

Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking

Kenneth Lowande
Assistant Professor
University of Michigan
5700 Haven Hall
505 South State Street
Ann Arbor, MI 48109
lowande@umich.edu

Rachel Augustine Potter*
Assistant Professor
University of Virginia
S162 Gibson Hall
1540 Jefferson Park Ave.
Charlottesville, VA 22904
rapotter@virginia.edu

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*Corresponding author.

Abstract

Scholars have long acknowledged that legislators strategically employ procedure to advance policy preferences. But evidence for this view is confined to the lawmaking process, omitting an essential function of elected representatives: oversight of executive policymaking. We argue that *ex post* procedural oversight is also driven by policy disagreement. We demonstrate this by analyzing congressional participation in U.S. Environmental Protection Agency rulemakings from 2007–2017. Using the content of public comments and commenters' political contributions, our study is the first to locate the spatial position of rulemaking proposals. We find that the more ideologically distant the agency proposal, the more likely a request for documents, additional hearings, or more time for public participation. Moreover, these requests are likely to parallel substantive criticisms, and be concentrated among members with experienced staff. These findings imply that—beyond setting the baseline rules of bureaucratic policymaking—well-resourced elected officials leverage procedure during policy implementation.

Keywords: Congress, oversight, bureaucracy, rulemaking, measurement

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When the Department of Labor (DOL) proposed a rule in late 2017 to rescind an Obama-era regulation that prevented employers from pooling tips for hourly employees, Democrats were incensed. Representative Bobby Scott (D-VA) accused the agency of “circumventing the will of Congress [...] and undermining other existing wage protections for workers” (Scott, 2018). Yet, when Democrats contacted the agency, their letter did not contain these substantive complaints. Instead, they asked the agency to extend the public comment period by an additional 30 days (Wheeler, 2017). By engaging on a procedural level—rather than a substantive one—Democrats provided oversight that potentially decelerated the pace of a disfavored policy.

Researchers have long acknowledged that procedures are critical to understanding legislative behavior (e.g., Oleszek et al., 2015). Yet scholars overlook procedure as a means of conducting *ex post* oversight of bureaucratic agents. Instead, most research on oversight emphasizes *ex ante* control by setting policy, designing agencies or leveraging administrative procedures. Studies on *ex post* control focus on appointments and active oversight that seeks explicit policy revision (for a review, see Huber and Shipan, 2009). Further, as a result of its scholarly neglect, it is unclear whether procedural oversight serves as a substitute for or complement to its substantive analog.

Though legislators often appeal to first principles when engaging procedurally, we argue these elites use procedure to advance their preferences *after* the enactment of legislative statutes. Because procedural oversight demands costly investment in understanding the administrative process, it complements substantive points about agency policy proposals. Moreover, these investments are more likely to be made by members with experienced staff capable of lowering the cost of acquiring information.

We provide unique evidence for these claims by analyzing congressional and industry participation in agency rulemaking. Specifically, we examine determinants of substantive and procedural comments on rules proposed by the Environmental Protection Agency (EPA) from 2007-2017. The primary innovation of our approach is that it leverages the content of public comments along with information about the preferences of commenters to identify the spatial location of individual EPA proposals. This allows us to estimate the probability of participation as a function of a political actor’s distance *from the policy in question*, rather than relying on mean ideological scores for various political actors in the U.S. separation of powers system. The technique we deploy is scalable, opening the door to the empirical study of many questions in the realm of bureaucratic policymaking and demonstrating the promise of vast public participation data to measure policymaking in the administrative state.

Political Oversight of the Bureaucracy

Our study advances knowledge of the political control of bureaucracies by investigating *ex post* procedural oversight. By *ex ante* and *ex post*, we mean oversight undertaken before (or during) and after the legislative stage of policymaking, respectively. We omit a wholesale review of these vast literatures, and summarize our contribution in Table 1.

Table 1: How does Congress Oversee Bureaucratic Agents?

