibly commit to longer-term agency goals or reform initiatives.” Further these altered time horizons can meaningfully influence agency outputs. For example, in a study of agency budget forecasting, Krause and Corder (2007) show that the Social Security Administration (SSA, a less politicized agency) makes systematically less optimistic (and more accurate) economic forecasts than the OMB (a highly politicized agency). They argue that the difference in forecast quality owes to greater leadership stability at the SSA. Leaders at OMB draw from the political ranks and tend to come and go. As a result, their political and career fortunes are tied to the success of the current administration and the administration’s success, in turn, is tied to a favorable economic outlook. Meanwhile SSA’s leadership relies more on career civil servants, whose professional incentives drive them toward greater accuracy and to enhancement of the agency’s reputation. Clearly, agency politicization can have important implications for policy quality.

A similar effect may occur with guidance. From the political appointee’s per-

spective, accomplishments must be earned to burnish the resume for the next job; while regulations overseen during an appointee's tenure in a position are useful, they take a long time to produce. Guidance on the other hand can be procured and added to the "accomplishments" list at a much faster clip. Further, even if guidance is not an ideal policymaking vehicle for the agency (e.g., policy will be harder to enforce, harder to defend in court), these are not problems that the appointee overseeing the production of the policy will personally have to face, as he or she will likely be gone by the time these problems surface.

Building from these two sources of pressure, I hypothesize that agencies that when agencies have more political agents in their leadership structure they will be more likely to use guidance as an avenue for policymaking. Importantly, using guidance in this political way does not prevent agencies from using guidance in a more rote, administrative way. Guidance can still be used to carry out an agency's everyday administrative functions *and* also in pursuit of political ends. For this reason, the analyses below focus on changes in the volume of guidance issued as the levels of politicization within and across agencies varies. In other words, I do not expect political guidance to "crowd out" more administratively-oriented guidance, but rather to be layered on top of it.

Data and Methods

Currently, there is no federal inventory of agency guidance documents. Instead, some agencies post guidance on their websites, others publish some of them in the *Federal Register*, and still others do not have a discernible system for managing and disseminating them. This scattershot approach is part of the frustration of political overseers (not to mention parties subject to the guidance), but it also makes empirical studies of guidance challenging.

To overcome this challenge, I exploit the recent investigation, mentioned earlier,

by the House Committee on Oversight and Government Reform that surveyed agencies about their guidance documents.¹⁵ In the investigation, the House requested an inventory of guidance documents from each of 46 agencies. The request covered all agency guidance documents from January 1, 2008 until December 31, 2017. Although the report uncovered thousands of guidance documents, responses to the committee's inquiry were mixed; some agencies provided a full accounting of all of their guidance documents, while others provided what appeared to be partial accounts and still others did not respond at all. For example, the Committee's report noted that the Securities and Exchange Commission "reported issuing only 19 guidance documents since 2008. [However,] many more are available on the Commission's website" (4). Meanwhile, the Committee highlighted the thoroughness of responses from the Department of Labor and the Department of Education (13). Given the variation in responses to the Committee, I exclude agencies that the report identified as incomplete and those with responses that were obviously partial.

For the remaining agencies, I follow a process, described in the Supporting Information (SI), to clean and standardize the data. However, the thoroughness of reporting remains an important consideration. On the one hand, self-reports to an official oversight body incentivize agencies to be scrupulous and comprehensive in their reporting. Additionally, self-reported data offer a view of guidance as agencies themselves see it. On the other hand, there is a risk that agencies may have underreported the volume of guidance in their stock or that there are inconsistencies in the types of guidance that are reported across agencies. In the analyses that follow, I use two aspects of the research design to

¹⁵As an alternative approach to empirically studying guidance, a researcher could collect agency guidance documents from agency websites or directly from agencies (i.e., through a Freedom of Information Act (FOIA) request). However, these approaches introduces other problems. For instance, since guidance are sometimes not available on the web (a concern of many political overseers) and researchers may favor easier to codify forms of guidance (e.g., policy memoranda, white papers) over those that are harder to classify (e.g., press releases, FAQs, pamphlets), collecting from websites would likely result in an undercount of guidance. Additionally, there is no reason to believe that agencies would be more thorough in response to an individual requestor than to a congressional one, suggesting that the FOIA approach may be ineffective as well. Nevertheless, the recent adoption of E.O. 13891 requires agencies to post all guidance documents to a centralized web clearinghouse, which should make studies like this one much more straightforward for future researchers.

address these issues. First, for executive branch agencies, I focus on lowest possible unit of analysis—the bureau level.¹⁶ This mitigates the inconsistency problem since individual units are more likely to be internally consistent in their reporting (i.e. consistency problems are more likely across units rather than within). As a robustness check, I also subset the data to agencies that reported high volumes of guidance, since these agencies may be the most comprehensive in their accounting. Second, the analyses include bureau-level fixed effects, which makes within-unit variation the focus of the analysis.

The resulting dataset contains more than 7,500 guidance documents issued by 24 executive branch bureaus and 5 independent agencies. The data show a tremendous range of the policy landscape covered by agency guidance; Table 1 shows the various forms guidance takes at one agency, the Mine Safety and Health Administration (MSHA), including letters, bulletins, policy manuals, and handbooks.

