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Partisans & Partisan Commissions

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PARTISANS & PARTISAN COMMISSIONS

*Keith S. Brown and Adam Candeub**

By statute, commissioners of both the Republican and Democratic parties serve on partisan independent agencies, such as the Federal Communications Commission ("FCC") or Federal Energy Regulatory Commission ("FERC"), but the majority of commissioners and the commission chairs must belong to the president's party.[1] These partisan requirements have spawned a myriad of constitutional and administrative law debates concerning the constitutionality and/or desirability of requiring the president to appoint agency heads belonging to the opposing party[2] and, more generally, permitting agencies to be independent of direct executive control.[3]

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[1] Neither the United States Constitution nor federal statutes define what an independent agency is. The term instead refers to the varying limits placed on the president's power to appoint and remove agency heads. *See infra* note 20. By most counts, there are six major independent agencies with partisan requirements: the Federal Communications Commission, 47 U.S.C. § 154(b)(5) (2006), the Federal Trade Commission, 15 U.S.C. § 41 (2006), the Securities and Exchange Commission, 15 U.S.C. § 78d(a) (2006), the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b) (2006), the Federal Election Commission, 2 U.S.C. § 437c(a) (2006), and the Nuclear Regulatory Commission, 42 U.S.C. § 5841(a)(1) (2006).

[2] Scholars have examined a variety of mechanisms of control and influence over the administrative state but have concentrated on political and partisan control. *See* Todd T. Kunioka & Gary M. Woller, *Bank Supervision and the Limits of Political Influence over Bureaucracy*, 59 PUB. ADMIN. REV. 303, 303-04 (1999); Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCI. 336, 336 (1995). *Compare* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 780 (1983) (examining congressional control of the FTC), *with* Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197 (1982) (examining the presidential impact on independent agencies), Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L. ECON. & ORG. 269, 271 (2000) (arguing that the Senate and the president influence agency appointments), *and* Steven D. Stehr, *Top Bureaucrats and the Distribution of Influence in Reagan's Executive Branch*, 57 PUB. ADMIN. REV. 75, 76-77 (1997) (presenting survey data that indicate that bureaucrats respond to presidential and congressional, and special interest influence). Economists and public choice theorists have identified numerous ways bureaucrats act to extract rents, such as maximizing their discretionary budgets. *See* William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618-23 (1975)

These debates have existed largely without empirical data showing how or whether party affiliation affects independent agency decisionmaking. Using a vast dataset of every FCC final order over a twenty-eight-year period, this Essay finds that the FCC, the federal independent agency with the greatest output of orders and other administrative promulgations, is not obviously partisan—meaning that party affiliation does not drive voting to the degree one might expect.[4] Most decisions are unanimous. Certain commissioners, however, have a much greater tendency to dissent, and this commissioner-specific tendency, more than party affiliation, drives dissent. In other words, even when two commissioners are in the same party, commissioners vary greatly in their tendency to dissent. If partisanship dominated voting, one would expect lockstep voting. Instead, it appears as if "non-partisan interests" or "idiosyncrasies" drive a commissioner's voting. These interests could range from his or her future career ambitions in industry, a desire to placate a constituency important to a particular congressional ally or sponsor, personal ideological fervor, or even an individual propensity towards contrariness.[5]

The process of selecting commissioners and the administrative structures in which they interact affect partisanship. First, the changing practices the Senate employs in confirming commissioners, such as only considering a nominee if a nominee of the opposite party is also considered at the same time, has increased partisanship. Second, the institutional structure in which commissioners operate—a five or seven person commission—can explain variation in partisanship. Our results supplement recent claims that partisanship increased after the Reagan revolution.[6] Our results show a decrease in partisanship during the early years of Reagan's tenure, but also an in-

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(examining bureaucrats' incentives to maximize their discretionary budgets). Many scholars have examined how opportunism and transaction costs affect regulators' behavior and their relationship to the legislative and executive branches. *See* John D. Huber & Charles R. Shipan, *The Costs of Control: Legislators, Agencies, and Transaction Costs*, 25 LEGIS. STUD. Q. 25, 25-26 (2000); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243-46 (1987); B. Dan Wood & James E. Anderson, *The Politics of U.S. Antitrust Regulation*, 37 AM. J. POL. SCI. 1, 1-2 (1993) (connecting political influences to FTC decisionmaking); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 801-02 (1991) (identifying events such as appointments, resignations, and budget appropriations, and showing a bureaucratic response to them).

[3] *See infra* notes 9-11.

[4] This question has never been examined before. For instance, Ho only examines partisan drivers. Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* (Stanford Law Sch., Working Paper, Feb. 12, 2007), *available at* http://dho.stanford.edu/research/partisan.pdf.

[5] *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 72-89 (1989) (explaining agency capture).

[6] Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 479-91 (2008).

crease during the later 1980s and 1990s.[7] We call for increased scholarly attention to these "micro-institutional features."

These findings bear upon the constitutional theory of separation of powers and administrative law. Independent agencies' constitutional status continues to be controversial,[8] with debates typically pitting the unitarians against the anti-unitarians. The former argue that the president enjoys unitary executive power over the entire bureaucracy and thus challenge both the wisdom and constitutionality of independent agencies.[9] The latter argue that limits on presidential power are legitimate.[10]

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[7] This may be somewhat ironic since the move from seven to five commissioners was a purely partisan political move against a few Democratic commissioners. *See* DENNIS W. MAZZOCCO, NETWORKS OF POWER: CORPORATE TV'S THREAT TO DEMOCRACY 162 (1994) (attributing the decrease in the number of commissioners to "political squabbling between the Reagan administration and Senate").

[8] *See, e.g.,* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 356-57 (2006) ("A vast literature exists debating whether Article II's Vesting Clause requires a 'hierarchical, unified executive department under the direct control of the President,' or whether the Clause permits a looser hierarchy in which some exercises of executive power can be placed beyond the President's direct control." (footnote omitted)); Stephen G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 27-28 (1995) ("It is therefore a bit surprising that the last thirty years in this country have seen the emergence of what may prove to be an enduring (and angry) debate over the proper scope and extent of presidential power. The issue seems to be whether 'Our President' has come to have *too much power* over the last 200 years or perhaps *too little!*" (footnote omitted)); William N. Eskridge, Jr., *America's Statutory "Constitution"*, 41 U.C. DAVIS L. REV. 1, 11 (2007) ("Scholars heatedly disagree as to whether such [independent] agencies and such lawmaking or adjudicatory authority are un-Constitutional . . . .").

[9] *See* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1068 (2007) ("[S]omeone who favors the idea that the Constitution enshrines a unitary executive and who regards conventional delegations as generally constitutional might argue that conventional delegations made to nonexecutive branch entities are unconstitutional."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992) ("The practical consequence [of the modern unitary] theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power." (footnote omitted)); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 567 (1994) ("[W]e think it is highly unlikely that the Framers intended to permit Congress to conjure up an independent administrative branch of government . . . ."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) ("I argue that a statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978 n.44 (1992) ("*Chevron's* democratic theory thesis appears to presuppose a unitary executive, i.e., an interpretation of separation of powers that would place all entities engaged in the execution of the law—including the so-called independent regulatory agencies—under presidential control."); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51-52; Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 246 ("Of course, agency members are subject to a host of influences, including expected future rewards, from sources other than the White House. Nevertheless, despite recurrent suggestions that independent agency members are somehow specially vulnerable to such 'outside' influences, there is no evidence that susceptibility to exogenous pressures or influences is a function of bureaucratic form." (footnote omitted)); Paul R.

Unitarians argue against independent agencies because they see them as highly partisan tools of congressional aggrandizement which sap energy from the executive and diminish democratic accountability.[11] Anti-unitarians tend to see independence as enabling professionalized bureaucratic decisionmaking and/or furthering valuable deliberative democratic goals.[12]

Commissioners' idiosyncratic agenda can drive voting more than partisanship, an important point the current agency independence debate misses. If party-affiliated voting is a proxy for congressional or presidential control, our data suggest that chairs' and commissioners' responsiveness to this control varies significantly.

Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779, 781 ("The critical guaranty of independence . . . is the statutory protection that commissioners enjoy against presidential removal; typically, they can be removed only 'for cause.'").