	<i>Ex Ante</i>	<i>Ex Post</i>
Substance	Status quo policy selection	Public comment, limitation riders, hearings, private contact
Procedure	Agency design, reporting requirements, Administrative Procedure Act	Requests for extensions, documents, or public meetings

Note: Cells indicate avenues of oversight identified by past research (unshaded) and our study (shaded). For a recent literature review, see Huber and Shipan (2009).

Studies of *ex post* oversight of the bureaucracy tend to focus on the volume and venue of legislator behavior. Early debates focused on whether Congress had effectively abdicated its authority to a runaway bureaucracy. Contemporary work explores the politics associated with oversight by various means. Hearings and investigations provide consistent evidence that oversight is partially motivated by political considerations (Kriner and Schickler, 2016). More recently, studies have examined oversight via direct communication with agencies (Mills, Kalaf-Hughes and MacDonald, 2016). Studies of *ex ante* oversight focus on the degree to which principals defer to bureaucratic agents, and the selection of the rules of the implementation game (e.g., Epstein and O'Halloran, 1999).

Explaining Procedural Oversight

We extend the classical view of procedures as tools used by legislators to advance policy preferences (e.g., Oleszek et al., 2015) to oversight of the bureaucracy. Accordingly, we assume that legislator time and resources are scarce, which requires strategic prioritization of tactics. As one such tactic, procedural oversight takes many forms. Most often, these are requests to extend public comment periods, conduct additional analyses, provide in-person briefings, produce documents, or hold additional hearings. For their part, agencies take communiqués from Congress seriously. Agencies, for example, carefully parse the language and closely abide congressional committee reports, even though these documents are not legally binding. This means procedural oversight has the potential to yield benefits for members.

First, legislators stand to obtain policy concessions. Though a procedural request may appear

innocuous (e.g., a request to extend the public comment period for an additional 15 days), it transmits useful information. The legislator is paying attention to that particular rulemaking and, moreover, he or she has some preference over the outcome. Observing this, the agency may be more reticent to take an ambitious policy stance and also more likely to accede to substantive legislative demands. Put differently, this is a classic example of the “second face of power” (Bachrach and Baratz, 1962), with the agency compelled to act without a binding demand.

Second, legislators can potentially delay the policymaking process. Extending the public comment period on a rulemaking proposal means the agency is held up both by the additional time granted for comment and by the requirement to respond to additional comments. In Section C of the Supporting Information (SI), we report an association between comment period extensions and the time it takes agencies to finalize proposed rules. Other procedural requests, like conducting new analyses, may require even more time. Put simply, procedural oversight may be a way for legislators to strategically obstruct. This obstruction introduces uncertainty into the policymaking process and enhances the possibility of extracting concessions.

Finally, and perhaps most critically, procedural moves may serve an electoral purpose in the form of position-taking (Mayhew, 1974). Unlike the vast majority of direct communication with agencies (*à la* Lowande, 2018), legislator comments on proposed rules are observable and closely watched by key constituencies. Indeed, many of the member letters in our data “carbon copy” particular audiences (e.g., constituents, firms, other members), indicating that members wanted these audiences to know their stance on the rule in question. These audiences are likely to be narrow interests representing industry, who tend to be high demanders (in terms of obtaining regulatory changes) and who also tend to be contributors to members’ reelection campaigns.

Nonetheless, accruing these benefits through procedural oversight is costly. Beyond standard time constraints and opportunity costs, administrative policymaking imposes additional informational demands. To oversee the agency substantively (and if necessary, recommend alternative proposals), members must understand the implications of agency actions with respect to their own preferences. To oversee procedurally, they must go farther by understanding the rulemaking process and applying requirements for public participation, analysis, or transparency to a particular case. Most importantly, members will vary in their capacity to overcome these additional informational costs.