Table 1: Forms of Guidance at MSHA

Guidance Form	%age
Handbook	9
Procedure Instruction Letter	5
Program Information Bulletin	44
Program Policy Letter	26
Program Policy Manual	5
Questions and Answers	5
Miscellaneous	6

In order to study systematic trends in guidance issuance, I aggregate observations to the agency-quarter level. Not only does this require relatively limited aggregation (as compared with, say, the yearly level), but many of the key independent variables are also observed on this level. The dependent variable *Guidance (ln)* is a logged count all guidance documents issued by an agency in a given quarter.¹⁷ I add one to each observation before

¹⁶For simplicity however, I refer to all organizational units as agencies throughout the remainder of the paper.

¹⁷Previous studies have relied on a ratio of guidance to rules issued rather than counts of guidance per se. Theoretically speaking, it is not clear whether the denominator in such a ratio should include all rules or only those that are substantively significant. Additionally, this approach is not practicable here for another

logging it, in order to prevent quarters where no guidance was issued from dropping out of the sample.¹⁸

To measure agency politicization, I rely on the number of politically-appointed managers in an agency over the number of career civil service managers in that agency. This ratio has become standard in studies of the bureaucracy (e.g., Berry and Gersen, 2016; Lewis, 2008; Lowande, 2019; Wood and Lewis, 2017). Measured every quarter, it captures the extent to which an agency's leadership team is comprised of the president's directly chosen agents. Specifically, *Politicization* is the number of politically appointed leaders (i.e., non-career Senior Executive Service (SES), Schedule C, and Senate-confirmed political appointees (PAS)) over the number of career SES managers; this proportion ranges from 0 to values greater than one—when the number of appointed leaders exceeds the number of career managers.¹⁹

An important question in the literature is whether agencies trade off rules for guidance. *Rules (ln)* is a count of all final rules issued by an agency in that quarter according to the *Federal Register*.²⁰ If agencies are using guidance as a way to flesh out the details of regulations, then there should be a positive relationship between the volume of an agency's regulatory requirements and the volume of guidance documents. If, on the

reason. It is not uncommon for an agency to issue zero rules in a particular quarter. This results in a high proportion of agency-quarters dropping out of the sample since the denominator is undefined.

¹⁸For the same reason, I follow the same practice of adding one before taking the natural log to all of the logged variables in the paper.

¹⁹All personnel data are drawn from the Office of Personnel Management's FedScope database. For privacy reasons, OPM does not report data on cells with fewer than 12 employees. This restriction makes it impossible to systematically measure politicization at the bureau level, since many bureaus do not have enough appointees within each appointee category to exceed that threshold. For this reason, politicization is captured at the department level in the analyses reported here.

One potential issue with the FedScope data is that the GAO has raised a concern about the completeness of reporting of PAS officials in the database (GAO, 2019, 10-12). Since this is one of the components of the politicization numerator, I considered an alternate accounting of PAS officials based on the Plum Book (Berry and Gersen, 2016; Wood and Lewis, 2017). Released every four years, the Plum Book is an accounting of all PAS positions available in Washington. Using these PAS data (and linearly interpolating PAS values to the quarter level) together with the FedScope data on other politically appointed positions does not affect the results.

²⁰While there are other sources of rulemaking counts (e.g., the GAO, the Unified Agenda, or www.reginfo.gov), Nou and Stiglitz (2016) argue the *Federal Register* offers the most exhaustive accounting of agency rules.

other hand, agencies are using guidance *in lieu of* regulations then an inverse relationship may develop. As an alternate measure, I also consider the number of new regulatory requirements added by each agency to the Code of Federal Regulations (CFR) in each year. *CFR words (ln)* is the logged number of the agency’s new CFR words as reported by RegData.²¹

Prior studies have suggested two features of the political environment that may incentivize agencies to increase their policymaking activities (e.g., Raso, 2009; Yackee and Yackee, 2009). *Midnight* is a dichotomous variable coded as one during the last quarter of each of the two presidential administrations covered by the data.²² Similarly *Divided* is a dichotomous variable that indicates quarters that fall during periods of divided government. Descriptive information for all model variables is provided in Table SI-1.

The resulting panel data set covers agency guidance issuance for all quarters from 2008 through 2017. Using these data, I estimate the following least squares model:

$$\ln(\text{Guidance}_{it}) = \alpha_i + \beta(\text{Politicization}_{it}) + X_{it}\gamma + \delta_t + \epsilon_{it} \quad (1)$$

where subscript i denotes an agency, and t denotes a quarter. The α_i are agency fixed effects and δ_t is a vector of time polynomials (Carter and Signorino, 2010),²³ X_{it} is a matrix of agency level time-variant control variables, β and γ are regression coefficients, and ϵ_{it} is an error term. For all models, I report robust standard errors clustered on the agency.

²¹The RegData US 3.1 Annual data come from McLaughlin and Sherouse (2018) and are available at <https://quantgov.org/regdata-us/>. RegData also reports on the number of new restrictive words added to the CFR; using this measure results in substantively similar results to those reported here.

²²Specifically, the last quarter of President George W. Bush’s administration in 2008 and the last quarter of President Barack Obama’s administration in 2016.

²³Specifically, I include time and time-squared in all models. The results are robust to a cubic polynomial specification.

Results

Table 2 presents the results of models predicting the influence of agency politicization on guidance production. Model 1 is a parsimonious model evaluating the bivariate relationship between *Politicization* and agency production of guidance. Model 2, the preferred specification, presents the same model with the addition of the number of final rules issued by the agency in that quarter, as well as controls to account for the political environment. Model 3 mirrors Model 2, but includes *CFR words*, an alternate measure of agency rulemaking production.