[10] Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 227 (1998) ("[T]he emergence of the new presidentialism, as a dominant theme in administrative and structural constitutional law, is, at least potentially, a profoundly anti-regulatory phenomenon."); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 835-36 (1996) (arguing that the unitary executive decreases presidential power because it prevents the president from deflecting responsibility); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV 1, 2-4 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 965-66 (2001) ("Although proponents of a 'unitary executive' theory claim that the president's constitutional role as chief executive should give him unqualified executive power, . . . policy considerations raised by this issue leads to a contrary conclusion." (footnote omitted)); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 597 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-81 (1984); Verkuil, *supra* note 9, at 792-94.

[11] Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 318-19 (1993) (contending that members of Congress and independent agencies—which are more beholden to committee and subcommittee chairmen—are both "farther from the median of national opinion than are presidents"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 333-35 (1994) (arguing that the unitary executive approach to *Chevron*, which would entitle the president's interpretation of laws to the greatest deference, is the better interpretation).

[12] *See* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 171 (2006) ("In contrast to pure executive agencies, independent agencies that stand apart from partisan politics and set the ground rules for the political branches' exercise of political power serve as process-reinforcing or pluralism-reinforcing referees rather than reflexive servants of the president's majoritarian will."); Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 179 (1997) (describing the dangers and developments of presidentialism, or the "cult of the Chief Executive"); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994) (arguing that we must accept some congressional efforts at regulating presidential lawmaking); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 49-50 (1994) (arguing that the president should not micro-manage agency policy decisions but rather use a "big picture approach" to influence agency policy more effectively).

Given this insight, the unitarians are probably mistaken in suggesting that independent agencies necessarily result in the opposing party undercutting presidential authority. The anti-unitarians are also probably mistaken when arguing that agency deliberations will necessarily result in deliberative decisionmaking insulated from the political fray.[13] Rather, commissioners respond varyingly to agenda and purposes, suggesting that both presidential and congressional control, to the degree they exist, vary greatly. This control is not a necessary feature of agency independence but a feature of persons and personalities who wield power.

This Essay first explains the logistic model that we use to show how idiosyncratic concerns drive commissioner voting, often to a greater degree than party affiliation. Second, we examine the confirmation and nomination process for commissioners and find that the institutional structure can explain much of the variation in commissioner partisanship. Third, we examine how these results lead to questions about many of the assumptions implicit in the fierce controversies in constitutional and administrative law concerning independent agencies.

I.   THE FCC: AN EMPIRICAL RESEARCH PROGRAM

The FCC produces the greatest number of orders and dissents of all the independent agencies,[14] thus offering an excellent opportunity to examine voting behavior and its motivations. Charged with setting national communications policy,[15] its members receive five-year presidential appointments, subject to Senate confirmation.[16] From its inception in 1934 until 1983, the FCC had seven commissioners, and since 1986 it has had five.[17] By statute, the majority of the commissioners must belong to the party of the president; the remainder must belong to the other major party.[18] The commissioners vote on all major administrative actions, such as reports and orders, notices of proposed rulemakings, notice of inquiries, informational reports, notices

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[13] *See* Calabresi, *supra* note 8, at 83-84 (criticizing independent agencies for "not only a risk of industry or interest group capture" but also for capture by "*geographic* congressional committee interests"); Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021, 1056 (2008) ("Finally, Congress typically requires that agencies be composed of some members of the opposition party, thus increasing the chance that some members will have preferences that vary from the appointing President's presumed preferences." (citing DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 3-4 (2003))).

[14] Ho, *supra* note 4, at 11.

[15] 47 U.S.C. § 155(a) (2006).

[16] 47 U.S.C. § 154(a) (2006).

[17] *Id.*

[18] 47 U.S.C. § 154(b)(5) (2006).

of liability and other enforcement actions, and license transfer approvals, which often relate to media or telecommunications firm mergers.[19]

Agency "independence," a concept without a definitive constitutional or statutory meaning, generally refers to the standards under which an agency head may be removed (or selected).[20] Unlike heads of executive agencies, such as Defense, Health and Human Services, State, Interior, etc., who are "at pleasure" employees who may be removed for any reason at any time and may belong to any political party, independent agency heads may generally only be removed "for cause" or some other standard that Congress sets forth in statute, and independent commissions often have partisan membership requirements.[21] There is no statutory provision for the removal of FCC commissioners.[22] However, the president may remove the chair at will, "demoting" him or her to commissioner, although that has only occurred in recent history when a new president assumes office.[23]

We employ a unique data set comprised of over 8,000 orders and decisions, which includes *every* vote on an FCC final order from the period of 1977-2003.[24] For each vote, we observe how the chair voted, how each commissioner voted, the chair's party affiliation, each commissioner's party affiliation, and whether the issue was one of the highly-disputed cases that

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[19] *See* 47 U.S.C. § 155(a).

[20] There are numerous agencies with varying types of independence. *See* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 274 (1993). The "traditional independent agencies" are governed by bi-partisan commissions; they are typically identified as the "SEC, ICC, FCC, Federal Reserve Board, and NLRB." Miller, *supra* note 9, at 51; *see, e.g.*, 47 U.S.C. § 154(a) (setting forth conditions of FCC independence).

[21] Verkuil, *supra* note 9, at 781 ("The critical guaranty of independence . . . is the statutory protection that commissioners enjoy against presidential removal; typically, they can be removed only 'for cause.'").

[22] *See* Elizabeth A. Snodgrass, Note, *Foreign Affairs in the Twilight Zone: The Foreign Affairs Powers of the Federal Communications Commission*, 83 VA. L. REV. 207, 211 (1997) ("[T]he Communications Act establishes five-year terms for the Commissioners and provides no other provision for presidential removal, a formulation that eliminates the President's discretion to remove officials at will." (footnote omitted)).

[23] 47 U.S.C. § 154(a).

[24] We only included final orders and adjudications susceptible to court appeal and challenge. We did not, therefore, include Notices of Proposed Rulemakings, reports, and other agency documents. While vital to the administrative process, these documents do not constitute determinations of legal rights. FCC orders were identified by searching Westlaw. Search results were compared for certain test years with the Federal Communication Commission Record, the official publication of the FCC, with a discrepancy of roughly 1 to 2 percent. Only final orders voted by the commissioner and subject to judicial appeal were included in the database. Bureau-level orders, which are not subject to appeal, and non-final items, like Notices of Proposed Rulemaking, not subject to appeal, were not included in the database. The search string employed for each year in the study was: (order decision) +255 adopted +4 2003 +10 released & "by the commission" & DA (AFT 01/01/2003 & BEF 04/12/2003) & FCC +2 "03". Slight variations were used in some years to account for changing formats of FCC orders.

involved Regional Bell Operating Companies ("RBOCs").[25] We treat the chair's vote as an independent variable driving the votes of the other com- missioners, which leaves us with a data set of 32,515 commissioner votes, (i.e., the chair votes are treated on the other side of the regression).

The raw or descriptive statistics reveal an interesting story. As the fol- lowing table illustrates, the overwhelming majority of agency decisions are made unanimously. Most of the votes are affirm, whether they are cast by commissioners of the chair's party ("majority affirm") or commissioners of the party different from the chair ("minority affirm").
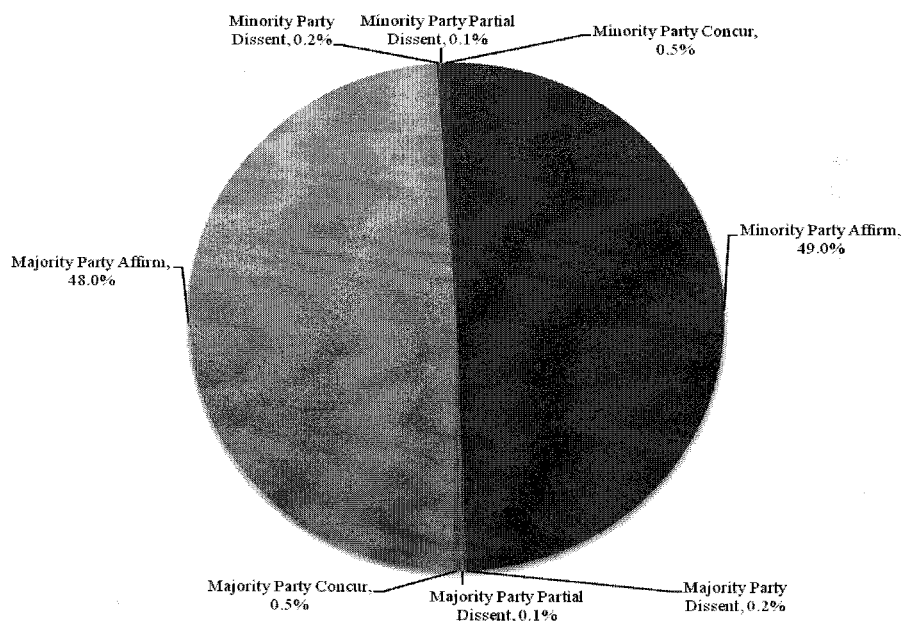
Figure 1. Voting Breakdown

FCC procedure explains why so many decisions are unanimous. The chair controls the agenda by deciding which orders are voted on and setting each meeting's agenda.[26] Chairs will use their power to bring only those orders to vote with which they agree so that control of the agenda works as

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25   We include RBOCs as an independent variable because their issues tended to pit the interests of large telecommunications firms like AT&T and MCI against equally large firms like Verizon and SBC. These issues tended to be heavily lobbied, as evidenced by the leading position of the giant telecommu- nications companies in amounts spent on lobbying and campaign contributions. RBOC decisions have been found to receive different treatment from the FCC. *See* John M. de Figueiredo, *Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation*, 21 J.L. ECON. & ORG. 501, 518 (2005).

