Using Complexity to Secure Agency Autonomy in the Rulemaking Process

Christopher Carrigan  
Stuart Kasdin  
Trachtenberg School of Public Policy and Public Administration  
George Washington University

We analyze the claim made by scholars of the federal rulemaking process that agencies can use complexity in how they present their regulatory proposals to insulate these rules against attack during the regulatory review process. To do so, we study a set of 104 rules submitted for review to the Office of Information and Regulatory Affairs (OIRA), the executive office agency charged with providing presidential oversight of the regulatory process. We show that, in fact, those agencies whose proposed rules have greater levels of detail in relation to the public laws authorizing their promulgation are able to secure substantially quicker reviews, cutting review times by up to one-third on average for each one standard deviation increase in relative rule length. Moreover, we show that while an agency’s resources and technical capacity also shorten OIRA review times, these channels are not able to explain the statistically significant and substantive relationship between the level of elective detail with which agencies write rules and OIRA oversight. Thus, it is not simply that more capable agencies naturally write more detailed regulations and secure quicker approvals because of their capabilities. Rather, these results provide empirical evidence that at least with respect to the rulemaking process, agencies can secure autonomy through their strategic use of complexity to both overcome objections and overwhelm would-be critics.
Recent research on the regulatory process has asserted that by the time agencies submit their rules to the White House’s Office of Information and Regulatory Affairs (OIRA) and the public as part of the notice-and-comment process required by the Administrative Procedure Act (APA), they have largely decided on their preferred course of action (see, e.g., West 2009). Thus, the regulatory review process becomes one in which agencies prepare to defend their preferred action, rather than one by which the agency uses the information it receives to improve the rule. As evidence for these claims, with respect to public participation in notice and comment, evidence has shown that agencies rarely make changes to their proposed rules in light of the public comments received (Golden 1998; Wagner, Barnes, & Peters 2011; West 2004).

One mechanism that agencies can use to defend their preferred approaches is to increase the complexity of their supporting documentation, including the corresponding analysis as well as the level of detail in which they present their rules (Wagner 2009). Such activities can be a mechanism to overcome the possibility that their proposal will be challenged, making it difficult for would be critics to ferret out controversial aspects of the rulemaking (Carrigan & Shapiro 2015). Moreover, increasing the level of detail with which agencies prepare their rules can insulate them from potential challenges by spelling out contingencies and filling in technical details. In doing so, rulemaking agencies are able to establish secure greater autonomy in the rulemaking process, allowing them more opportunity to implement their preferred approaches.

Still, much less systematic evidence exists on whether agency efforts to ratchet up the complexity of the associated documentation actually impacts rulemaking reviews as agencies intend. With respect to Environmental Impact Statements (EISs), some research has suggested that courts are less apt to overturn regulatory decisions in which the associated EIS is lengthy, based on the courts’ misinterpretation that length corresponds to thoroughness (Karkkainen
2002). In this paper, we ask whether such efforts to increase the complexity of the agency’s proposed rules affect the stringency of subsequent review of those rules by the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA). In particular, we study how OIRA responds when agencies amplify the relative detail with which they present their analyses.

To do so, we present a new measure to study the induced complexity of the rule itself. In addition to presenting a word count of the underlying rule, we control for the complexity of the underlying rulemaking task by differencing the associated length of the sections of the statute on which the rule relies for its authority. Thus, we effectively measure the relative complexity of the presentation of the rule above and beyond the complexity of the underlying task at hand.

We find that our measure of induced complexity is negatively associated with the time of OIRA review, suggesting that OIRA responds to complex presentations of the rule by approving the associated rule more quickly. The results are statistically significant and numerically large, reflecting the fact that a one standard deviation increase in the word length of the rule relative to its authorizing public law is associated with review times that are one-third shorter on average.

In our analysis, we control for other potential explanations for the relationship between induced complexity and OIRA review. In particular, we are able to rule out possibilities that build from the notion that agency expertise or agency resources drive the relationship between induced complexity and review. While both have significant independent effects on OIRA, holding these factors constants, complex rule presentations still meet with quicker approvals, ruling out the possibility that relative quality is driving the faster reviews. We further control for rule characteristics, specifically the extent to which the rule is elective relative to mandated, as well as the degree of ideological unity between the agency and the presidential administration in
office. Interestingly, politics does not drive OIRA review in our data, as review lengths are not influenced by the degree of ideological conformity between the agency and the executive office. In sum, our results provide evidence that agencies not only act to fortify their preferred regulatory choices, but these efforts have real effects, even impacting the president’s regulatory gatekeeper.

Complexity as a Mechanism to Promote Regulatory Autonomy

Over a period of several decades, a burgeoning literature in political science has asked who if anyone controls the bureaucracy. An extensive scholarship has studied the means by which Congress controls federal agencies, using agency design and administrative procedures to reduce monitoring costs that support efforts to overcome the principal-agent problem (see, e.g., Epstein & O’Halloran 1994; McCubbins, Noll, & Weingast 1987). Proponents of “congressional dominance” argue that little noticeable evidence of direct congressional oversight does not mean that bureaucrats operate with discretion (Weingast & Moran 1983). In fact, rather than engage in explicit efforts to uncover evidence of decision-making which opposes congressional mandates, rational legislators use less costly “fire-alarm” oversight which relies on rules and procedures that allow interest groups to alert government officials when problems arise (McCubbins, Noll, & Weingast 1987; McCubbins & Schwartz 1984).