Across all specifications the coefficient for *Politicization* is positive (as expected), statistically significant, and of the same relative magnitude—suggesting that having an agency leadership constituted of a higher proportion of politically-selected leaders is associated with an increase in the production of guidance documents. To interpret these effects substantively, I follow Mummolo and Peterson’s (2018) approach to interpreting fixed effects regression models. Specifically I evaluate the models based on the levels which *Politicization* varies within agencies. Focusing on Model 2, an increase in politicization of one unit within an agency (which is the typical within-agency shift of one-standard deviation) is associated with a 14% increase in guidance documents produced in a given quarter. This is a large and substantively significant effect; at the average agency in the sample, this translates to about one additional guidance document per quarter.

The models also offer further insight into the question of whether guidance serves as a substitute for regulations. If guidance functions primarily as a substitute for regulations, then we might expect to see a negative relationship between rule production and guidance production. While the sign for these variables is consistently negative, the coefficients for *Rules* and *CFR words*, consistently fail to reach standard levels of statistical significance. This indicates that if there is indeed such a substitution relationship, it is sufficiently weak that it cannot be detected in these data.

Table 2: Effect of Agency Politicization on Guidance Counts by Quarter, 2008–2017

	Guidance (ln) (1)	Guidance (ln) (2)	Guidance (ln) (3)	Guidance count (4)
Politicization	0.102** (0.040)	0.086** (0.042)	0.117** (0.047)	0.100* (0.056)
Rules (ln)		-0.059 (0.058)		-0.025 (0.076)
CFR words (ln)			-0.261 (0.321)	
Midnight		-0.026 (0.093)	-0.040 (0.102)	0.012 (0.138)
Divided		0.068 (0.054)	0.057 (0.059)	0.071 (0.076)
Decisionmaker Independence				-0.992 (0.876)
Policy Independence				0.764 (0.555)
Employees (ln)				-0.016 (0.195)
Constant	0.895*** (0.102)	0.957*** (0.106)	4.225 (4.021)	0.342 (1.826)
<i>N</i>	1,145	1,145	1,093	1,065
R-squared/ Log-likelihood	0.044	0.047	0.047	-2612.70
Number of Agencies	29	29	27	27
Time controls	YES	YES	YES	YES
Agency FE	YES	YES	YES	NO
Agency RE	NO	NO	NO	YES

Notes: For Models 1-3, the dependent variable is the logged count of guidance documents issued in each agency-quarter; cell entries are coefficients from least squares models. For Model 4, the dependent variable is the raw count of guidance documents issued in each agency-quarter; cell entries are coefficients from mixed effect negative binomial models. Robust standard errors clustered on the agency are in parentheses. FE= fixed effect; RE = random effect. Significance: * $p < 0.1$, ** $p < 0.5$, *** $p < 0.01$.

Similarly, the political variables offer little by way of systematic predictive power. While prior studies have suggested that the midnight period and divided government should encourage agencies to produce more policy, the results do not provide strong evidence that this effect is occurring in practice. Across the models the coefficients for

these two variables largely carry the expected positive sign (although *Midnight* is more varied), but do not approach statistically significant levels.

An alternate approach to handling count data is to employ a negative binomial model, a form of count model which addresses the overdispersion present in the dependent variable. The limitation with this approach is that I cannot include unit level fixed effects, due to known issues with these models (Allison and Waterman, 2002). Instead, I include agency-level random effects. However, this also allows me to include agency-level controls, some of which are slow-moving or time-invariant. *Employees (ln)* is the logged number of employees in an agency in a given quarter. Additionally, I include measures from Selin (2015) that indicate the structural features of an agency that make it more or less independent from the executive branch. *Decision Independence* captures the features of an agency that bind its leadership in terms of qualifications placed on selecting leaders (e.g., expertise requirements) and high level employees. *Policy Independence* focuses on the discretion agencies have in making policy decisions without executive oversight (e.g., whether the agency is able to bypass OMB budget review, whether it is subject to oversight by an inspector general). These are both time-invariant continuous measures that take on positive values when an agency is more structurally independent from the executive.

The results of this approach, shown in Model 4 in Table 2, largely conform with those already presented. *Politicization* has a positive and statistically significant effect, but the control variables, including the agency-level controls, carry little explanatory power.

These results are robust to a number of alternate specifications. First, I consider an alternate way to account for the effects of time, by including both year and quarter fixed effects in lieu of the time polynomials. Next, I use a hierarchical modeling approach to more fully account for the nested structure of the data (i.e., some bureaus fall within larger Cabinet departments). The third modification I consider is the addition of lags of rule counts as a control variable, on the logic that if a complementarity is occurring, it

may take time for rulemaking to translate into guidance: no such effect is detected. Given the House committee's concerns about the completeness of agency reporting in their respective guidance inventories, I then restrict the models to focus only on agencies that listed at least 100 guidance documents in their guidance inventories. Finally, I aggregate the observations to the year level and reestimate them. The results are substantively unaffected by each of these modifications, although in some cases they are less precisely estimated. Importantly, these checks indicate that these findings do not hinge on the precise model specification, set of controls, or the agencies included in the sample.