26   ERWIN G. KRASNOW ET AL., FCC LOBBYING: A HANDBOOK OF INSIDER TIPS AND PRACTICAL ADVICE 90-91 (2001); 47 C.F.R. § 0.3 (1994).

a sort of veto. Once a chair brings an order to vote, commissioners have five options: affirm, concur, dissent in part, dissent in full, or not partici-pate. These choices inform our statistical methods. We use a technique called multinomial logistical regression to model them.

This statistical technique relates discrete choices (in this case, com-missioners' votes to affirm, concur, dissent in part or dissent in full) to in-dependent variables (in this case, the chair votes and whether he or she be-longed to the same party as the commissioner), revealing whether there is a statistically significant relationship between the independent variable and the commissioner votes choices. Because the chair controls his agenda, his votes are the independent variable that control or determine the commis-sioner's choices.[27] Of course, the chair generally agrees with himself, and, therefore, almost always affirms, concurring, partial dissenting, or dissent-ing only in a tiny handful of cases. Therefore, the important result for our regression can be reduced to the question of how a commissioner votes when (i) the chair affirms and belongs to the same party and (ii) the chair affirms but belongs to a different party.

This relationship is expressed below:
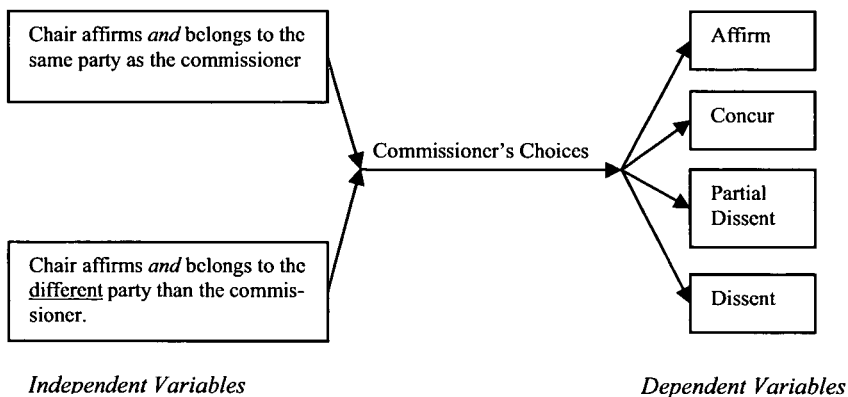
Figure 2.

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27 To be more specific, we classify the commissioners according to whether or not they are in the same party as the chair ("majority party") or in the other party (the "minority party"). The four possible votes (affirm, concur, dissent in part, dissent) create eight possible values for commissioner votes: majority-affirm, majority-concur, majority-dissent in part, majority-dissent in full, majority-affirm, majority-concur, majority-dissent in part, majority-dissent in full. We do not treat the not participating category because it is the smallest and, for statistical reasons, we must exclude one option as discussed below.

In some specifications, we include "dummy" variables for each commissioner as well as for chairs in order to measure the individual effect of each commissioner (or chair) on voting decisions. Dummy variables omit data related to one commissioner in the regressions in order to detect the "individual" effect of that commissioner's votes, creating a metric for determining the "idiosyncratic effects" of a particular commissioner.

II.   RESULTS

We present our results in two steps. First, using multinomial probit logistic regressions, we show evidence of partisanship in FCC voting, revealing that party affiliation appears to be a driving factor in some FCC voting.[28] Second, we use the results from the logistic regressions to infer conditional probabilities.

These estimates show how a commissioner's membership (or not) in the chair's party drives the probability that the commissioner will vote in a particular way. Not surprisingly, when a commissioner belongs to the chair's party, the commissioner is more likely to affirm and less likely to dissent. We call this the "partisan gap" in voting.

Using dummy variables, we also compare the difference between the likelihoods of dissent under individual chairs as well as the likelihoods that individual commissioners will affirm or dissent. We call this the "idiosyncratic gap" and it varies significantly among chairs and among commissioners. Quite surprisingly, when comparing the "partisan gap" to the "idiosyncratic gap" the idiosyncratic difference can dwarf the partisan difference.

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[28]   We readily concede that multinomial logits use the independence of irrelevant alternatives ("IIA") assumptions, but many contend that the IIA assumption is not overly restrictive for most applications. *See* Jay K. Dow & James W. Endersby, *Multinomial Probit and Multinomial Logit: A Comparison of Choice Models for Voting Research*, 23 ELECTORAL STUD. 107, 107-13 (2004). Indeed, some recent research suggests multinomial logits produce better estimations than multinomial probits, which loosen the IIA restriction. *See* Jonathan Kropko, Choosing Between Multinomial Logit and Multinomial Probit Models for Analysis of Unordered Choice Data 1 (Apr. 5, 2008) (unpublished manuscript, available at http://www.allacademic.com//meta/p_mla_apa_research_citation/2/6/5/6/9/pages265696/p265696-1.php). Political scientists and public choice scholars have long used both multinomial logit and probit modeling to examine voting behavior. *See* Dean Lacy & Barry C. Burden, *The Vote-Stealing and Turnout Effects of Ross Perot in the 1992 U.S. Presidential Election*, 43 AM. J. POL. SCI. 233, 233-34 (1999); Normal Schofield et al., *Multiparty Electoral Competition in the Netherlands and Germany: A Model Based on Multinomial Probit*, 97 PUB. CHOICE 257, 270 (1998).

A.   *Evidence of Partisanship*

     The following tables summarize the results showing the significant effects of party affiliation on voting or what this essay terms "partisanship." For simplicity, this table only reflects the relationship between (i) a chair's decision to affirm and whether he is of the same party as the commissioner and (ii) the commissioner's voting choice. We report results without and then with dummy commissioner variables.

Chair's Party is Same or Different from Commissioner's Party/ Chair Affirms		Commissioner Vote			
		Affirm	*Concur*	*Partial Dissent*	*Dissent*
	Same Party Chair Affirm	.82***	0.03	1.70*	−0.24
	Different Party Chair Affirm	0.17	−0.23	2.01**	0.05
Observations	32,515				

Table 1. Determinants of Commissioner Choice; Multinomial Logit (Partial Results);[29] (* significant at 10%; ** significant at 5%; *** significant at 1%)

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[29]   Complete results may be found in the Appendix.

		Commissioner Vote			
		Affirm	*Concur*	*Partial Dissent*	*Dissent*
Chair's Party is Same or Different from Commissioner's Party/ Chair Affirms	*Same Party Chair Affirm*	.65***	−0.05	1.45	−0.34
	Different Party Chair Affirm	−0.01	−0.35	1.77*	−0.07
Observations	32,515				

Table 2. Determinants of Commissioner Choice. Multinomial Logit with Chair Dummies (Partial Results)[30] (*** significant at 10%; ** significant at 5%)

These results demonstrate the partisan component to FCC voting. In both specifications, if the chair affirms and the chair is of the same party as the commissioner, there is a statistically significant likelihood that the commissioner will affirm. Conversely, if the chair affirms and the commissioner is of a different party, there is a statistically significant and consistent, but weaker, likelihood that the commissioner will partially dissent.