Mechanisms for Political Control of the Regulatory Process

One important mechanism for fire-alarm oversight of the regulatory process is the aforementioned APA (McCubbins, Noll, & Weingast 1987, 1989). The APA mandates that agencies give advance notice before adopting new regulations, solicit feedback from interested parties, and provide a clear statement of the link between evidence and decisions. By requiring
the agency to publish a proposed rule, solicit public comments on that rule, and, afterward, consider those comments when finalizing the rule, the notice-and-comment process can be said to help facilitate interest group monitoring of agencies by provide a formalized process through which they can engage in the rulemaking process. The comments themselves can provide a pathway for members of Congress to learn what matters to their constituents as well as ferret out agency regulatory actions that counter statutory mandates.

In contrast to proponents of “congressional dominance,” advocates of “presidential dominance” question what they perceive is an overly focused notion of political influence that does not consider the important role of the executive office (Moe 1987, 1990). Although legislators have the power to approve budgets and confirm agency heads, they typically respond to the proposals and priorities issued by the president, who holds considerable agenda-setting power (Moe & Wilson 1994).

Presidents’ willingness to act unilaterally extends to regulatory agencies as well (Howell & Lewis 2002; Moe & Wilson 1994). With relatively little resistance from Congress, the Office of Management and Budget’s (OMB) role in the regulatory process greatly expanded with President Ronald Reagan’s Executive Order 12291. The order mandated that agencies submit rules associated with major proposals to OMB for review to “provide for presidential oversight of the regulatory process.” All subsequent presidents have retained OMB’s role in reviewing proposed regulations, which has come to be regarded as an important mechanism for presidential control of regulation (Moe & Wilson 1994).

OIRA is the office within OMB that reviews the draft regulations before they may be submitted to the Federal Register. Both Executive Order 12291 as well as President Bill Clinton’s Executive Order 12886 mandated that agencies accompany their submissions with a
regulatory impact assessment including a benefit-cost analysis of the proposal and, whenever legally possible, adopt those regulations for which the societal benefits exceed the costs. OIRA reviews the draft regulations and the regulatory impact statements before they can be sent to the Federal Register. OIRA can request changes in their content, thus offering presidents with a tool for control of the content of agency regulations (Kagan 2001; Moe & Wilson 1994). Regulations are only then presented to the public in the Federal Register, initiating the notice-and-comment process.

*Cultivating Agency Autonomy*

Still, the president and Congress can create oversight institutions, but they may not always perform the role for which they were intended. Some have found that administrative procedures such as cost-benefit analysis and notice-and-comment requirements do limit discretion, but others are struck by the extent to which bureaucrats operate autonomously (Furlong 1997; Potoski & Woods 2001; Wood 1988; Wood & Waterman 1991). For example, while initial research on Federal Trade Commission antitrust enforcement in the 1970s suggests the agency was highly affected by turnover in Congress (Weingast & Moran 1983), subsequent examination of the Commission has pointed to a more limited role for legislative influence (Moe 1987). Analysis of case selection during the same period at the Department of Justice Antitrust Division, another antitrust enforcement agency, reveals that the Division was influenced not by congressional oversight but rather by internal organizational changes (Eisner & Meier 1990). Moreover, evidence from early 1980s budget cuts appeared to have had only minor impacts on enforcement at the Environmental Protection Agency (EPA) (Ringquist 1995).

The effectiveness of oversight institutions may be moderated based on the characteristics of the agencies themselves. Agencies vary in terms of the program content as well as how
assessable they are to political principals. Lewis (2003), for example, has evaluated the link between agency design and program performance, essentially asking whether political appointees make bad bureaucrats, producing bad policy. Similarly, enterprising managers can be the force by which agencies craft their ability to act independently of their political principals (Carpenter 2001).

Congress can create political insulation from the president for an agency, which affects agency responsiveness. For example, the heads of some agencies are insulated from at-will presidential removal. Agencies may be headed by multi-member boards with or without partisan requirements. Other agencies rely on an extensive field structure and are headed by a non-partisan leadership in which there is a norm against political intervention. One example is the U.S. Forest Service, whose structured allowed it to shelter itself from political influence over a long period (Koontz 2007; Sabatier, Loomis, & McCarthy 1995).

**Insulating Rulemaking through Complexity**

In the context of the regulatory process specifically, a recent literature has determined that the mechanisms by which agencies are made accountable to the public and political principals are not necessarily as effective in doing so either. Indeed, studies of notice-and-comment point to this problem. The hope behind notice-and-comment rulemaking was that it would imbue the public comment process with a sense of democratic accountability (Davis 1969). But evaluations of the process have found mixed evidence for the extent to which agencies incorporate public comment into their rules. Some studies have found that they do seem to affect subsequent final rules (Yackee 2005), but others have shown that agencies consider public comments only in limited circumstances and rarely make significant changes to their proposals (Golden 1998; West 2004). And even when they do incorporate comments, agencies appear much more responsive to
business interests than others (Yackee & Yackee 2006). West (2009) argues that this is because agencies, faced with the prospect of defending a policy publicly at the proposed rule stage, settle on a preferred policy before issuing the proposal. The public comment process then becomes largely window dressing to satisfy a legal requirement, rather than a critical input to agency decision-making. This point is reinforced by West and Raso (2012) who emphasize the importance of the agenda setting portion of the rulemaking process.