Focusing on the Significant

One potential concern about the prior results is that they may be indicative that more politicized agencies are more productive and produce more policy overall, but that this is not necessarily meaningful in terms of policy substance. After all, entertainment value aside, why should anyone care if APHIS produces yet another fact sheet on exotic carnivore maintenance? To get at this concern, in this section I home in on a set of guidance documents that are substantively significant; if the politicization effects hold in this subsample, this should provide another point of evidence that "political guidance" is indeed occurring and that it is also meaningful.

In 2007, the OMB directed agencies to establish internal procedures for identifying, issuing, and subsequently publicizing guidance documents that were substantively significant.²⁴ While all executive branch agencies were supposed to follow this guidance, in practice few have adhered to this directive and many agencies still do not handle significant guidance documents in accordance with these standards (GAO, 2015; Committee on Oversight and Government Reform, 2018). In the guidance dataset, only 12 agencies

²⁴OMB defined a significant guidance document as one that has "a broad and substantial impact on regulated entities, the public or other Federal agencies;" see "Final Bulletin for Agency Good Guidance Practices" January 25, 2007 72 FR 3432.

even reported on whether a guidance document was significant, even though this was an explicit component of the House’s request. Nonetheless, for this minority of agencies I calculate a new dependent variable—*Significant Guidance*, a count of significant guidance documents issued in each agency-quarter.

The models, shown in Table 3, follow the same general approach adopted earlier, with the exception that in Models 2 and 4 I include *Significant Rules (ln)*, a logged count of significant rules issued by in each agency-quarter,²⁵ as a control variable. Overall, the results indicate that increased politicization is associated with an increase in the production of significant guidance documents. Looking at Model 2 (and again following the approach of Mummolo and Peterson (2018)), an increase in politicization from one observed standard deviation below the mean to one observed standard deviation above the mean is associated with a 37% increase in significant guidance documents in a quarter. At the average agency, this translates to the production of 0.4 additional significant guidance documents; while that effect may appear small, it is observed at the quarter level and may accumulate over an extended period of politicization.

In contrast with the earlier results, the measures of rule production are positively signed. However, they remain statistically insignificant. One interesting result that emerges from Model 2 is that *Midnight* is consistently positively signed and statistically significant. The effect is substantively large too; during the midnight period the average agency is expected to increase its significant guidance production by 54% (i.e., an additional 0.6 significant guidance documents in that quarter). Interestingly, this result is not conditioned on politicization,²⁶ but rather is common across all agencies, suggesting that the political cycle may motivate even non-politicized agencies. This is consistent with Potter’s (2019) argument that agencies try to “lock-in” certain policies before a new

²⁵For rules, significance is determined by OMB under E.O. 12866 and generally means rules that have an economic impact of \$100 million or more in a given year.

²⁶In a separate set of models (not shown), I interact *Midnight* and *Politicization*. The results do not indicate a meaningful conditional relationship.

administration assumes office.

Table 3: Effect of Agency Politicization on Significant Guidance Counts by Quarter, 2008–2017

	Signif (ln) (1)	Signif (ln) (2)	Signif (ln) (3)	Signif count (4)
Politicization	0.046* (0.024)	0.063* (0.030)	0.076** (0.034)	0.177* (0.094)
Significant Rules (ln)		0.073 (0.066)		0.051 (0.167)
CFR words (ln)			0.379 (0.563)	
Midnight		0.191* (0.098)	0.250** (0.102)	0.615** (0.302)
Divided		-0.114 (0.090)	-0.102 (0.095)	-0.395 (0.320)
Decisionmaker Independence				-2.843 (2.314)
Policy Independence				3.014 (2.144)
Employees (ln)				0.006 (0.644)
Constant	0.359*** (0.106)	0.281* (0.134)	-4.652 (7.437)	-2.287 (6.234)
<i>N</i>	480	480	440	400
R-squared/ Log-likelihood	0.011	0.032	0.036	-440.50
Number of agencies	12	11	11	9
Time controls	YES	YES	YES	YES
Agency FE	YES	YES	YES	NO
Agency RE	NO	NO	NO	YES

Notes: For Models 1-3, the dependent variable is the logged count of significant guidance documents issued in each agency-quarter; cell entries are coefficients from least squares models. For Model 4, the dependent variable is the raw count of significant guidance documents issued in each agency-quarter; cell entries are coefficients from mixed effect negative binomial models. Robust standard errors clustered on the agency are in parentheses. FE= fixed effect; RE = random effect. Significance: * $p < 0.1$, ** $p < 0.5$, *** $p < 0.01$.

Tempering the Guidance Bias

Stepping back, these results suggest that there is an association between points when agencies are politicized and an increase in guidance output; this effect holds among all guidance documents and also within those that are “significant” in nature. In this section, I examine whether institutional features—specifically, the internal proceduralization of the guidance process—can temper this bias toward guidance.

Although the procedural and clearance hurdles for issuing guidance are much lower than for rulemaking, they are not uniform across agencies. As explained earlier OMB has a policy on good guidance. Some agencies, however, have implemented OMB’s policy for significant guidance and have gone even further to institute their own written policies for issuing guidance. When an agency does this, it can serve as a form of “self-insulation” (Nou, 2013), wherein agency staff create an infrastructure that makes it more difficult for a policymaking forum to be permeated by politics. The expectation here is that when agencies have a written policy and processes in place, political actors will be less able to leverage guidance for political purposes.