This leads to three expected patterns in procedural oversight. First, since the benefits of concession, delay, and position-taking accrue most to legislators who disagree with agency proposals, we expect ideological conflict to increase the likelihood of procedural oversight. This is a straightforward application of

spatial voting models that tie congressional interventions in bureaucratic activity to ideology (e.g., Shipan, 2004), and in line with empirical studies that suggest that divided government is an important predictor of increased oversight behavior (e.g., Kriner and Schickler, 2016).

Second, we expect procedural and substantive oversight to be hierarchical, complementary strategies: procedural points will come in addition to (rather than in lieu of) substantive comments. Procedural oversight presents more considerable informational hurdles. The member must recognize that the rule is problematic on substantive grounds, and she must also have a deep understanding of the procedures associated with the agency's process and how to successfully make a procedural claim. Thus, members will most often have an initial substantive concern that precipitates a procedural point. Finally, we expect legislators with higher capacity to be more likely to conduct oversight. By capacity, we simply mean direct access to the kind of knowledge required to conduct oversight. Thus, there will be variation across legislators in the cost of procedural and substantive oversight.

Locating Agency Proposals

Testing these expectation requires determining the spatial location of agency proposals. Existing methods for estimating ideology typically locate members of Congress in the same policy space as actors such as the president, agency heads, and lower-level department personnel (e.g., Chen and Johnson, 2015). While this measurement is useful, it has several clear limitations. First, agencies may make decisions inconsistent with their aggregate preferences for strategic reasons. Second, common space measures typically vary by year or administration, which means identifying variation is often synonymous with numerous other time-varying characteristics, such as divided government. Locating individual policies allows us to hold constant these macro-political characteristics to test basic predictions of spatial models within agency-member pairs. Though we select a single agency for the purposes of this study, this approach can be extended to any agency with a significant rulemaking docket—allowing researchers to systematically map the regulatory state.

To locate policies, we extend the method developed in Richman (2011), which locates broad policy areas covered by congressional lawmaking. The basic approach leverages information about the ideological orientation of an actor along with their opinions about the policy in question. Our method relies on the comments submitted by key actors on agency proposed rules. Following Richman (2011),¹ we focus exclusively on the comments of those actors for whom we also have measures of ideological preference:

¹Richman (2011) pairs legislator responses on the National Political Awareness Test (NPAT) survey with legislator ideal points (i.e., DW-NOMINATE) in order to locate proposal positions for a series of policy issues. We largely follow his approach, although we substitute public comments on rules for survey responses and rely on Bonica's (2013) CFscores.

members of Congress and Fortune 500 companies.

Fortune 500 firms provide a comparison group of commenters with fundamentally different incentives than elected officials. Though their leaders are politically active, they have no re-election audience or party loyalty, and their ambitions lie outside of Congress. Yet, they nonetheless invest in responding to new rules, and their participation has the potential to influence their market value. Thus, although individual firms may benefit from procedural oversight, we suspect that this benefit is likely associated with a firm's profit base, and not with its ideology. Including firms serves as a validity check on our measurement strategy and results, and also allows us to estimate the position of the status quo with greater precision.

We collected all comments submitted to the EPA's rulemaking record using www.regulations.gov, the online portal for federal agency rulemaking. Our data cover the time period 2007–2017.² The EPA was active and politically salient during this period, which ensures a sufficient number of comments. Its proposals drew routine rebukes from Republicans charging the agency engaged in policymaking without proper industry input, as well as Democrats calling for additional environmental safeguards. It is, therefore, an appropriate test case for our research question. Finally, while agency participation in [regulations.gov](http://www.regulations.gov) is voluntary, the EPA offers a complete and accurate record of public comments and associated documents.

We subsetted the data to comments from members of Congress and Fortune 500 firms. Table SI-1 shows the top corporate and congressional commenters, along with their corresponding ideological rating. We use CFscores based on political contributions developed by Bonica (2013). (We discuss the relative merits and drawbacks of this measurement in the SI.) We coded each comment according to the actor's position on both the policy proposed by the agency and the status quo, as either "too lenient," "about right," or "too restrictive," which in this policy context means the level of environmental protection was too weak, satisfactory, or too strong. Members of Congress, in particular, tend to express their preferences in clear terms. In Figure 1, Sen. Tom Carper (D-DE) makes his support for a liberal EPA proposal clear, and acknowledges the zero-sum nature of the substance of the policy—apologizing for the pressure the agency received to "go the other way."

