

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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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: * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.