B.   *Partisan vs. Non-Partisan Drivers*

The preceding results establish a statistically significant relationship between the chair's party and commissioners' voting choices—consistent with the theory that party affiliation causes or drives commissioner voting. These results do not give a sense of the magnitude of these variables' effects. Logistic regressions, however, permit calculations of inferential probabilities—percentages that show the likelihood of a commissioner's vote choice, given certain variables. Using inferential probabilities and dummy variables, we can calculate the degree to which the likelihoods of commissioner vote choices (affirm, partial dissent, concur, dissent) change due to different chairs ("chair effects" or "chair gap"). We can also calculate how the likelihoods of commissioner vote choices change due to the commissioner being of the same or different party as the chair ("partisan gap" or "party affiliation effects"). By comparing these results we can see whether different chairs or different party affiliation has a greater effect on commissioner voting. We find the likelihood to affirm and dissent changes much more in relationship to the chair than with party affiliation, suggesting that varying chair preferences for unanimity predominate over partisan concerns.

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30   Complete results may be found in the Appendix.

Similarly, we can calculate how the likelihoods of commissioner votes choices (affirm, partial dissent, concur, dissent) change due to different commissioners ("commissioner effects" or "commissioner gap"); we also can calculate how likelihoods of commissioner vote choices change due to the commissioner being of the same or different party as the chair ("partisan effects" or "party affiliation effects"). We can also compare these results to see whether different commissioners or different party affiliation has a greater effect on the likelihood to affirm or dissent. We find the likelihood to affirm and dissent changes much more with commissioner than with party affiliation, suggesting that varying commissioner preferences to affirm or dissent predominate over party affiliation.

1.   Chair Effects

This table compares the likelihoods of the various commissioner vote choices (in non-RBOC cases) when the commissioner is of the same party as the chair, the party as the chair, and under different commissioners, here Reed Hundt and Michael Powell. Hundt is a member of the Democratic Party and served as FCC Chair from 1993-1997. Powell is a member of the Republican Party who served as FCC Chair from 2001-2005.

		Chair Actions		
		Chair Affirms/Same Party as Commissioner	Chair Affirms/Different Party as Commissioner	Partisan Gap
		Hundt (D)		
	Affirm	96.80%	94.40%	2.40%
	Dissent	0.20%	0.50%	−0.3%
Commissioner Votes		**Powell (R)**		
	Affirm	95.80%	91.80%	4.00%
	Dissent	1.30%	3.30%	−2%

Table 3. Inference from Multinomial Logit Results. No RBOC, Chair Dummies (Partial Results)[31]

When Hundt voted to affirm, a Democratic commissioner had an estimated probability of 96.8% of voting to affirm and a 0.20% chance of voting to dissent. A Republican commissioner had a 94.4% chance of voting to affirm and a 0.5% chance of dissenting. We calculate a "partisan effect," which is the difference between the likelihood that a Republican or Demo-

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[31] Complete results may be found in the Appendix.

crat would vote a particular vote choice under Chairman Hundt. This "partisan effect" is 96.8% − 94.4% = 2.4% in voting to affirm and 0.5% − 0.2% = 0.3% in voting to dissent. In other words, Democrats were more likely to affirm under Hundt, and Republicans more likely to dissent. This is not surprising.

Under Powell, a Republican commissioner had an estimated probability of 95.8% of voting to affirm and a 1.3% chance of voting to dissent when Powell voted to affirm. A Democratic commissioner had a 91.8% chance of voting to affirm and a 3.3% chance of voting to dissent when Powell voted to affirm. Under Powell, the partisan effect is 95.8% − 91.8% = 4.0% in voting to affirm when the chair affirms. The partisan effect in dissenting when the chair affirms is 3.3% − 1.3% = 2.0%. Again, Republicans are more likely to agree with a chair of their own party, and Democrats more likely to dissent.

In addition to examining the differences in commissioners' likelihood to affirm and dissent attributable to party affiliation, we can use the inferential probabilities to examine differences attributable to serving under different chairs (the "chair gap"). In certain cases, the chair gap between Powell and Hundt is larger than the partisan effect during their tenures.

Commissioners from the same party as the chairman were more likely to dissent where the chairman voted to affirm during Powell's tenure as compared to Hundt's tenure. We therefore calculate a "chairmen gap," which is the difference in vote probabilities across chairmen, holding constant the commissioner's own majority or minority party status and the chairman's vote. Across Hundt and Powell, the chair gap is 1.3% − 0.2% = 1.1% for majority-party commissioners voting to dissent when the chair affirms. The chairmen gap is 3.3% − 0.5% = 2.8% for minority party commissioners voting to dissent when the chair affirms. Concerning the probability of commissioners voting to dissent when the chairman affirms, the chair gap between Powell and Hundt is larger than the partisan gap within both Hundt and Powell.

As discussed below, this finding suggests that chairs push highly varying partisan agenda—some inspire very partisan voting; others do not. This effect is purely "personal" and has nothing to do with the structure of independent agencies per se. People appear more important than agency structure.

2. Commissioner Effects

As shown above, individual chairs can strongly drive results, even in the presence of statistically significant partisan drivers. In addition, individ-

ual commissioners could drive results even in the presence of partisan voting. To examine this possibility, we employ four commissioners:[32]

(1) Andrew C. Barrett, a Republican, was appointed in 1989 by the first President Bush and served until 1996.[33] A former commissioner on the Illinois State Commerce Commission, Barrett entered public relations after his term at the FCC.[34]

(2) Ervin Duggan, prior to service at the FCC, was a *Washington Post* reporter and White House aide. Appointed by the first President Bush, Duggan was a Democrat. After he completed his term at the FCC in 1994, he served as president and CEO of the Public Broadcasting Service, a post he held until 1999.[35] Duggan has largely disappeared from the public eye, but occasionally reviews books for Amazon.com.

(3) Prior to his appointment by President Clinton in 1997, Commissioner Harold W. Furchtgott-Roth, a Republican, was the Chief Economist for the U.S. House Committee on Commerce. He worked for Economists Incorporated between 1988 and 1995 and previously had served as a research analyst for the Center for Naval Analyses.[36] He has written columns for the *New York Sun* and is a partner in a small economic consulting firm with his wife Diane Furchtgott-Roth, a noted think tank economist and policy wonk.[37]

(4) Benjamin Lawson Hooks was nominated as a member to the FCC by President Richard M. Nixon in 1972, becoming the first African-American appointed to the Commission.[38] He served as a commissioner until July 1977 and then became NAACP executive director. Hooks is currently serving as a distinguished adjunct professor in the History and Political Science departments at the University of Memphis.[39]

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[32] We chose these commissioners because they all served both under chairs who were and chairs who were not members of their party and, therefore, provide real data (as opposed to computer generated counterfactuals) for comparing "commissioner effects" to "partisan effects."

[33] *See* Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 149 (1993); NNDB.com, Andrew C. Barrett, http://www.nndb.com/people/090/000169580 (last visited July 20, 2008) [hereinafter NNDB.com: Barrett].

[34] *See* NNDB.com: Barrett, *supra* note 33.

[35] *See* CharlieRose.com, Ervin Duggan, http://www.charlierose.com/guests/ervin-duggan (last visited July 20, 2008).

[36] Federal Communications Commission, Former FCC Commissioner Harold Furchtgott-Roth: Biography, http://www.fcc.gov/commissioners/previous/furchtgott-roth/biography.html (last visited Jan. 6, 2010).

[37] Furchgott-Roth Economic Enterprises, About Us, http://www.furchtgott-roth.com/aboutus.php (last visited Jan. 6, 2010); The New York Sun, Harold Furchtgott-Roth—Archive, http://www.nysun.com/authors/Harold+Furchtgott-Roth (last visited Jan. 22, 2010).

[38] The Museum of Broadcast Communications, Benjamin Lawson Hooks, http://www.museum.tv/eotvsection.php?entrycode=hooksbenjam (last visited Jan. 30, 2010).

[39] University of Memphis: University News, Library Displays Feature Life and Career of Dr. Benjamin Hooks, http://www.memphis.edu/newsarchive/dec07/hooks.php (last visited Jan. 22, 2010).

To compare the effects on voting attributable to partisanship with those attributable to individual commissioners, we examine the partisan gap and the commissioner gap for voting to affirm and dissent. All four of the commissioners we examine served under both Democratic and Republican chairs. Observing their difference in likelihood to affirm and dissent under a chair of the same party and of a different party gives us each commissioner's "partisan gap." Observing the differences between commissioners in the likelihood to affirm or dissent we can determine their idiosyncratic differences in affirming and dissenting or their "commissioner gap."