Following Richman (2011), we estimate an ordered probit, relying on political actors' ideal points to predict the probability of support for maintaining the proposal "as-is." Once these responses are paired with the commenter's CFscore, we estimate the maximum predicted probability (in terms of spatial preferences) for the "about right" response. Note, Bonica (2016) reports scores covering individuals working in Fortune 500 firms. To develop a firm-specific score, we follow the approach that Chen and Johnson (2015) use to

²Our data collection and processing strategy as well as our coding rules and procedures are explained in the SI.

Figure 1: Congressional Comment on EPA Proposed Regulation

With best personal regards, I am

P.S. I'm sure
you're receiving
a lot of pressure
to go the other
way on this one.
Please don't do
that and you'll make possible a healthier
New Year for a lot of Americans.
Merry Christmas to you and the Johnson
family!

Sincerely,


Thomas R. Carper
Chairman
Clean Air and Nuclear Safety Subcommittee
Senate Environment and Public Works Committee

Note: “I’m sure you’re receiving a lot of pressure to go the other way on this one. Please don’t do that...” Excerpt from Document # EPA-HQ-OAR-2005-0172-7022, commenting on 2007 ozone standards. We coded Sen. Carper’s comment on the proposal as “about right” (since he was writing in support of it) and his position on the status quo as “too lenient” (since he advocated a change to the status quo in favor of more stringent regulation).

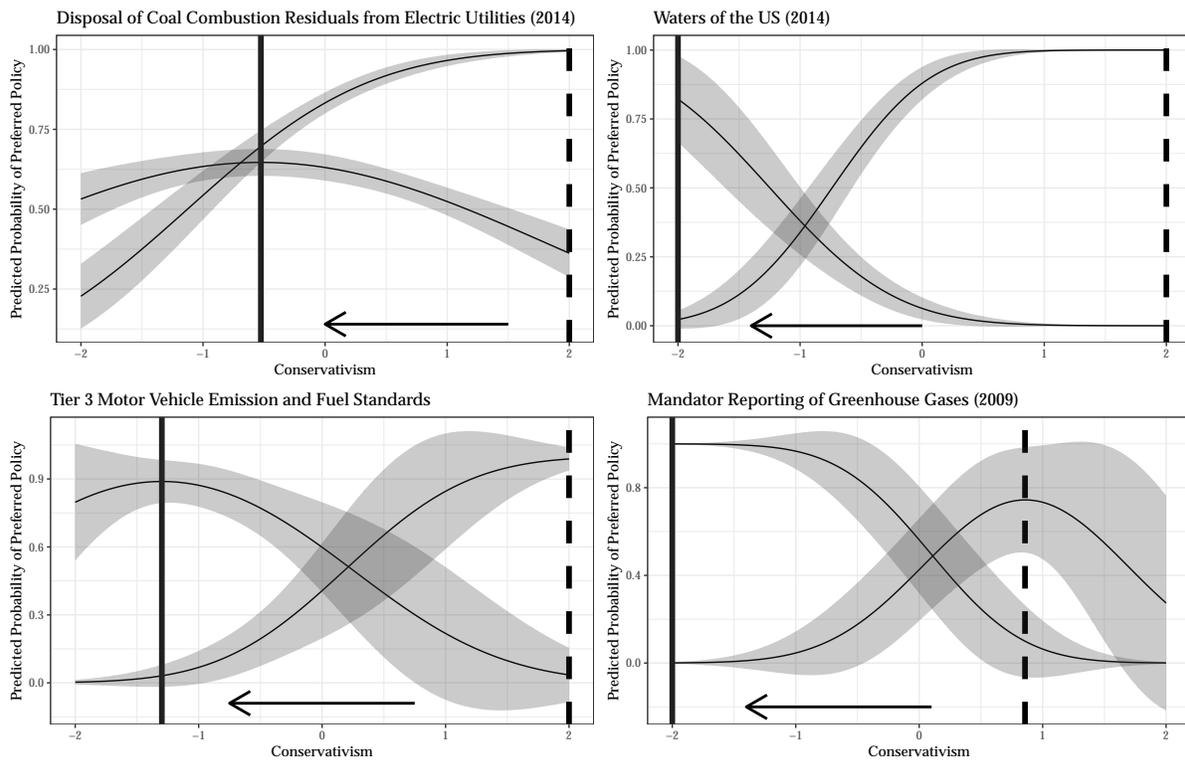
generate ideology scores for bureaucratic agencies based on the political giving of top agency officials (see the SI for more details).