Yet, the same arguments apply to the documents prepared for OIRA regulatory review as well. Because the regulatory impact analysis (RIA), which is largely composed of the benefit-cost analysis accompanying the rule proposal, is often produced only after a policy decision is made, it serves more to justify the regulatory decision than to inform it (Olson 1984; Wagner 2009). Wendy Wagner notes, “That the RIA offers nothing to policy analysis is, in fact, precisely the point; in other words, the point is to protect the rulemaking, not to open it up to attack” (2009, p. 78). Supporting this view, Shapiro and Morrall (2012) used a dataset of more than 100 regulations to examine the relationship between benefit-cost analyses and their political context. They found that the results of the associated benefit-cost analyses correlated with factors such as the salience of the rule, supporting the argument that RIAs, while justified with technocratic language, largely function as political documents.

One weapon that agencies can use to minimize interest group participation in the rulemaking process is to ratchet up the complexity of the rule or the accompanying analysis (Carrigan & Shapiro 2015). If the agency has a particular preference for how the regulatory program should be carried out, they will have little incentive to write the rule such that it is comprehensible. Alternatively, they may even have reason to make the rule and the accompanying analysis more difficult to insulate themselves from attack. This may manifest itself in attempts by agencies to
either spell out every contingency and technical detail or increase the opacity of the rule and accompanying analysis to overwhelm would be participants, or some combination of the two.

In addition to the interested public, efforts to imbue proposed rulemakings with complexity also serve to make it less likely that courts will overturn agency rules when interest groups sue (Sinden 2004). Judicial review builds from the language in the APA which suggests that courts can set aside regulatory rules that are “arbitrary or capricious” (Schuck & Elliott 1990). In fact, this effect is similar to the experience with Environmental Impact Analyses (EISs), where courts have been reluctant to overturn bureaucratic decisions based on lengthy EISs produced by the associated agencies. The theory is that courts equate the mass of the analysis with its quality, encouraging agencies to produce EISs that are excessively detailed (Culhane 1990; Karkkainen 2002).

Yet, while claims are frequent that agencies attempt to use the technical detail in which they present their rules and supporting analyses to insulate themselves external influence, less empirical evidence exists to support these claims. Moreover, to the extent evidence does exist, it is mainly case studies of particular rules (see, e.g., Wagner 2009). And even this evidence is focused on how detail affects interest group participation in the notice-and-comment process and judicial review after the rule is promulgated. None of this existing evidence demonstrates how complexity in agency proposed rules and their accompanying documents impacts OIRA review specifically.

This research fills these gaps through the study of 104 rules submitted to OIRA over the period from 2007 through 2009. We ask whether the degree of, what we term, elective detail that agencies include with their rules affects OIRA’s efforts to facilitate presidential oversight of rulemaking. In some ways, it would seem that the technical competence and experience at OIRA
in dealing with the volume of rules they consider in their role as the executive’s regulatory gatekeeper would negate agency’s attempts to insulate themselves from oversight using complexity. Because OIRA can come closer to matching the agency’s technical knowledge of the policy issue in question, relative to the courts and public at least, agencies would be less successful in guarding their autonomy by infusing technical detail into their rulemakings. Our research studies how OIRA, in its role as regulatory gatekeeper for the president, responds when faced with agencies that attempt to assert their independence in the way they present their regulatory proposals.

Assessing Elective Detail in Agency Rulemaking

The data used for this project were collected from OIRA’s reginfo.gov website which tracks all executive agency regulations reviewed by OIRA, including when it was received, when the review was completed, and the outcome of that review. We tracked all completed evaluations of “economically significant” proposed rules, focusing on those rules that OIRA determined are likely to “have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities” (OIRA 2015). While these represent a subset of the “significant” rules referenced in Executive Order 12866 which are required to be sent to OIRA for review before publication in the Federal Register, economically significant rules are those that OIRA, and specifically agency desk officers, spend the bulk of their time analyzing (Susan Dudley, pers. comm., 2015). Moreover, we included in our review proposed rules only, representing those which had not yet been submitted for public comment, because OIRA has much more of an opportunity to influence
these rules relative to final rules which are also submitted to OIRA prior to their final publication.

Beginning with the full set of proposed rules submitted to OIRA between the beginning of 2007 through the end of 2009, we were able to also track the effects of a changeover from Republican control of the executive office under President George W. Bush to Democratic control with the inauguration of President Barack Obama at the beginning of 2009. While Executive Order 12866 covers executive department agencies only, some independent agencies – most prominently the Environmental Protection Agency – likewise submit their rules to OIRA. To the extent they did so, independent agency rules were also included in our final dataset.

In order to track each rule back to its authorizing legislation, we relied on the legal authority field populated in OIRA’s database, which is determined by the agency in conjunction with OIRA. Although, in our process, we used OIRA’s database, the information duplicates what is actually included in the authority section of the Federal Register notice of proposed rulemaking that follows the completion of OIRA review. Although all proposed rules were accompanied by this legal authority field, in many cases, it referred not to specific public laws but to sections of the U.S. code, which represents the consolidation of these public laws sorted under various titles. In order to track the rule back to its public law which gave the agency authority to promulgate the associated rule, we analyzed the associated section of the U.S. code which lists the sections of the public law or laws from which the code section was created. The public law sections described in the associated section of the code was then considered the authorizing statute.