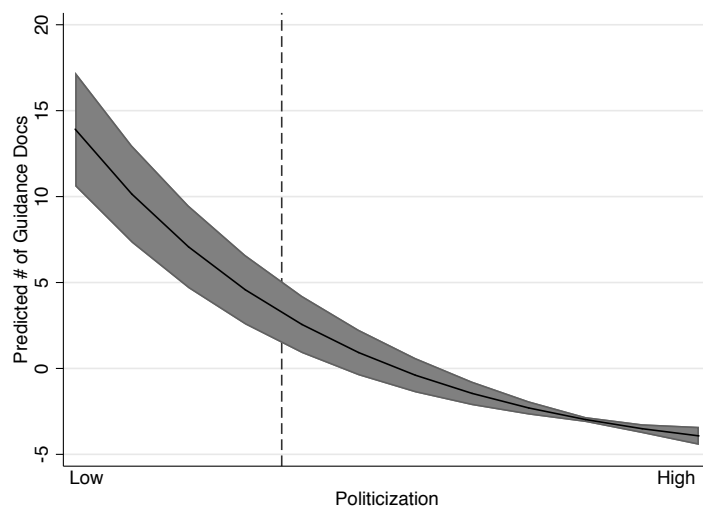
To gauge the level of proceduralization surrounding agency guidance, I rely on the GAO’s classification of internal agency guidance procedures. In its 2015 report on agency guidance, the GAO queried agencies about whether they had written procedures in place for the development and issuance of new guidance documents. Of the thirteen agencies queried that are also in my sample, six had written procedures for issuing guidance and the remaining did not.²⁷ For instance, the Office of Special Education and Rehabilitative Services (OSERS) at the Department of Education, had “an informal process for developing and reviewing guidance. Officials explained that there was no need to have

²⁷Ideally, I would have collected data on the internal guidance practices for a much larger set of agencies. However, internal agency guidance procedures are not generally publicly available. The GAO’s report offers unique insight in this regard, although it provides no indication of *when* these policies were adopted by their respective agencies. Future research might consider a design that studies agency behavior pre- and post- procedure adoption.

a documented process because it had a congenial and close group of experienced OSERS staff with a clear understanding of policy” (68). In such an agency, it may be relatively easy for politicization to permeate the guidance process. In contrast, other agencies had a rigorous internal development and clearance process for new guidance documents, a system which may be more difficult for politics to penetrate. From the GAO’s accounts, I code *Written Policy*, a dichotomous variable indicating whether or not the agency had a written guidance procedure. Because the GAO data only covers a snapshot in time, in this analysis I focus only on the six quarters the report covers (March 2014–April 2015).

Focusing in on this subset of agencies, I estimate models of guidance production. Specifically, I interact *Politicization* with *Written Policy* in order to assess whether having this institutional feature serves as a buffer against political guidance. I reserve the model estimates for Table SI-2 in the SI, but present the results graphically in Figure 2. The results show that among the most politicized agencies studied by the GAO, having a written policy in place is associated with the production of five fewer guidance documents; among less politicized agencies this effect is reversed. Among the least politicized agencies, having a written policy is associated with a sizable increase in guidance production.

Figure 2: Marginal Effect of Having a Written Policy



Notes: Figure shows the marginal effect of having a written guidance procedure on agency guidance production for the thirteen agencies in the sample. Values of politicization represent the range observed for the 13 agencies in the sample; dashed line shows the mean level of politicization. Effects estimated based on Model 2 in Table SI-2.

These results are a departure from those presented earlier which suggested a consistent and positive relationship between politicization and guidance. While this is a small sample, the results are broadly consistent with the idea that institutional features like having a written policy in place may make it more difficult for political actors to use guidance toward political ends. While there remain unanswered questions—like what led some agencies to adopt these policies in the first place—this finding suggests that formalizing the guidance production process may change how guidance is used in practice.

Conclusion

The evidence presented here on the political use of guidance is not dispositive; it does not definitively show that agency guidance is politically-motivated, nor that agencies are misusing this policymaking venue. Given the fuzzy line between what counts as guid-

ance (versus a rule) and what counts as “political guidance” (versus more administratively-oriented guidance), this is not a cut-and-dry empirical call. That said, the evidence presented here is entirely consistent with a politically-motivated explanation of guidance production. In other words, if political guidance is occurring, these are precisely the types of patterns we should expect to observe. Importantly, the changes in guidance production associated with increased politicization within an agency are relatively moderate: one additional guidance document and 0.4 additional significant guidance documents in a quarter. These effect sizes suggest that political guidance is targeted toward specific goals (i.e., it is not a panacea used to solve all political problems of which there are presumably many) and also that, rather than supplanting more administratively-oriented guidance, it is layered on top of it.

An emerging literature documents the numerous and deleterious consequences of agency politicization (e.g., Lewis, 2008; Lowande, 2019; Resh, 2015; Richardson, 2019); this study shows that politicization is associated with an increase in agency guidance production—a type of agency policymaking that is vast in both scope and quantity. However, before concluding that that this is normatively troubling and should be added to the considerable list of problems created by politicization, it is worth remembering that this may be a form of political responsiveness that may be desirable—at least from the executive’s perspective. Policy production is, undoubtedly, one of the reasons that presidents put political appointees into agencies. In this sense, the system is working as intended. An important question for future research is, therefore, whether political guidance is associated with reduced policy quality.