Figure 2 plots several results from our approach, specifically indicating the predicted location of the status quo (dashed line) and the proposal (solid line) for several key EPA proposed rules in our dataset. Although our data cover three presidential administrations, the majority of years of our data fall under Obama’s tenure. Given that this approach requires a high volume of comments in order to make spatial predictions, we are able to estimate the policy positions for a truncated set of the rules that EPA issued during the time period under study.³

Overall, we recover status quo and policy proposals for 35 EPA proposed rules. Table SI-2 provides a full list of these rulemakings, as well as the associated diagnostics. The estimated proposal positions pass a simple “face-validity” test: the vast majority of Obama-era EPA proposals shift the status quo left, while a smaller set of rulemakings initiated under the Trump administration attempt a reversal. In addition, diagnostic indicators suggest that the models perform relatively well; CFscores accurately predict the content of comments for most rules. One potential concern, however, is that the sample of comments will not accurately reproduce the preference distribution of legislators and prominent firms. To assess this potential problem, we report the distributions of the universe of potential participants and participants

³Following Richman (2011), we use Monte Carlo simulations to assess the potential for non-response bias. We report the full results in Section B of the SI, but in general, find that ideologically motivated commenting behavior is unlikely to result in systematic bias in the estimated location of the proposal.

Figure 2: Proposal and Status Quo Locations for Select Proposed Rules



Note: Plotted lines indicate the predicted probability of the “about right” responses for the status quo and proposal policies; bands indicate 95% confidence intervals. The dashed vertical line indicates the predicted status quo location and the solid vertical line locates the prediction for the agency’s proposed rule.

who submitted comments in Figure SI-1, and conduct a simulation study. Although more conservative commenters (i.e., those with higher CFscores) tend to participate more often, we have complete coverage of the distribution of commenters—with the lone exception of a few extreme liberal firms. In addition, in keeping with Richman (2011), our analysis reveals the potential for non-response bias in our approach is low under minimal assumptions (Figure SI-2).

Empirical Patterns in Procedural Oversight

To assess the argument that procedural oversight is motivated by member ideology, we revisit our dataset of EPA comments and code whether each comment contained a procedural request. Procedural requests ask for a longer public comment period, additional public hearings, additional analyses, or the production of documents. We also coded whether each comment contained a substantive request, meaning that it included policy-specific content. These categories are exhaustive but not mutually exclusive.⁴

⁴Fifteen comments included both procedural and substantive requests. For descriptive statistics on comments, see Table SI-3.

To evaluate our core expectation, we estimate the absolute distance between each actor’s CFscore and the proposal location. For the analyses presented in this section, we bin this measure into equal-sized quintiles, and produce a five-point ordinal measure of disagreement: aligned, nearly aligned, slight disagreement, moderate disagreement, and high disagreement. This reduces the impact of the measurement error that would be associated with using both scores as cardinal measures. More substantively, we have found that many of the proposals do not exist alongside a continuous set of policy alternatives. For example, revisions to ground-level ozone standards involve adjusting allowable levels up (conservative) or down (liberal). In practice, proposed revisions are binned—the EPA proposed lowering the standard from between 70–75 ppb to between 65–70 ppb. So the cardinal “distance” recovered by our procedure may be an artifact of the underlying preference scale rather than an indication of the magnitude of disagreement. The results are unaffected by using a continuous measure (reported in Table SI-7).