		Chair Action		
		Chair Affirms/ Same Party as Commissioner	Chair Affirms/ Different Party as Commissioner	Partisan Gap
Commissioner Votes "Affirm"	All commissioners	95.80%	92.10%	3.70%
	Barrett (R)	97.50%	96.80%	0.70%
	Duggan (D)	97.60%	97.00%	0.60%
	Furchtgott-Roth (R)	88.40%	82.70%	5.70%
	Hooks (D)	79.00%	73.20%	5.80%

Table 4. Inference from Multinomial Logit Results. No Chair and no Commissioner Dummies, Chair Dummies (No RBOCs, Partial Results)[40]

As Table 4 shows, commissioners have wildly divergent tendencies to affirm and dissent. Barrett and Duggan had the highest relative likelihood to affirm, while Furchtgott-Roth and Hooks had the lowest. They also have divergent partisan gaps, as the final column reveals. Moreover, the idiosyncratic gap can be large. The difference between the likelihood that Furchtgott-Roth and Hooks would affirm when the chair votes to affirm is 82.7% − 73.2% = 9.5%. This is approximately 2.5 times larger than the partisan gap of 3.7% for *all* commissioners. The gap between Duggan and Hooks on the probability of affirming when the chair affirms is 97.0% − 73.2% = 23.8%. This is approximately 6 times larger than the partisan gap of 3.7%. Simply put, idiosyncratic commissioner effects can dwarf the effects of party affiliation, which suggests that commissioners' own ambitions, desires to placate particular constituencies, or peculiar political loyalties play a dominating role in voting decisions.

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[40] Complete results may be found in the Appendix.

III. PARTISANSHIP OVER TIME

    Given that partisanship is so variable, it is possible to identify those factors associated with increased or decreased partisanship. Consider the graph below showing changes in likelihood to dissent and partial dissent over time.

**Dissents and Partial Dissents at the FCC
1976-2003**
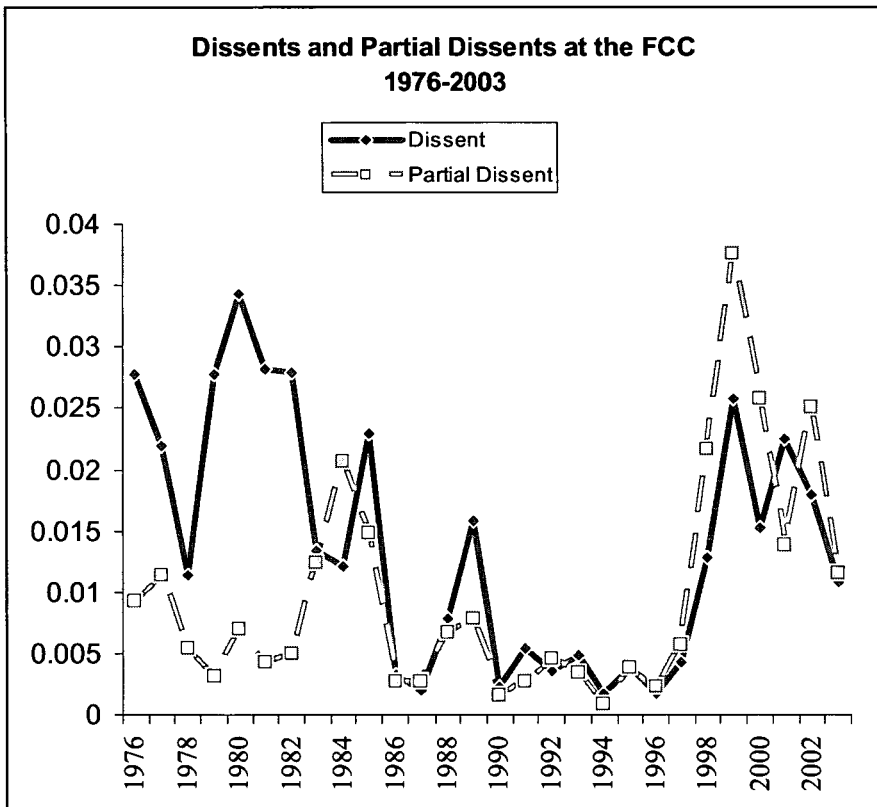
Figure 2. Likelihood to Dissent and Partial Dissent Over Time. The *y*-axis represents the percentages of all orders; the *x*-axis shows the years.

    The graph above simply shows raw statistics on rates of dissent and partial dissent. There are three distinct periods of voting in our data: 1976-1985, 1986-1997, and 1997-2003. We can reasonably ignore the 1984-85 and the 1997-98 periods as anomalous because the 1984 Modified Final Judgment that broke up the century-old AT&T monopoly[41] and the 1996

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[41]   United States v. AT&T, 552 F. Supp. 131, 226-34 (D.D.C. 1982).

Telecommunications Act[42] were the most controversial and important events in United States telecommunications history to date. Even with these anomalies, these identifiable three periods become even more pronounced.

The three periods correspond to dramatic changes in FCC institutional structure and commissioner selection processes. As mentioned above, in 1984 the Commission moved from a seven-member to a five-member body.[43] A larger Commission makes dissenting in groups more likely because coalitions are easier to build.

More instructive, however, is understanding why dissents increased so dramatically after 1997. No doubt the highly polarizing Telecommunications Act of 1996 had something to do with this change, but we posit something more subtle. Starting in 1997, FCC commissioners were routinely chosen by a highly partisan process. In the nomination and confirmation process, the president and Senate leadership stopped choosing individuals who were acceptable to both parties. Rather, the Democratic leadership chose its seats and the Republican chose theirs.[44] A Republican commis-

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[42] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[43] Act of Sept. 8, 1982, Pub. L. No. 97-253, §501(b)(1), 96 Stat. 763.

[44] There appears to be a period, starting in 1997, in which "package deals" became the norm. Paul Kane, *Deal at Hand on Nominees*, ROLL CALL, June 20, 2002; *Adelstein Confirmed*, ELECTRONIC MEDIA, Nov. 18, 2002, at 1 ("Jonathan Adelstein's long-pending nomination for a Democratic seat on the Federal Communications Commission received Senate confirmation late Thursday as part of a package deal that included dozens of nominees for federal appointments."); *Daschle Pushes for His Adviser to Be Chosen for Vacant FCC Seat*, TEL. REP., Nov. 15, 2001 ("One observer, however, noted that unlike previous years, when 'package deals' were worked out between the Senate and White House on FCC nominees, Mr. Adelstein would have to go through the confirmation process alone."); Doug Halonen, *FCC's Ness, Furchtgott-Roth to Exit*, ELECTRONIC MEDIA, Feb. 5, 2001, at 2 ("Sources said the FCC slots will be filled as part of a package deal, with Democrats having their say on candidates for Democratic openings. Some sources speculated that the package could be announced within the next couple of months."); Doug Halonen, *Ness Closer to Confirmation; FCC Commissioner's Campaign Nears End*, ELECTRONIC MEDIA, Mar. 27, 2000, at 4 ("Veteran lobbyists also said Ms. Ness's best hope for confirmation now, assuming she wins committee confirmation, would be to get 'paired' with a nominee who has strong GOP support for an important post elsewhere in the government and then be approved by the full Senate as part of a bipartisan package deal."); Doug Halonen, *The Hundt Resignation: Succession Race Already Under Way*, ELECTRONIC MEDIA, June 2, 1997, at 47 ("Sources said the White House, however, will insist that its candidate to succeed Mr. Hundt be part of a package . . . ."); *Furchtgott-Roth Said to Lead Candidates for FCC Post*, TEL. REP., Feb. 10, 1997 ("For months congressional sources have maintained that since two Commission seats are open—one Republican and one Democrat—any potential nominee likely would be part of a "package deal" with the White House."); *Barrett To Leave FCC, Pressler Asks Him To Stay*, TELEVISION DIG., Mar. 18, 1996, at 1 ("Sources said [the] Administration earlier this year tried to work [a] package deal with Senate Republican leadership. Republicans would select Barrett or any other nominee of their choice in return for promise to allow smooth confirmation of Democratic candidate, which wouldn't be Quello. Agreement couldn't be worked out, sources said, in part because Quello has bipartisan support in both houses of Congress."). Interestingly, at the very end of our dataset, the second Bush presidency seems to be changing that norm. Norman Ornstein & Nicole Duran, *The Games Bush Plays with Good Nominees Are Counterproductive*, ROLL CALL, July 14, 2004 ("The president has the authority to make all such nominations, but

sioner could only be confirmed if a Democratic commissioner was as well. (Re-nominations were routinely held up to allow this type of horse trading to occur.) Conceivably, this produced more partisan individuals—and led to more dissent.[45]

Inferential statistics support this theory. The following table reports the conditional probabilities of different commissioner vote choices, based on a multinomial logit choice model that uses a dummy variable that distinguishes between the pre-1997 and the post-1997 period.