In addition to the complication associated with working through the code to identify the public law authorizing the regulation, the agency often referenced multiple sections of the code or sections of public laws as representing the legal authority for the rule. While multiple potential
options exist for managing this issue, perhaps none represents a perfect solution. If one were able to identify the most influential piece of legislation for the rule, that choice would likely represent the best alternative. Without that possibility, we chose to focus on the earliest statute, with the idea being that the associated regulatory program was likely built and continues to stand on the initial legislation referenced by the agency. One alternative to this would be to use the most recent public law instead. While, in our view, an equally defensible choice, one potential operational issue is that, particularly when the agency references the U.S. code as its authorization for the rule, the most recent public law referenced by the code can easily – and often does – follow regulatory review in chronological order.

Absent a mechanism to identify the most important source of legislation for the rule, it is hard to say how our choice to focus on the initial law may affect the results. Certainly it can introduce measurement error which, when the errors are uncorrelated with the true values of the underlying measure, results in attenuation bias. However, much of the effect depends on the extent to which the assumption about the correlation between the errors and the true measure is accurate (Wacholder 1995). In fact, when the true values are negatively correlated with the errors, the coefficient can actually be too large.

As a rudimentary check to see how important the choice of which public law to focus on is for the analysis, we study the relationship between the aspect of these laws that is most fundamental for our study – the word counts – for a subset of regulations for which we have identified the most recent public law and have found that the law preceded OIRA review. We find that the associated words counts for authorizing sections of the first and most recent public laws are highly correlated ($r = 0.8744$), suggesting that our choice to focus on the earliest public law may not have that much of an effect on the analysis.
To prepare our measure of the extent to which agencies introduce complexity into their rulewriting process, we performed word counts of the each rule as well as the sections of the public law authorizing it and differenced the two. We subtracted the word count of the public law sections from the word count for the rules based on the notion that doing so allows us to proxy for the extent to which the associated agency is introducing detail above what may be required to implement the statute. In contrast, simply introducing the word count associated with the rule would not account for the possibility that the rule is more detailed simply because it must incorporate, for example, more provisions in the public law. Thus, although one would not expect a perfect one-to-one correspondence between the length of the provisions of the public law authorizing the rule and the length of the rule itself, the extent to which the rule is relatively voluminous in comparison to other rules controlling for the sections of the public law from which it derives authority corresponds to the amount of elective detail presented in the wording of the rule.

A second important feature of the measure is that it incorporates information on the proposed rule itself and does not include the preamble associated with the Federal Register notice. When a proposed or final rule is published in the Federal Register, it contains two main sections. The first is the preamble, which typically presents a summary of the proposed rules, documents its justification, and lays out the alternative approaches considered for mitigating the public problem offered as justification for the rule (Office of the Federal Register 2011). While in the proposed stage it does not contain responses to the public comments received, the proposed rule preamble is still likely to vary based on the anticipated controversy associated with the proposed rule (Susan Dudley, pers. comm., 2015). Because we are interested in complexity as a strategy that agencies use to establish autonomy, we attempt to control for the controversy
surrounding the rule by focusing on the length of the proposed text of the rule specifically. Still, as one might expect, the length of the preamble and the rule text are fairly highly correlated \((r = 0.64)\), indicating that ratcheting up the detail in which the rule is presented is a response to the potential controversy surrounding it.

[Insert Table 1 about here]

Table 1 presents summary statistics for the word counts for the individual rules and public law provisions associated with those rules as well as our core independent variable which subtracts the two for each rule. We label the latter variable, elective rule detail, to reflect the idea that the measure is intended to capture the relative level of detail with which the agency chooses to present the rule. As the table suggests, while the average rule length is shorter than the associated provisions of the statute on which it relies for authority by close to 10,000 words, there is a great deal of variation as suggested by both the variance and range of the measure. This variance in rule length is further illustrated through Figure 1 which breaks the rules from the dataset into quartiles based on word length. Whereas rules in the first quartile average only 1,400 words, those from the fourth average over 80,000 words. Moreover, rule length is not necessarily a function of statute length. Comparing quartiles three and four, for example, in which rules differ on average by a little less than 70,000 words, the associated statute provisions remain remarkably similar with respect to length. Although no more than simple descriptive evidence, the figure clearly demonstrates the varied practices among agencies, and potentially even within agencies, with respect to the level of detail they instill in their rulemakings.

[Insert Figure 1 about here]
Measuring OIRA Oversight and Its Determinants

In this section, we describe the preparation of and rationale for using OIRA review time as our core dependent variable as well as the control variables used in the analysis. In tandem, our controls span the sources of potential influence over OIRA review times. We incorporate measures of the characteristics of the rule (in addition to its elective detail), the characteristics of the associated agency promulgating the rule, and the characteristics of the political environment in which the rule is written. Of course, these variables are included to control for alternative explanations for any relationship between elective rule detail and OIRA review. However, because these variables also suggest interesting hypothesized relationships independent of their roles as controls, we outline those hypotheses in this section as well.

Using Review Times to Measure OIRA Scrutiny

As suggested, our dependent variable is the length of OIRA review, labeled review time in Table 1. Review time is calculated as the time in days from when OIRA receives the rule to the point in which it completes its review. Both fields are provided in OIRA’s online database. While an alternative measure of OIRA’s treatment of the rule in theory could be the outcome of that review, the vast majority of rules are ultimately approved with change by OIRA. For example, in our sample of 104 rules, although five were withdrawn, zero were rejected outright. OIRA’s leverage is found more in the negotiation of how the rule is altered and updated than in rejecting it completely. The time it spends at OIRA measures the degree of scrutiny that the rule receives, reflecting the degree to which OIRA exercises oversight and authority over the agency. Table 1 indicates that review times averaged 53 days and varied from same day approvals (0 days) to over a year (447 days). While OIRA is bound by Executive Order 12,866 to complete its review within 90 days, this evidence suggests this deadline is sometimes missed.
Measures of Agency Rulemaking Discretion

In measuring the impacts of the rule characteristics on OIRA oversight, we pay particular attention to those characteristics which flow from the sections of the public law which authorized the rule. While some rules are directly mandated by the public laws, others are initiated by the agency itself in response to changes in socioeconomic, environmental, and political conditions or as new information becomes available, sometimes many years after the original statute is passed. In these cases, the agency’s decision to propose a rule is still based upon authority provided in that authorizing legislation, but the rule itself is not specifically mandated by the legislation.