The results with respect to proceduralization suggest that there are ways that agencies may be able to insulate themselves from having politics permeate this venue. This finding has immediate policy implications; the recent executive orders signed by President Trump will increase the overall proceduralization around agency guidance, by, for instance, requiring agencies to post all guidance to a centralized website and to solicit

comment on some types of guidance documents. This means future presidents will face a tradeoff; increased standardization may be an overall good governance move, but it may also reduce the executive's ability to issue political guidance.

Finally, this research highlights that political scientists should be taking all forms of agency policymaking—particularly guidance—much more seriously. While these venues are often considered overly complex or even boring, their cloaked nature makes them a place where important politics and policymaking can occur undetected. Specifically, there is much richness waiting to be discovered in terms of how politics influences guidance production, including exploring when agencies issue guidance to satisfy interest group demands and how structural features of an agency (e.g., agency independence, professionalism) influence agency reliance on guidance. Future research should also consider important questions like how politics affects not just the issuance of new guidance but also their revocation, as Thrower (2017) has done in the context of executive orders. Such research promises to yield insight into the power wielded by the vast administrative state.

References

- Allison, Paul D. and Richard P. Waterman. 2002. "Fixed-Effects Negative Binomial Regression Models." *Sociological Methodology* 32(1):247–265.
- Anthony, Robert A. 1991. "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind The Public." *Duke Law Journal* 41(6):1311–1384.
- Aubrey, Allison. 2017. "Trump Administration Reverses Bottled Water Ban In National Parks." *NPR*, Aug 18. Available online: <https://www.npr.org/sections/thesalt/2017/08/18/544456726/trump-administration-reverses-bottled-water-ban-in-national-parks>.
- Berry, Christopher R. and Jacob E. Gersen. 2016. "Agency Design and Political Control." *Yale Law Journal* 126(4):1002–1049.
- Carter, David B. and Curtis S. Signorino. 2010. "Back to the Future: Modeling Time Dependence in Binary Data." *Political Analysis* 18(3):271–292.
- Committee on Government Reform. 2006. "Non-Binding Legal Effect of Agency Guidance Documents." House Report 106-1009, U.S. House of Representatives, 106th Congress.
- Committee on Oversight and Government Reform. 2018. "Shining Light on Regulatory Dark Matter." Majority Staff Report, March. U.S. House of Representatives, 115th Congress.
- Davis, Julie Hirschfeld and Matt Apuzzo. 2016. "U.S. Directs Public Schools to Allow Transgender Access to Restrooms." *New York Times*, May 12. Available online: <https://www.nytimes.com/2016/05/13/us/politics/obama-administration-to-issue-decree-on-transgender-access-to-school-restrooms.html>.
- Dull, Matthew and Patrick S. Roberts. 2009. "Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009." *Presidential Studies Quarterly* 39(3):432–453.
- Fears, Darryl. 2017. "The National Park Service Showed that its Bottled Water Ban Worked — Then Lifted It." *Washington Post*, Sept 26. Available online: <https://www.washingtonpost.com/news/energy-environment/wp/2017/09/26/the-national-park-service-showed-that-its-bottled-water-ban-worked-then-lifted-it/>.
- GAO. 2015. "Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices." Government Accountability Office Report GAO-15-368. Washington, D.C. Available online: <https://www.gao.gov/assets/670/669688.pdf>.
- GAO. 2018. "Federal Regulations: Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices." Government Accountability Office,

- GAO-18-436T. Testimony of Kris Nguyen, Acting Director. Washington, D.C. Available online: <https://www.gao.gov/assets/700/690650.pdf>.
- GAO. 2019. "Federal Ethics Programs: Government-wide Political Appointee Data and Some Ethics Oversight Procedures at Interior and SBA Could Be Improved." Government Accountability Office, GAO-19-249. Available online: <https://www.gao.gov/assets/700/697593.pdf>.
- Hollibaugh, Gary E. 2019. "How Effective are Political Appointees?" *Oxford Research Encyclopedia of Politics*. Available online: DOI: 10.1093/acrefore/9780190228637.013.1395.
- Howell, William G. 2003. *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton, NJ: Princeton University Press.
- Howell, William and Kenneth Mayer. 2005. "The Last One Hundred Days." *Presidential Studies Quarterly* 35(3):533–553.
- Krause, George A. and J. Kevin Corder. 2007. "Explaining Bureaucratic Optimism: Theory and Evidence from US Executive Agency Macroeconomic Forecasts." *American Political Science Review* 101(1):129–142.
- Lewis, David E. 2008. *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance*. Princeton, NJ: Princeton University Press.
- Lowande, Kenneth. 2019. "Politicization and Responsiveness in Executive Agencies." *Journal of Politics* 81(1):33–48.
- Lowande, Kenneth S. 2014. "The Contemporary Presidency After the Orders: Presidential Memoranda and Unilateral Action." *Presidential Studies Quarterly* 44(4):724–741.
- Magill, M. Elizabeth. 2004. "Agency Choice of Policymaking Form." *University of Chicago Law Review* 71(4):1383–1447.
- McLaughlin, Patrick A. and Oliver Sherouse. 2018. "RegData US 3.1 Annual (dataset)." QuantGov, Mercatus Center at George Mason University, Arlington, VA. <https://quantgov.org/regdata-us/>.
- Melnick, R. Shep. 2018. *The Transformation of Title IX: Regulating Gender Equality in Education*. Washington, D.C.: Brookings Institution Press.
- Moe, Terry M. 1985. The Politicized Presidency. In *The New Direction in American Politics*, ed. John Chubb and Paul Peterson. Washington, D.C.: Brookings Institution Press pp. 235–270.
- Mummolo, Jonathan and Erik Peterson. 2018. "Improving the Interpretation of Fixed Effects Regression Results." *Political Science Research and Methods* 6(4):829–835.
- Nou, Jennifer. 2013. "Agency Self-Insulation Under Presidential Review." *Harvard Law Review* 126(7):1755–1837.