		Chair Actions		
		Chair Affirms/Same Party as Commissioner	Chair Affirms/Different Party as Commissioner	Partisan Gap
		Pre-1997 RBOC		
	Affirm	94.60%	90.60%	4.00%
	Dissent	0.80%	1.90%	1.10%
Commissioner Votes		**Post-1997 RBOC**		
	Affirm	93.00%	85.70%	7.30%
	Dissent	1.60%	3.90%	2.30%

Table 5. Inference from Multinomial Logit Results. No Chair and no Commission Dummies (RBOCs, Partial Results)[46]

As is clear from the last column, the partisan gap for both affirm and dissent is significantly greater in the post-1997 period. In other words, if a commissioner belongs to a different party from the chair, he or she is much less likely to affirm and more likely to dissent in the post-1997 period than in the pre-1997 period.

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longstanding tradition has given the basic responsibility for nominating candidates for seats reserved for the party not in the White House to that party's Senate leader. Thus, when Bill Clinton was president, Republican Leader Lott was the point man. The nominations did not simply reflect his personal preferences; he would listen to committee leaders, party officials, interest groups and others before making his preferences known.").

[45] These results are consistent with, and to a degree, conflict with recent findings. See Devins & Lewis, *supra* note 6, at 481-86. Devins & Lewis find increasing party polarization over the 1990s. *Id.* at 498. They see it as a product of batching and a legacy of the presidency of Ronald Reagan. *Id.* Our data support the first claim, but not the second, as Reagan's move to reduce the size of the FCC, a change motivated by partisanship, ironically led to a period of less partisanship. See MAZZOCCO, *supra* note 7, at 162 (attributing the decrease in the number of commissioners to "political squabbling between the Reagan administration and the Senate").

[46] This table draws from Tables 5 and 7 in the Appendix.

Table 6 shows the difference in conditional probabilities in affirming between the seven-member (pre-1983) and five-member (post-1983) Commission.

		Chair Actions		
		Chair Affirms/Same Party as Commissioner	Chair Affirms/Different Party as Commissioner	Partisan Gap
		5 commissioners		
Commissioner Votes	Affirm	92.30%	85.70%	6.60%
	Dissent	1.20%	2.90%	1.70%
		7 commissioners		
	Affirm	82.40%	71.20%	11.20%
	Dissent	2.30%	5.20%	2.90%

Table 6. Inference from Multinomial Logit Results. No Chair and no Commissioner Dummies (RBOCs)

Again, the partisan gaps for seven commissioners for both affirm and dissent are greater in the larger commissions. If administrative dissents/concurrences serve a signaling function, the significance of size can be explained in terms of the dynamics of coalition-building. A larger Commission allows the alliances to send more powerful signals. Also, in an atmosphere in which coalition-forming is prized and commissioners hesitate making a lone stand, a larger Commission makes dissenting in numbers not only more possible but more desirable. In this regard, our results are similar to research showing that larger juries have a greater tendency to hang.[47]

IV. OUR FINDINGS AND CONSTITUTIONAL AND ADMINISTRATIVE THEORY

Legal scholars have spilled much ink on the questions of whether and how the president controls independent agencies. Some argue that a unitary executive is required to place the bureaucracy under the president's direct command and control. By granting "the executive power" exclusively to the president, the Constitution forecloses Congress from creating "independent" executive entities.[48] Others argue that there are functions that Congress may legitimately vest in an entity not directly answerable to the presi-

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[47] Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451, 459 (1997).

[48] Calabresi & Prakash, *supra* note 9, at 581-82.

dent, even though the Constitution has some executive functions that Congress may not limit, like defense and foreign affairs.[49] For instance, Professors Larry Lessig and Cass Sunstein point to the Opinions Clause,[50] which empowers the president to require written reports from the heads of "departments," as well as the Appointments Clause,[51] which enables Congress to vest heads of department with authority to appoint inferior officers.[52] In light of these limitations, they argue that the Vesting Clause does not cloak the president with an inherent power to control administration completely.[53] Similarly, Professor Robert Percival looks to the Necessary and Proper Clause[54] which provides Congress with the authority to enact laws "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[55] He interprets this clause as a power grant to Congress to specify how administrative authority is exercised.[56]

Regardless of how one parses the constitutional text, divines the original understanding, or slices and dices the three arms of government, the entire debate inevitably involves empirical claims. Anti-unitarian advocates, those who interpret the Constitution as permitting independent agencies, generally find independent agencies as having positive value in governance;[57] unitarians, those who interpret the Constitution as forbidding such agencies, generally view them less positively.[58] The following briefly lists four important empirical claims found most prominently in (or implicit in) the scholarly literature about independent agencies and presidential and congressional control:

(1) The justification for independent agencies—that they are free from political pressure so as to follow "professional" or "objective ends" in a focused manner—has been derided as wishful thinking.[59]

(2) Independent agencies reduce executive "energy" because they "can pose a particularly stark challenge to the aspiration of presidents to control administration."[60]

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[49]   Lessig & Sunstein, *supra* note 10, at 32-36.

[50]   U.S. CONST. art. II, § 2, cl. 1.

[51]   *Id.* art. II, § 2, cl. 2.

[52]   Lessig & Sunstein, *supra* note 10, at 32-36.

[53]   *Id.*

[54]   U.S. CONST. art. I, § 8, cl. 18.

[55]   *Id.*

[56]   Percival, *supra* note 10, at 968.

[57]   Lessig & Sunstein, *supra* note 10, at 106-08.

[58]   Calabresi & Prakash, *supra* note 9, at 581-85.

[59]   Calabresi, *supra* note 8, at 83-84 ("[T]here are no 'independent' government actors in Washington, D.C. There are only actors influenced by [politics] . . . ." (footnote omitted)); Miller, *supra* note 9, at 79-83.

(3) Independent agencies are particularly egregious in reducing accountability because they magnify the interests of Congress above those of the president in violation of constitutional structure. A "unitary executive was said to be necessary to enable the president to defend himself from constitutional encroachments on his powers by the legislature."[61] This view is shared by Antonin Scalia.[62] Indeed, many see congressional hearings as a form of congressional control.[63] Even anti-unitarians argue that "[agency] independence can be understood as a form of [congressional] aggrandizement."[64] Therefore, congressional concerns, reflecting localized and regional agendas, dominate independent agencies.[65]

(4) Independent agencies decrease "accountability," taking decision-making from the executive, who is accountable for enforcing the law. Both unitarians and anti-unitarians share this view.[66]

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[60] Kagan, *supra* note 9, at 2274.

[61] Calabresi, *supra* note 8, at 37.

[62] Antonin Scalia, *Historical Anomalies in Administrative Law*, *in* YEARBOOK 1985, at 103, 110.

[63] Calabresi, *supra* note 8, at 52 ("Between the formal and the informal aspects of the oversight process alone, I think it is fair to say that the congressional committee structure plays a very significant role in affecting how any given cabinet department or agency will use its law enforcement discretion. . . . [I]t raises the likelihood that those other two pretenders to the law execution function will carry out their duties with state and local political preferences as their main concern, when the true claimant to the executive throne would not do so. Put another way, one might fairly suspect that the paradigm case of congressionally driven law execution would look something like Senator Sam Nunn setting national defense policy on gays in the military with an eye to the social policy preferences of his State of Georgia electoral base."). Indeed, some have claimed that congressional committees dominate the functioning of the FCC and point to particular anecdotal instances to buttress the claims.

> "Congress is quite jealous of its hegemony over the independent agencies, and can be expected to react strongly to any executive poaching." . . . Congress's view of its prerogatives is usually not completely lost on agency commissioners. Thus, it is not surprising that when Deborah Tate recently appeared before the Senate Committee on Commerce, Science and Transportation for her confirmation hearing as an FCC Commissioner and pledged 'to work closely with Congress[,]' [s]he said nothing about working closely with the President.

Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 449 (2006) (quoting Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 350 (1991); *Nominations of Deborah Taylor Tate and Michael J. Copps to be Commissioners of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. (2005) (statement of Deborah Tate, Nominee, FCC)) (footnotes omitted). One can, however, quite easily find instances of FCC chairs thumbing their noses at Congress. For instance, Chairman Kevin Martin has pointedly and conspicuously ignored congressional calls to halt his media ownership deregulation plan. Brooks Boliek, *Lawmakers Push Delay on Ownership Vote*, HOLLYWOOD REP., Nov. 9, 2007.

[64] Lessig & Sunstein, *supra* note 10, at 115.

[65] Easterbrook, *supra* note 11, at 318-19 (contending that members of Congress and independent agencies—which are more beholden to committee and subcommittee chairmen—are both "farther from the median of national opinion than are presidents").

[66] Calabresi & Prakash, *supra* note 9, at 546; Kagan, *supra* note 9, at 2274, 2383-84 (arguing that an increased presidential role in regulation "both satisfies legal requirements and promotes the values of administrative accountability and effectiveness").

We discuss these claims in order and how our findings support or question them.

A.   *Claim: Independent Agencies Are (or Are Not) Free from Political Pressure Allowing them to Follow "Professional" or "Objective" Goals*

Our data do not address this issue head-on. Indeed, such a question defies empirical inquiry simply because of the difficulty of coding for professional or objective goals: how does one determine objectively whether a given FCC order professionally advances the objective public good or reflects a crass political accommodation? From a certain perspective, our data are consistent with the professional vision of the bureaucracy. After all, most decisions are by consensus, and dissent is not party-driven. Such a world is consistent with one guided by clear professional goals—and differing views based upon honest disagreement, not partisan pressure.

Yet, claims about politicization of independent agencies need to be clarified. The scholarly literature underappreciates that independent agencies need *not* necessarily be independent. If a president appointed a chair and at least two commissioners beholden to him, a very un-independent chair could ram through anything the president wanted on a 3-2 basis. Strong presidential control would result in highly partisan commissions.[67] While the president cannot fire a commissioner, he can remove him as chair, which is a significant sanction.

Independence is a choice; depending on one's view of human motivation, either the chair makes this choice or those appointing the chair do. Thus, our data show that independence and the degree to which that independence functions as proxy for "professionalism" (and party affiliated voting and the degree to which partisanship functions as a proxy for congressional or presidential control) do not emerge necessarily from agency structure. At most, agency structure is a necessary, but not sufficient, cause for independence.

Beyond that, our results question an assumption concerning the relationship between independence and partisanship. Implicit in the argument that partisan agencies promote independence is the assumption that commissioners from different parties would allow for differing perspectives to inform policy. The right "professional" answer would emerge from an ideological compromise resulting from the commission's partisan composition—the shared area in a Venn diagram of a Democratic circle overlapping a Republican circle.

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[67]   We agree with those who claim that increasing partisanship increased presidential control. *See* Devins & Lewis, *supra* note 6, at 469-71.

Our results do not support such a vision of independent agencies. When there is dissent from the consensus, the dissent does not seem particularly related to party. Rather, commissioners of either party seem to dissent for reasons other than party affiliation. Independence is a quality that does not appear particularly partisan.

B.   *Claim: Independent Agencies Reduce Executive "Energy" Because they Can Pose a Particularly Stark Challenge to the Aspiration of Presidents to Control Administration*

It is not clear why independent agencies sap presidential power. As mentioned above, the chair does serve as chair at the president's pleasure, and the president does nominate all commissioners. After all, if the president can appoint sufficiently partisan commissioners—or if parties function as sufficiently disciplining entities over all branches of government— everything can be rammed through on a partisan basis. Indeed, the regressions show that partisanship does drive decisionmaking.

Yet, even with increasing partisanship in recent years, compromise remains the rule, and, when dissent occurs, non-partisanship drives such dissent. This suggests that the FCC agenda must be made palatable not only to the majority party, but to the minority party as well. Further, different commissioners have significantly different tolerances for dissent: some are conciliatory while others are less so.

Our data, therefore, support the notion that the FCC saps presidential power and provides an explanatory mechanism. Some chairs value consensus and clearly consensus must be bought at a price. In this sense, the chair has mixed loyalties—not just to his or her president or congressional sponsors but also to "go along and get along," (i.e., to garner favors from either other commissioners or special interests). A similar analysis applies to commissioners' tendency to dissent. At the same time, the non-partisan drivers for dissent also indicate that commissioners are not following the party line. If party-line voting can be understood as proxy presidential control, then independent agencies do seem to resist at times this control.

C.   *Claim: Independent Agencies are a Form of Congressional Control*

Just as it is likely that party affiliation serves as a proxy for presidential control, it is also likely to serve as a proxy for congressional control. The unitary executive debate sees independent agencies as tools both of Congress as an institution and of particular factions within it (i.e., commit-

tee chairs, geographical blocks, etc.).[68] We find that while partisanship is a driver, it is not always the most significant driver. Commissioners do not function in party lockstep. Therefore, Congress, as a party-run institution, cannot be said to control the FCC.

If congressional control means that commissioners are beholden to particular congressional sponsors or allies, then the data may offer some support. Given that Congress's votes are not as rigidly party-driven as many would expect,[69] it seems likely that commissioners, currying favor with particular congressman, would not make party-driven decisions. Further, not all congresspersons are lock-stop partisans, and commissioners could mirror the variety of partisanships found among congressmen and women.

D.   *Claim: Independent Agencies Decrease "Accountability," Meaning that They Take Decisionmaking from the Hands of Those who are Democratically Chosen*

Because the president, who alone faces a national electorate, cannot exercise complete control over independent agencies, their performance is not accountable to the national electorate, thus frustrating democratic oversight of government. Our data support this. We find non-partisan concerns driving commissioner behavior. To the degree party-affiliated voting can be seen as reflecting presidential or congressional control, our results find a surprising lack of such control, or at least a large amount of variability of such control.

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[68]   *See* Calabresi, *supra* note 8, at 82-83 ("Not only does such an arrangement discourage energy and accountability, it also creates the risk of factional domination of the administration of the government through the congressional committee system."); Calabresi & Prakash, *supra* note 9, at 583 ("Such indirect political control will necessarily exist with any so-called 'independent' agency or officer because absent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly 'independent' agencies."); Lessig & Sunstein, *supra* note 10, at 115 ("[Agency] independence can be understood as a form of [congressional] aggrandizement. Congress might make agencies independent not to create real independence, but in order to diminish presidential authority over their operations precisely in the interest of subjecting those agencies to the control of congressional committees. Independence, in short, might be a way of increasing legislative power over agencies." (footnote omitted)); May, *supra* note 63, at 448 ("As Justice Scalia suggested, many generally assume that Congress, by virtue of various means at hand, exerts more policy control over the independent agencies than the President. The vehicles for congressional influence include control over appropriations, appropriation riders directing or restricting specific agency actions, oversight hearings and investigations, mechanisms for congressional review of regulations, enactment of legislation overturning or modifying agency actions—or just the threat to employ any of these devices." (footnote omitted)).

[69]   *See generally* Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 425-27 (1996).

CONCLUSION

This essay has several, related empirical findings. First, while party affiliation does drive decisionmaking to some degree, non-partisan concerns often dominate. Second, to the degree party affiliation drives voting, its effect varies significantly among chairs and commissioners. Third, to the degree partisan voting can serve as a proxy for presidential or congressional control, this control varies. Fourth, this variation among chairs and commissioners can often be greater than the variation between members of different parties. Finally, this variation seems sensitive to the method of commissioner selection and their decisionmaking environment.

These findings change our understandings of the debates concerning the constitutionality and desirability of independent agencies. Partisanship does not exercise a lock-step control over partisan agencies. Rather, partisanship can turn more on which individuals are chosen to be commissioners or chairs and their working environment.