We incorporate measures of agency rulemaking discretion through two means, one narrow and the other broad. First, we use the field in OIRA’s database that indicates whether a deadline was imposed on the agency by which time it must promulgate the final rule. Certainly, those rules with deadlines are mandated rules. Of course, this measure does not capture all rules that are required by the authorizing statute. To augment this measure with one that more fully captures the universe of rules that are mandated by the associated sections of the public law, we compute the time elapsed between when the public law authorizing the rule was initially passed and when it entered into OIRA review. While not perfectly correlated with those actually mandated by their statutes, it is undoubtedly true that the extent to which time elapses between the public law authorizing the regulation and the submission of the rule to OIRA is correlated with the extent to which the rule is discretionary. Those rules further removed from the authorizing public law are likely to be those more apt to have been initiated by the agency itself.

We expect that those rules in which the agency exercises discretion to receive greater scrutiny by OIRA. Given they are not directly mandated through the public law, OIRA is likely to have greater leverage as well as interest as regulatory gatekeeper in exercising its authority
over these types of rules. Thus, using our proxies for discretion, we expect those rules accompanied by deadlines to receive less scrutiny by OIRA, spending less time there. We further expect that the time elapsed from statute to rule submission to be positively related to OIRA review time, again reflecting the degree to which they were initiated at the agency’s discretion. Summary statistics for both measures, labeled deadline and statute-to-rule time respectively, are provided in Table 1.

**Measures of Agency Structural Characteristics**

Potentially, a plethora of characteristics connected to the agencies responsible for the proposed rules might impact OIRA review times. As a result, we focus on those which could be drivers of a spurious relationship between elective rule detail and review times. Based on that criterion, we chose two agency characteristics to include in the analysis (in addition to the political characteristics discussed in the next subsection). The first, labeled agency budget in Table 1, reflects the average size of the budget of the agency which proposed the rule, including both mandatory and discretionary spending in billions over the period of the dataset from 2007 through 2009. This is a measure of agency resources. The second, labeled agency career SES in the table, is the average number of career Senior Executive Service (SES) employees at the agency over the period from 2001 through 2005, as determined using the Office of Personnel Management’s FedScope database.

Created through the Civil Service Reform Act of 1978, the SES are the highest level managers below presidential appointees and, thus, “are the major link between these appointees and the rest of the Federal workforce” (OPM 2014, p. 1). For the analysis, we focused on career SES employees, which are the only employees allowed to fill career reserved positions “to ensure the impartiality … of the Government” (OPM 2014, p. 3) as opposed to non-career SES
positions, which must be approved by the White House before they can be assigned to the agency and serve “at the pleasure of the appointing authority” (OPM 2014, p. 8). As a result, the number of career SES can be seen as a measure of the relative technical and managerial capacity of the agency, where greater numbers suggests the agency is likely capable of producing better regulations. Furthermore, to the extent more career SES are assigned to a particular agency, it provides an indicator of the complexity of the issues facing the agency, reflecting a need for more professional skill.

Controlling for agency resources and capabilities is important because one might expect that agencies that have more funding and skills would receive quicker approvals from OIRA, simply because they write better regulations. However, these are likely the same agencies that, because of the abilities of their employees, would write more detailed rules, better filling in the gaps relative to agencies with less expertise. In that case, the source of any relationship between elective rule detail and length of OIRA review would be the result of the capabilities and resources available to the agency and not necessary because of the agency’s decision to use detail to insulate itself from OIRA oversight. Still, we expect both variables, agency budget and career SES, to have negative relationships with the length of OIRA review, reflecting how resources and expertise should impact the extent to which OIRA scrutinizes the rule. As Table 1 shows, the average agency had 11 career SES employees and $237 billion in budgetary resources for the period of our data.

Measures of Agency Politics

The final broad category of influence over OIRA review emanates from the politics surrounding both the agency and OIRA itself. Positioned within OMB, OIRA operates as part of the Executive Office of the President and so largely exists to execute the president’s political
agenda. Thus, in its capacity in providing presidential regulatory oversight at least, OIRA can be expected to share the political orientation of the president in office.

Yet, the same cannot be said for agencies – even those within the executive branch – which vary substantially with respect to ideological orientation. Researchers have used a variety of mechanisms to measure the ideological differences between agencies. For example, Gilmour and Lewis (2006) classified federal agencies as Republican or Democratic based on campaign speeches by political candidates. Alternatively, Clinton and Lewis (2008) categorized agency ideology based on expert opinion. The idea of each of these approaches is that agencies either have inherent preferences that would inform their management choices or are perceived by legislators and the public to have such affinities even if they do not in reality.