Our core expectation about ideology suggests that the probability of engaging in each type of oversight will increase as the level of ideological disagreement increases. In the models, we also include binary indicators of whether the legislator was a member of the relevant oversight committee, their position in that committee, as well as whether they were a member of the Senate. Table SI-5 reports results of logistic regressions of ideology and status on the likelihood of making procedural and substantive comments.⁵ We also mirror the models with *Substance* as the dependent variable, both as a reference point for the procedural models and also to investigate the effect of ideology as it is understood in the majority of the literature on *ex post* congressional oversight. We plot these effects in Figure 3. The unit of analysis is the commenter-proposed rule. Robust standard errors are clustered at the commenter level, and all models include congress and rule fixed-effects.⁶

For MCs, the marginal probability of engaging in oversight is generally increasing in an legislators’s distance from the policy proposal.⁷ In terms of *Procedure* the marginal increase in the probability of engaging in oversight is +3% for a legislator who has a high level of disagreement with the proposed rule (compared to a MC who is aligned with the proposal). This effect is substantively large, since the baseline probability of making a procedural comment is 0.7%. Comments about the substance of a proposal exhibit similar patterns. Specifically, the models suggest that, holding other variables at their means, the marginal increase

⁵We also estimated linear probability models, as shown in the supplementary materials in Table SI-6. In addition, we estimated a multinomial logistic model where each type of response (e.g., procedural, substantive) constituted its own unordered category. Both estimation strategies yield results that are substantively similar in terms of sign, significance, and magnitude.

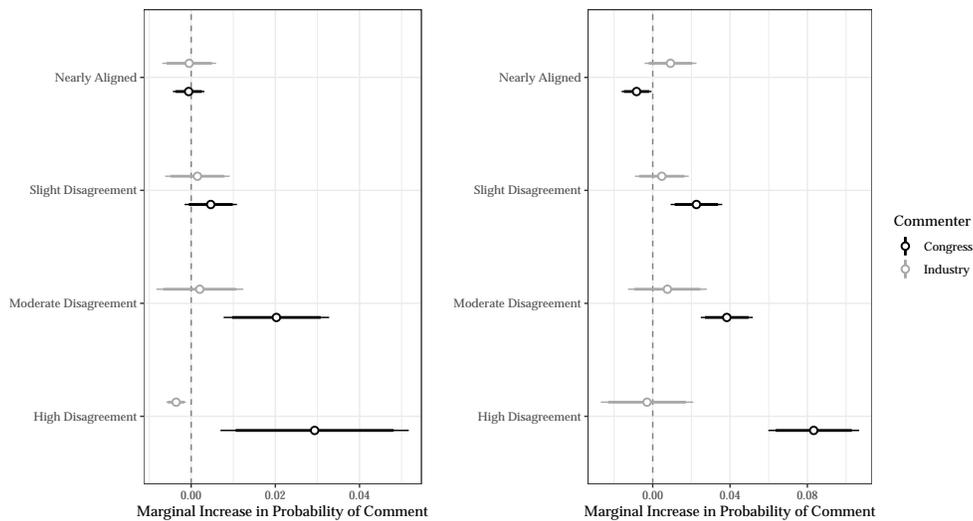
⁶For some subsets of actors and comment types, there are no comments (e.g., some rules received no procedural comments from firms). This means that rule-intercept shifts perfectly predict the outcome, forcing us to omit these rules from the models.