- Nou, Jennifer and Edward H. Stiglitz. 2016. "Strategic Rulemaking Disclosure." *Southern California Law Review* 89(4):733–792.
- Ostrander, Ian and Joel Sievert. 2013. "The Logic of Presidential Signing Statements." *Political Research Quarterly* 66(1):141–153.
- Parrillo, Nicholas R. 2019. "Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries." *Yale Journal on Regulation* 36(1):165–271.
- Potter, Rachel Augustine. 2019. *Bending the Rules: Procedural Politicking in the Bureaucracy*. Chicago, IL: University of Chicago Press.
- Raso, Connor. 2015. "Agency Avoidance of Rulemaking Procedures." *Administrative Law Review* 67(1):65–132.
- Raso, Connor N. 2009. "Strategic or Sincere-Analyzing Agency Use of Guidance Documents." *Yale Law Journal* 119:782.
- Reeves, Andrew and Jon C. Rogowski. 2016. "Unilateral Powers, Public Opinion, and the Presidency." *Journal of Politics* 78(1):137–151.
- Resh, William G. 2015. *Rethinking the Administrative Presidency: Trust, Intellectual Capital, and Appointee-Careerist Relations in the George W. Bush Administration*. Baltimore, MD: Johns Hopkins University Press.
- Richardson, Mark D. 2019. "Politicization and Expertise: Exit, Effort, and Investment." *Journal of Politics* 81(3):878–891.
- Rottinghaus, Brandon and Jason Maier. 2007. "The Power of Decree: Presidential Use of Executive Proclamations, 1977-2005." *Political Research Quarterly* 60(2):338–343.
- Seidenfeld, Mark. 2011. "Substituting Substantive for Procedural Review of Guidance Documents." *Texas Law Review* 90(2):331–394.
- Selin, Jennifer L. 2015. "What Makes an Agency Independent?" *American Journal of Political Science* 59(4):971–987.
- Sunstein, Cass. 2019. "Trump's New Executive Orders Deserve Praise." *Bloomberg Opinion*, October 15. Available online: <https://www.bloomberg.com/opinion/articles/2019-10-15/trump-regulation-executive-orders-deserve-praise?srnd=opinion>.
- Thrower, Sharece. 2017. "To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity." *American Journal of Political Science* 61(3):642–656.
- Walters, Daniel E. 2019. "The Self-Delegation False Alarm: Analyzing Auer Deference's Effects on Agency Rules." *Columbia Law Review* 119(1):85–168.
- Wood, Abby K. and David E. Lewis. 2017. "Agency Performance Challenges and Agency Politicization." *Journal of Public Administration Research and Theory* 27(4):581–595.

- Wood, B. Dan and Miner P. Marchbanks III. 2007. "What Determines how Long Political Appointees Serve?" *Journal of Public Administration Research and Theory* 18(3):375–396.
- Yackee, Jason Webb and Susan Webb Yackee. 2009. "Divided Government and US Federal Rulemaking." *Regulation & Governance* 3(2):128–144.
- Yackee, Susan Webb. 2019. "The Politics of Rulemaking in the United States." *Annual Review of Political Science* 22:37–55.

Supporting Information
for
“Providing Political Guidance?
Agency Politicization and ‘As If’ Policymaking”

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Data Collection and Cleaning

Collecting data on agency guidance documents is not a straightforward exercise for two reasons. First, there is no official federal inventory or accounting of agency guidance documents. Agencies each take their own approach to producing and managing their guidance collections. Second, the definition of a guidance document is inherently fuzzy. The Office of Management and Budget defines a guidance document as “an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended), that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”²⁸ Yet, as one agency describes it, this definition is both “elusive” and “too broad to provide meaningful boundaries” (Committee on Oversight and Government Reform, 2018, 4). Simply put, what one agency counts as a guidance document another may not.

In order to create a dataset of agency guidance documents, I rely primarily on a report issued by the House Oversight and Government Reform Committee in March of 2018. The report, titled “Shining Light on Regulatory Dark Matter,” gathered information on more than 13,000 guidance documents produced by 46 agencies over a ten-year period (2008–2017). Of the 46 agencies queried, responses varied considerably; 27 fully responded, 11 partially responded (e.g., with responses covering only some bureaus within an agency), and 8 agencies did not give any information. The data in the report address

²⁸“Final Bulletin for Agency Good Guidance Practices” January 25, 2007 72 FR 3432.

the two issues with guidance data reported here. First, the report serves as an inventory of sorts. Second, the data are self-reported, allowing agencies to interpret OMB's definition according to their various missions. While this is an imperfect solution to the fuzziness problem, as detailed in the paper, I take additional steps with the research design to account for differences across agencies and bureaus.