Our measure of agency ideology is computed using actual historical budget data to establish whether the agency’s programs are favored by one party or another. Its numerator is computed as the ratio of the agency’s average discretionary budget (using real dollars) for those years in which Congress is controlled entirely by the Democratic party to the average discretionary budget in years in which Congress is controlled entirely by the Republican party from 1976 to 2008. The denominator represents the same ratio, but for all agencies. The natural logarithm of this ratio of ratios is then computed to make the score symmetrical, as the change in the initial ratio is asymmetrical between 0 and 1 and 1 and greater.

Thus, the measure reflects not the absolute comparison of spending but the relative partisanship preference for a set of programs over the years. As a result, if overall spending levels are higher for periods with a unified Republican Congress than for periods with a unified Democratic Congress, the index is not affected. A high positive score reflects that the agency is
preferred by Democrats, whereas a negative number suggests the opposite. A score of zero indicates that the agency is not favored by Democrats or Republicans, thus it is “neutral.”

Still, it is not the ideology of the agency that matters as much as how that ideology corresponds to that of the president. As OIRA is charged with overseeing the regulatory process for the White House, we expect that its gatekeeping power will depend on the degree with which the agency is ideologically in correspondence with the president. We hypothesize that ideological unity between the agency and the White House can potentially neutralize OIRA’s role in the rulemaking process. When an agency shares a political orientation with the president, we expect OIRA’s capacity for intervention to decline and so review times to also decline.

To test this directly, we interact our agency ideology measure with the party in the White House. When President George W. Bush was in office during 2007 and 2008, Republican agencies’ ideologies are made positive and Democratic agencies are made negative. On the other hand, when President Barack Obama assumed office in the beginning of 2009, those Democratic agencies’ ideologies become positive and Republican agencies change to negative. The result is that the variable, ideological agreement, measures both agreement by positive numbers as well as the intensity of that agreement given how large the index number is. In the context of our hypothesis that agencies more in agreement with the president should receive more deference by OIRA, ideological agreement should be negatively correlated with review times, suggesting faster reviews for more ideologically aligned agencies.

While OIRA review is focused primarily on agencies situated in executive departments, some independent agencies, like the Environmental Protection Agency, are also subjected to such oversight. Given that independent agencies are often thought to be more insulated from the executive office generally, we include a dummy variable which we code as one when a rule
emanates from an independent agency. Summary statistics for our measure of independence, labeled independent agency as well as for our measure of ideological agreement are presented in Table 1.

Testing the Impact of Rule Elective Detail on OIRA Review

Figure 2 shows a bar chart of OIRA review times relative to the residuals from a simple regression of rule word counts on the word counts of the associated sections of the public laws authorizing those rules. Thus, the residuals effectively measure the rule word counts controlling for the associated statute length. The horizontal axis divides rules into those falling below the median in terms of rule word count controlling for statute length, and those falling above the median. As the chart demonstrates, longer rules tend to have shorter review times regardless of whether comparing mean or median OIRA review times. Those rules in which the level of elective detail is higher are the same rules which are apt to receive quicker approvals by OIRA. This relationship suggests that, in fact, the extent to which agencies attempt to insulate themselves from oversight is reasonably effective.

[Insert Figure 2 about here]

The descriptive evidence demonstrating the negative relationship between rule elective detail and the length of OIRA review is further supported in a series of regression, reported in Table 2. The first regression controls for our measures of rule characteristics, statute-to-rule time and independence. We note that while the association in each case is in the anticipated direction, where deadlines shorten review and longer timeframes between the authorizing statute and rule lengthen review, neither is significant at standard levels. Thus, we cannot be sure that the effect of these two variables on OIRA review is anything but zero. Focusing on the core variable of interest, rule elective detail, we find a much different result. Here, the effect is significant at the
1% level and relatively large. While the variable in listed in 10,000 word increments, a one standard deviation change rule elective detail is much larger at close to 80,000 words. Thus, a one standard deviation increase in the length of the rule relative to the statute is associated with review times that average 17.5 days shorter, almost a 33 percent decline relative to the average time for review.

[Insert Table 2 about here]

Regressions two and three in Table 2 further support the conclusions from the simple specification in model one. In model two, the measures of agency resources and expertise are added to the regression. Consistent with our expectations, both are negative and strongly significant at 1%. A one standard deviation increase in agency resources (approximately $383 billion) means review times that are almost 20 days shorter on average, a very sizeable effect. Agency expertise has a similar relationship with respect to its statistical significance, but the actual magnitude is smaller. A one standard deviation change, equivalent to adding 13 career SES employees to an agency results in review times that are close to two days shorter. Thus, while strongly significant, adding SES employees does not appear to have the same impact as agency resource levels.

These variables also slightly weaken the effect of elective rule detail on OIRA review times. To the extent to which agencies with high levels of expertise and resources are naturally likely to write relatively more detailed rules, the direct impact of including these variables in the equation should be to weaken the independent relationship of elective rule detail on OIRA oversight. Still, the degree of attenuation in the regression coefficient is relatively small, diminishing by less than 5.5% (-2.198 to -2.078). Moreover, the effect of elective rule detail remains significant at the 1%
level. The end result is that the path by which agency expertise and resources affects OIRA review through its impact on rule complexity is relatively limited.

Finally, in the third specification, we add measures of politics to the regression, based on the idea that OIRA review times should be impacted by whether the agency’s proposed regulation accords with the policy objectives of the executive office. Interestingly, neither political variable has any independent effect on review. Both the independence of the agency and its ideological agreement with the president are insignificant, and at least in the case of ideological agreement, the sign is opposite of what would be expected. Of course, because it is insignificant, the direction of the association is not meaningful, reflecting that our best guess of the effect is zero. These results are rather interesting, in that they counter a literature that has been critical of OIRA and its role in the regulatory process, based on the grounds that the agency is highly politicized (see, e.g., Shapiro 2005). In fact, some have argued review should actually be moved out of the executive branch for this reason (Niskanen 2003).