⁷This relationship holds irrespective of the presence of divided government; see Table SI-9.

in the probability of comment for the highest level of disagreement is +9%.⁸ Again, this represents a meaningful difference, as the unconditional probability of a substantive comment is 5%. In sum, the results for *Procedure* and *Substance* offer similar takeaways, suggesting that ideological disagreement underlies both kinds of oversight queries from elected officials. These results are robust to using measures of error in the various latent variables included in the models as inverse weights, one way of accounting for uncertainty inherent in multi-stage analyses of this kind (Table SI-8).

Fortune 500 firms provide additional validation of these results. As Figure 3 indicates, all ideological estimates are estimated with relative precision, but are weak in magnitude. Moreover, in contrast to the subset of legislator comments, the marginal change in the probability of firm-commenting is *not* increasing in disagreement. Instead, the evidence suggests that when a firm’s financial interest is more closely tied to environmental and energy policy issues, that firm is more likely to submit a comment on an EPA rule.⁹

Figure 3: Marginal Increase in Probability of Commenting on EPA Rules, by Ideological Quintile



Note: Plots marginal increase in the probability of comment from the full models in Table SI-5; all effects relative to complete alignment, which indicates the commenter and proposal share the same quintile in the range of possible CFscores; the baseline probability of procedural commenting is 0.7% and 5% for substantive comments.

Figure 3 also suggests support for our second expectation, that procedure and substance should complement one another as oversight strategies. The strongest evidence for this notion is a straightforward

⁸Of course, the relative magnitude of these effects should not be compared since each model contains different baselines.

⁹Specifically, as shown in Table SI-10 we use firm-level lobbying data to calculate the proportion of a firm’s lobbying expenditures in a given year that are allocated toward environmental and energy issues (Kim, 2018). Compared to a firm that allocated none of its lobbying budget to energy and environmental issues, the probability that a firm that allocated all of its budget to those issues is higher for both procedural comments (1%) and substantive comments (6%), suggesting that the bottom line rather than ideology is the driving comments from these actors.

pattern in the commenting behavior. In our data, in only two percent of cases did a legislator submit a procedural comment without also submitting a substantive comment. Indeed, the opening vignette about Rep. Scott illustrates a case where a member submitted both types of comments, as he eventually signed a letter along with 119 of his Democratic colleagues laying out more substantive issues with DOL's proposal (Scott, 2018).

Finally, we expected members with access to knowledge—the chief resource required to participate—would have lower costs of conducting oversight, and therefore, be more likely to do so. While there are numerous ways to operationize legislative capacity, we follow recent work that links capacity to congressional staff (e.g., Montgomery and Nyhan, 2017). Members of Congress rarely do either type of oversight activity themselves. When a member has a staff with experience and know-how, we expect that member to have the capability to submit either a substantive and procedural comment to an agency. The likelihood of doing either is naturally enhanced when the member has the incentive to do so when they are ideologically opposed to the agency's proposal. Put simply, ideologically conflicted members of Congress with more experienced staffs should be more likely to engage in both types of oversight.

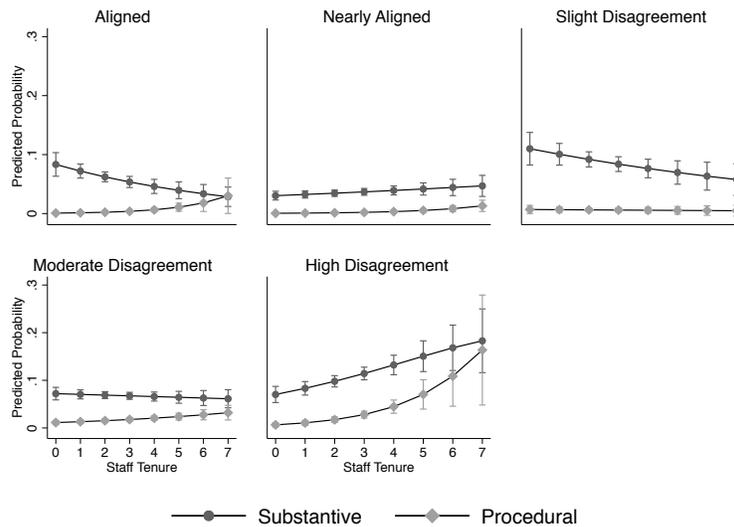
To evaluate this, we collected data on levels of staff expertise for members of Congress.¹⁰ To model the potential tradeoff between the types of oversight, we focus in on members of Congress (excluding firms) and consider the choice that members face with respect to submitting either a procedural comment, a substantive comment, or not submitting a comment at all. Specifically, we rely on a multinomial logistic model where each of these three choices is a potential—and mutually exclusive—outcome.¹¹ To assess the conditional effect of staff capacity on ideology, we interact our measure of ideological distance with *Staff Tenure*, the median years of experience in each member's staff.