Taking this dataset as a starting point, I begin by excluding any agency that the House determined not to be fully responsive. This removed nearly all of the independent agencies covered by the House's request, as well as some executive branch agencies. From there, I engage in a comprehensive cleaning process. First, I exclude agencies whose data was unusable for idiosyncratic reasons. For example, the Department of Veterans Affairs provided a seemingly complete response to the House report, but the files were not machine-readable; therefore I exclude it. Once an agency's data was deemed "usable," I then exclude any individual entries that had no associated date or where the date provided by the agency was the date the agency accessed the document, rather than the date the document was created. I also exclude documents that were listed as "annual" recurrences (i.e., where the agency reissues the same document every year at a particular point in time). While these exclusions reduce the size of the sample, I have no reason to believe that they bias the results in any particular direction. Next, for documents that were identified only by the year of issuance (i.e, no associated month given), I randomly assign a quarter. Finally, I count guidance issued jointly by multiple bureaus within a department as accruing separately to each bureau. I also count revisions to existing guidance documents as separate documents.

Additionally, I collected data separately from the websites of two agencies: the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA). Although these two agencies gave incomplete responses to the House, their guidance documents are readily available online.²⁹ Both of these agencies are considered to be

²⁹The EPA reported only significant guidance to the House, but the remaining set of guidance documents

important in terms of the volume and prominence of their guidance, so I include them in the dataset.³⁰

The resulting dataset includes more than 7,500 guidance documents issued by the following 29 agencies and bureaus:³¹

- Agricultural Marketing Service (USDA)
- Agricultural Research Service (USDA)
- Animal and Plant Health Inspection Service (USDA)
- Consumer Product Safety Commission
- Employment Benefits Securities Administration (DOL)
- Employment and Training Administration (DOL)
- Environmental Protection Agency
- Farm Service Agency (USDA)
- Federal Energy Regulatory Commission
- Federal Labor Relations Authority
- Food Safety and Inspection Service (USDA)
- Food and Drug Administration (HHS)
- Food and Nutrition Service (USDA)
- Foreign Agricultural Service (USDA)
- Mine Safety and Health Administration (DOL)
- National Aeronautics and Space Administration
- National Institute of Food and Agriculture (USDA)
- Natural Resources Conservation Service (USDA)
- Occupational Safety and Health Administration (USDA)
- Office of Civil Rights (ED)
- Office of Elementary and Secondary Education (ED)

is available on its website, at <https://www.epa.gov/laws-regulations/policy-guidance>. The Department of Health and Human Services, FDA's parent agency, gave a non-response to the House, but the FDA's guidance is available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents#guidancesearch>.

³⁰However, the results reported in the main body of the paper are robust to excluding these two agencies.

³¹Parent departments included in parentheses: ED = Department of Education; DOL = Department of Labor; HHS = Department of Health and Human Services; and USDA = US Department of Agriculture.

- Office of Federal Contract Compliance Programs (DOL)
- Office of Innovation and Improvement (ED)
- Office of Postsecondary Education (ED)
- Office of Special Education and Rehabilitative Services (ED)
- Office of Workers Compensation Programs (DOL)
- Rural Utilities Service (USDA)
- Veterans Employment and Training Service (DOL)
- Wage and Hour Division (DOL)

Table SI-1: Descriptive Statistics for Model Variables

Variable	Mean	Std dev	Min	Max
Guidance (ln) <i>Source: See SI</i>	1.34	1.13	0	4.56
Guidance count <i>Source: See SI</i>	6.99	11.69	0	95
Significant guidance (ln) <i>Source: See SI</i>	0.44	0.76	0	3.47
Significant guidance count <i>Source: See SI</i>	1.59	3.89	0	31
Politicization <i>Source: OPM FedScope</i>	1.21	1.59	0	6.25
Rules (ln) <i>Source: Federal Register</i>	1.02	1.22	0	5.25
Significant rules (ln) <i>Source: Federal Register</i>	0.50	0.71	0	3.30
CFR words (ln) <i>Source: Reg Data</i>	12.69	1.44	9.30	16.62
Midnight <i>Source: Author coding</i>	0.05	0.22	0	1
Divided <i>Source: Author coding</i>	0.70	0.46	0	1
Decisionmaker Independence <i>Source: Selin (2015)</i>	-0.43	0.68	-0.85	1.98
Policy Independence <i>Source: Selin (2015)</i>	-0.04	0.89	-0.49	3.54
Employees (ln) <i>Source: OPM FedScope</i>	10.03	1.55	4.71	11.63
Written Policy <i>Source: GAO (2015)</i>	0.46	0.50	0	1

Table SI-2: Written Policy as a Buffer to Political Guidance

	(1) Guidance (ln)	(2) Guidance count
Politicization	-0.157*** (0.006)	-0.220*** (0.026)
Written Procedure	0.447*** (0.015)	1.035*** (0.054)
Politicization × Written Procedure	-0.176*** (0.002)	-0.327*** (0.007)
Rules (ln)	0.260** (0.044)	0.187 (0.251)
Constant	5.126*** (0.018)	6.803*** (0.881)
<i>N</i>	78	78
R-squared/ Log-likelihood	0.150	-252.83
Time controls	YES	YES

Notes: For Model 1, the dependent variable is the logged count of guidance documents issued in each agency-quarter; cell entries are coefficients from a least squares model. For Model 2, the dependent variable is the raw count of guidance documents issued in each agency-quarter; cell entries are coefficients from a negative binomial model. Robust standard errors clustered on the agency are in parentheses. Significance: * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.