Given the minimal effect of the political variables on OIRA review, it is not surprising that our core independent variable of interest, elective rule detail, changes very little in this last specification. While the significance level dips slightly, such that it is now not quite significant at 1% ($p = 0.011$), instead reaching the 5% level, the size of the effect does not change at all. Thus, even controlling for the effects of the agency’s ideological unity with OIRA as well as its independence, elective rule detail still strongly impacts the length of subsequent OIRA review.

Conclusion

This paper has considered the regulatory review process from the perspective of an enduring question of bureaucratic politics, that being how successful government agencies are in securing
their autonomy in response to efforts by their political supervisors to limit their discretion. To do so, we approach the question by considering how autonomy can be secured in the rulemaking process through the level of detail with which agencies present their rule proposals. Agencies can attempt to insulate their rulemaking efforts by ratcheting up the complexity associated with how they support their rules. Such efforts can limit the ability of the public to participate in the notice-and-comment process as well as more strongly position the agency to be able to resist later judicial review. Yet, while some case evidence exists to suggest these efforts do have the intended effects on public participation and judicial review, much less is known about how agencies can use complexity to resist efforts by Congress and the president to limit discretion.

We fill this gap in the literature, finding that the level of detail agencies choose to impart in their proposed rules – measured in terms of the word lengths of proposed rules relative to the public laws authorizing them – significantly affects OIRA review. We show not only that the relationship between elective rule detail and the length of review is statistically significant, but that the magnitude of the effect is large as well, where a one standard deviation increase in detail reduces review times by upwards of one-third. Furthermore, the results remain controlling for other characteristics of the rules, agency, and political environment, most notably the resources and expertise of the agency. Thus, it is not simply that those agencies with more capabilities face weaker OIRA oversight, which explains why their rules are presented with more detail.

These results thus add credence to the view that regulatory agencies can use complexity to freeze would be overseers out of the process. However, the results are particularly important because they show that even among at an institution with top-notch analytical capacity like OIRA, the detail with which an agency drafts its rules can still fortify that agency’s preference for instituting a particular policy approach. Thus, while many have argued that complexity is a
weapon for protecting agency preferences against public participation in rulemaking (Carrigan & Shapiro 2015), this analysis extends the argument to OIRA, the regulatory gatekeeper, as well.

Yet, the results are interesting for what they do not show as well. At least in our sample, politics do not seem to play as much of a role as critics of OIRA would claim, a result that certainly merits further investigation. In addition, as an imperfect proxy of the degree to which agencies choose to infuse their rules with detail, our measure cannot help us determine what portion, if any, of this detail add value to the rule. In considering the extra effort that rulemakers’ put into gilding their rules with enough complexity to negate efforts by OIRA to shape the rule when it counters presidential preferences, it seems important to ask whether the efforts are worth it. While unquestionably a more normative question, one can approach it from the perspective of whether the costs justify the benefits, much like President Clinton’s Executive Order 12866 asks agencies to consider in affirming a role for OIRA in the rulemaking process. Future research might thus consider whether these efforts to neutralize OIRA provide effectively useless details as some have claimed or really do make the rules better. To the extent complexity fills in the rule by accounting for every contingency and potential objection, it seems reasonable to ask whether these resources would be better employed elsewhere.
References