Figure 4 shows several important features of this conditional relationship across the spectrum of members' ideological conflict with a rulemaking proposal. First, across the ranges of values the probability of submitting a substantive comment always exceeds the probability of submitting a procedural comment. Second, only at the highest level of ideological conflict are experienced staff associated with an increase in the likelihood of substantive commenting; at all other levels, there is no relationship or experienced staff may actually *discourage* members from engaging in substantive oversight. Third, only at highest two levels

¹⁰See Section E in the SI for details on the staff data.

¹¹Given that members rarely submit a procedural comment on its own (i.e., without a substantive comment to accompany it), we count any instance where a member submits both types of comments as a procedural comment. Including a fourth discrete option of "both" types of comments does not meaningfully change the results (Figure SI-3). Given the computational intensity, these multinomial models exclude rule and congress fixed effects. However including them in a comparable logit specification does not meaningfully affect the results; see Table SI-12.

Figure 4: Effect of Staff Tenure on Marginal Increase in Probability of Commenting, by Ideological Quintile



Note: Plots represent predicted probabilities generated from the multinomial logistic model in Table SI-11. The base category is “no comment.” The x -axis represents the median years of experience on the Hill for a member’s staff; to ease readability, this axis excludes the upper and lower 1% values of *Staff Tenure*.

of ideological conflict does the probability of submitting a procedural comment meaningfully increase in staff tenure.

These results, too, highlight the hierarchical complementarity of procedural oversight. The most experienced staffers promote procedural oversight only when the member is strongly opposed to the agency’s proposal. Even then, it is a strategy that is typically employed in tandem with the more routine substantive oversight.

Discussion

Legislative oversight of the bureaucracy is typically considered in substantive terms, as principals express policy concerns to agencies. This study challenges this understanding by pointing out that, consistent with tactics employed to enact legislation, overseers often engage with bureaucratic actors on procedural grounds after enactment. We find evidence that appeals to procedure are rooted in politicians’ ideological disagreement with agency policy proposals, that they complement substantive recommendations, and that they are conditional on legislative capacity. Although the focus of our study is notice-and-comment rulemaking, *ex post* procedural oversight exists in all aspects of administrative policymaking.

We have also deployed a new technique to locate the status quo and an agency’s policy proposal

in the same dimension as key political actors. This application offers potential inroads into a longstanding problem in the rulemaking literature: locating the ideological content and direction of rules. This limitation has forced scholars to focus on other more readily observed aspects of the rulemaking process, such as the timing of rules. It is straightforward to see how the insight provided by our study (i.e., a measurement of how far a particular rulemaking proposal moves the status quo) has the potential to closely connect empirical rulemaking studies to rigorous theoretical models. We encourage scholars to take up this agenda.

While innovative, there are limitations to our approach. Since we rely on comments made on specific policy proposals, we are not able to study issues that were not taken up (i.e., the location of the status quo for issues on which no proposal was made). These limitations notwithstanding, this study provides important groundwork for understanding the complex nature of legislative oversight of the bureaucracy.

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Biographical Statements: Kenneth Lowande is an Assistant Professor at the University of Michigan, Ann Arbor, MI 48109. Rachel Augustine Potter is an Assistant Professor at the University of Virginia, Charlottesville, VA 22904.