Table 1 – Variable Descriptions and Summary Statistics

<table>
<thead>
<tr>
<th>Variable</th>
<th>Description</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review Time</td>
<td>Time in days from when OIRA received rule to when it completed review.</td>
<td>53.47</td>
<td>57.87</td>
<td>0</td>
<td>447</td>
</tr>
<tr>
<td>Rule Length</td>
<td>Word count of Federal Register notice of proposed rule, including only description of rule itself and not the preamble.</td>
<td>26.393</td>
<td>49.882</td>
<td>126</td>
<td>309,066</td>
</tr>
<tr>
<td>Statute Length</td>
<td>Word count of provisions of public law which provided legal authority for rule. Where legal authority was given as U.S. code, relevant code sections were reviewed to find public law from which code section created. Where multiple public laws were cited in OIRA's database or in U.S. code, first law in chronological order was used for count.</td>
<td>36,099</td>
<td>71,661</td>
<td>37</td>
<td>294,493</td>
</tr>
<tr>
<td>Elective Rule Detail</td>
<td>Difference between rule length and statute length. Reported per every 10,000 words.</td>
<td>-0.97</td>
<td>7.95</td>
<td>-29.31</td>
<td>18.35</td>
</tr>
<tr>
<td>Statute-to-Rule Time</td>
<td>Time elapsed from date when public law described with statute length variable above was passed to date proposed rule received by OIRA. Reported per every 1,461 days which is equivalent to 4 years (including leap years).</td>
<td>6.83</td>
<td>4.17</td>
<td>0.02</td>
<td>13.06</td>
</tr>
<tr>
<td>Deadline</td>
<td>Indicates whether authorizing legislation imposed deadline on final rule according to OIRA's database. If yes, variable receives value of 1. If no, variables receives value of 0.</td>
<td>0.433</td>
<td>0.498</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Agency Budget</td>
<td>Average size of agency budget over period from 2007 through 2009, including mandatory and discretionary spending. Reported in billions of dollars.</td>
<td>237.30</td>
<td>383.33</td>
<td>0.15</td>
<td>897.17</td>
</tr>
<tr>
<td>Agency Career SES</td>
<td>Average number of career Senior Executive Service employees at agency over period from 2001 through 2005 as determined using Office of Personnel Management's FedScope database.</td>
<td>11.07</td>
<td>13.38</td>
<td>0</td>
<td>40.10</td>
</tr>
<tr>
<td>Obama in Office</td>
<td>Coded as 1 during period in which President Barack Obama occupied White House and 0 when President George W. Bush did.</td>
<td>0.481</td>
<td>0.502</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Agency Ideology</td>
<td>Numerator is ratio of agency's average discretionary budget (using real dollars) for those years in which Congress controlled by Democratic party to agency's average discretionary budget in years in which Congress controlled by Republican party from 1976 to 2008. Denominator is same ratio but includes all agencies. Reported as natural logarithm of ratio or ratios.</td>
<td>0.013</td>
<td>0.224</td>
<td>-1.136</td>
<td>0.722</td>
</tr>
<tr>
<td>Ideological Agreement</td>
<td>Computed using agency ideology variable. When President Bush in office, agency ideology score of Republican agencies (those with negative scores on agency ideology) made positive, and agency ideology score of Democratic agencies made negative. When President Obama in office, Republican agencies made negative, and Democratic agencies made positive.</td>
<td>0.022</td>
<td>0.223</td>
<td>-0.856</td>
<td>1.136</td>
</tr>
<tr>
<td>Independent Agency</td>
<td>Coded as 1 when agency proposing rule is independent agency. When agency is located in executive department, coded as 0.</td>
<td>0.212</td>
<td>0.410</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Note: The rules data are primarily derived from OIRA’s reginfo.org website and represent all “economically significant” proposed rules over the period from 2007 through 2009 (n = 104).
Note: All “economically significant” rules over the period 2007 through 2009 as reported in OIRA’s database at reginfo.org were divided into quartile by their word counts (n = 104). The rule bars in blue represent average words counts for each quartile. Each of the associated statute bars in red represents the average word count for the provisions of the public law which provided legal authority for those rules. Where the legal authority was given as sections from the U.S. code, those code sections were reviewed to find the public law from which code section was created. Where multiple public laws were cited in OIRA’s database or in the U.S. code, first law in chronological order was used for count.
Figure 2 – OIRA Review Times and Rule Length Controlling for Statute Length

Note: Residual rule length is defined as the residuals from a regression of rule word counts on word counts for the sections of the public laws authorizing those rules. Thus, the residuals measure relative rule lengths controlling for the length of the provisions of the associated public laws. The residuals were then grouped into two categories: those falling below the median and those falling above. The mean and median OIRA review time was then computed for both groups. The data for the figure include all “economically significant” rules over the period 2007 through 2009 as reported in OIRA’s database at reginfo.org (n = 104).
Table 2 – Regressions of OIRA Review Times on Relative Levels of Agency Elective Rule Detail

<table>
<thead>
<tr>
<th>Variable</th>
<th>Specification 1</th>
<th>Specification 2</th>
<th>Specification 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elective Rule Detail</td>
<td>-2.198*** (0.828)</td>
<td>-2.079*** (0.785)</td>
<td>-2.054** (0.794)</td>
</tr>
<tr>
<td>Statute-to-Rule Time</td>
<td>2.061 (1.486)</td>
<td>1.830 (1.479)</td>
<td>1.612 (1.539)</td>
</tr>
<tr>
<td>Agency Budget</td>
<td>---</td>
<td>-0.051*** (0.016)</td>
<td>-0.051*** (0.017)</td>
</tr>
<tr>
<td>Agency Career SES</td>
<td>---</td>
<td>-1.348*** (0.462)</td>
<td>-1.430*** (0.521)</td>
</tr>
<tr>
<td>Ideological Agreement</td>
<td>---</td>
<td>---</td>
<td>15.970 (24.405)</td>
</tr>
<tr>
<td>Independent Agency</td>
<td>---</td>
<td>---</td>
<td>4.454 (16.604)</td>
</tr>
<tr>
<td>Constant</td>
<td>37.858*** (13.420)</td>
<td>56.988*** (13.862)</td>
<td>57.837*** (14.031)</td>
</tr>
<tr>
<td>Observations</td>
<td>104</td>
<td>104</td>
<td>104</td>
</tr>
<tr>
<td>F-statistic (d₁,d₂)</td>
<td>2.76 (3,100)</td>
<td>4.56 (5,98)</td>
<td>3.27 (7,96)</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.076</td>
<td>0.189</td>
<td>0.193</td>
</tr>
<tr>
<td>Adjusted R-squared</td>
<td>0.049</td>
<td>0.147</td>
<td>0.134</td>
</tr>
</tbody>
</table>

Note: The dependent variable is OIRA review time, measured as the time in days from when OIRA received the rule to when it completed its review. Elective rule detail is reported per every 10,000 words. Statute-to-rule time is reported per every 1,461 days, equivalent to every four years. Agency budget is measured in billions of dollars, and agency career SES is reported per every 10 SES employees. A dash indicates that the variable is not included in the regression specification. Standard errors are in parentheses. Tests of significance are two-tailed tests of difference from zero. Significance levels: *** implies p < 0.01; ** implies p < 0.05; * implies p < 0.10.