APPENDIX

	Mean	Standard Deviation	Min.	Max.
Number of Commissioners	5.35	1.21	3	8
RBOC	0.06	-	0	1
Majority Party Chair Affirm	0.48	-	0	1
Majority Party Chair Concur	0.005	-	0	1
Majority Party Chair Partial Dissent	0.001	-	0	1
Minority Party Chair Dissent	0.002	-	0	1
Minority Party Chair Affirm	0.49	-	0	1
Minority Party Chair Concur	0.005	-	0	1
Minority Party Chair Partial Dissent	9E-04	-	0	1
Minority Party Chair Dissent	0.002	-	0	1
Observations	32,515			

Table 1. Descriptive Statistics

Ind. Variables	Majority Party	Choices			
		Affirm	Concur	Partial Dissent	Dissent
	Chair Affirm	.82***	0.03	1.70*	−0.24
	Chair Concur	−.51*	1.00***	2.73**	−0.21
	Chair Partial Dissent	19.8***			22.28***
	Chair Dissent	0.03	0.57		2.91***
RBOC		−0.28	.39*	.90***	0.25
# Comm'rs		−.79***	−.35***	−.77***	−.41***
Obs.	32,515				

Ind. Variables	Minority Party	Choices			
		Affirm	Concur	Partial Dissent	Dissent
	Chair Affirm	0.17	−0.23	2.01**	0.05
	Chair Concur	−0.06	1.35***	2.99***	0.46
	Chair Partial Dissent	−0.86		4.19***	−0.38
	Chair Dissent	0.09	−0.63	2.83**	0.01
RBOC		−0.28	.39*	.90***	0.25
# Comm'rs		−.79***	−.35***	−.77***	−.41***
Obs.					

Table 2. Determinants of Commissioner Choice. Multinomial Logit (* significant at 10%; ** significant at 5%; *** significant at 1%); "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party (i.e., majority party votes are made when the commissioner and chair are both Republicans or Democrats; minority party votes are when the commissioner is Democrat and the chair Republican or vice versa)

Ind. Variables	Majority Party	Choices			
		Affirm	Concur	Partial Dissent	Dissent
	Chair Affirm	.65***	−0.05	1.45	−0.34
	Chair Concur	−0.32	1.08***	2.95**	−0.08
	Chair Partial Dissent	20.9***			
	Chair Dissent	−0.06	0.56		2.98***
RBOC		−.67***	0.02	0.03	−0.41
# Comm'rs		−.33***	0.02	−.37***	−0.11
Obs.	32,515				

Ind. Variables	Minority Party	Choices			
		Affirm	Concur	Partial Dissent	Dissent
	Chair Affirm	−0.01	−0.35	1.77*	−0.07
	Chair Concur	0.15	1.44***	3.21***	0.6
	Chair Partial Dissent	−0.93	−38.2***	4.24***	−0.34
	Chair Dissent	0.17	−0.56	3.38**	0.14
RBOC		−.67***	0.02	0.03	−0.41
# Comm'rs		−.33***	0.02	−.37***	−0.11
Obs.	32,515				

Table 3. Determinants of Commissioner Choice. Multinomial Logit with Chair Dummies (* significant at 10%; ** significant at 5%; *** significant at 1%); "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party (i.e., majority party votes are made when the commissioner and chair are both Republicans or Democrats; minority party votes are when the commissioner is Democrat and the chair Republican or vice versa)

Ind. Variables	Majority Party	Choices			
		Affirm	Concur	Partial Dissent	Dissent
	Chair Affirm	.67***	0.08	1.67	−0.13
	Chair Concur	−.56*	1.33***	2.89***	−0.17
	Chair Partial Dissent	33.36***			34.15***
	Chair Dissent	−0.18	0.5		3.15***
RBOC		−.56***	0.2	0.22	−0.23
# Comm'rs		−.74***	−0.49	−.82***	−.68***
Obs.	32,515				

Ind. Variables	Minority Party	Choices			
		Affirm	Concur	Partial Dissent	Dissent
	Chair Affirm	0.3	−0.21	1.87*	0.12
	Chair Concur	−0.1	.99**	2.83**	0.2
	Chair Partial Dissent	−0.99		4.14***	−0.44
	Chair Dissent	1.50**	0.8	4.49***	1.43***
RBOC		−.56***	0.2	0.22	−0.23
# Comm'rs		−.74***	−0.49	−.82***	−.68***
Obs.	32,515				

Table 4. Determinants of Commissioner Choice. Multinomial Logit with Commissioner Dummies (* significant at 10%; ** significant at 5%; *** significant at 1%); "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party (i.e., majority party votes are made when the commissioner and chair are both Republicans or Democrats; minority party votes are when the commissioner is Democrat and the chair Republican or vice versa)

Commissioner Votes	Majority Party Chair Affirms	Majority Party Chair Concurs	Majority Party Chair Dissents	Minority Party Chair Affirms	Minority Party Chair Concurs	Minority Party Chair Dissents in Part	Minority Party Chair Dissents
No RBOC 5 commissioners							
Affirm	95.80%	75.80%	66.60%	92.10%	78.00%	63.70%	90.60%
Concur	1.70%	13.70%	4.60%	2.50%	12.80%	6.00%	1.80%
Dissent Part	0.50%	4.60%	0.20%	1.40%	3.90%	23.70%	3.30%
Dissent	0.70%	2.30%	26.80%	1.80%	3.00%	2.30%	1.90%
Not Participate	1.20%	3.60%	1.80%	2.20%	2.40%	4.30%	2.40%
RBOC 5 commissioners							
Affirm	92.30%	60.00%	53.70%	85.70%	63.00%	39.30%	81.40%
Concur	3.30%	21.20%	7.20%	4.50%	20.10%	7.30%	3.10%
Dissent Part	1.70%	11.90%	0.40%	4.20%	10.30%	47.50%	9.80%
Dissent	1.20%	3.10%	36.70%	2.90%	4.10%	2.40%	2.90%
Not Participate	1.50%	3.80%	2.00%	2.70%	2.50%	3.50%	2.80%

Table 5. Inference from Multinomial Logit Results. No Chair and no Commissioner Dummies; "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party (i.e., majority party votes are made when the commissioner and chair are both Republicans or Democrats; minority party votes are when the commissioner is Democrat and the chair Republican or vice versa)

Commissioner Votes	Majority Party Chair Affirms	Majority Party Chair Concurs	Majority Party Chair Dissents	Minority Party Chair Affirms	Minority Party Chair Concurs	Minority Party Chair Dissents in Part	Minority Party Chair Dissents
Hundt RBOC							
Affirm	94.10%	72.50%	74.70%	90.00%	75.40%	63.50%	89.60%
Concur	3.00%	19.20%	9.20%	4.20%	18.00%	10.40%	2.80%
Dissent Part	0.30%	3.00%	0.10%	0.80%	2.50%	17.70%	3.40%
Dissent	0.30%	0.70%	12.20%	0.70%	0.90%	0.90%	0.70%
Absent	2.30%	4.70%	3.80%	4.30%	3.10%	7.60%	3.50%
Hundt No RBOC							
Affirm	96.80%	83.70%	82.40%	94.40%	85.60%	77.30%	94.20%
Concur	1.60%	11.10%	5.10%	2.20%	10.30%	6.30%	1.50%
Dissent Part	0.20%	1.70%	0.10%	0.40%	1.40%	10.60%	1.80%
Dissent	0.20%	0.60%	10.30%	0.50%	0.80%	0.80%	0.50%
Absent	1.30%	2.90%	2.20%	2.40%	1.90%	4.90%	2.00%
Powell RBOC							
Affirm	92.80%	63.40%	45.70%	86.60%	65.70%	37.60%	78.20%
Concur	3.40%	18.90%	6.30%	4.50%	17.70%	6.90%	2.70%
Dissent Part	1.60%	12.80%	0.40%	3.90%	10.90%	51.20%	14.70%
Dissent	1.70%	4.00%	47.10%	4.00%	5.10%	3.40%	3.70%
Absent	0.50%	0.90%	0.50%	0.90%	0.60%	0.90%	0.70%
Powell No RBOC							
Affirm	95.80%	76.70%	53.60%	91.80%	78.10%	54.20%	86.90%
Concur	1.80%	11.50%	3.70%	2.40%	10.60%	5.00%	1.50%
Dissent Part	0.80%	7.60%	0.20%	2.10%	6.30%	36.30%	8.00%
Dissent	1.30%	3.70%	42.20%	3.30%	4.60%	3.70%	3.10%
Absent	0.30%	0.60%	0.30%	0.50%	0.40%	0.70%	0.40%

Table 6. Inference from Multinomial Logit Results. Chair Dummies; "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party (i.e., majority party votes are made when the commissioner and chair are both Republicans or Democrats; minority party votes are when the commissioner is Democrat and the chair Republican or vice versa)

Commissioner Votes	Majority Party Chair Affirms	Majority Party Chair Concurs	Majority Party Chair Dissents	Minority Party Chair Affirms	Minority Party Chair Concurs	Minority Party Chair Dissents in Part	Minority Party Chair Dissents
Barrett No RBOC							
Affirm	97.50%	79.10%	75.20%	96.80%	88.60%	90.30%	95.70%
Concur	1.80%	17.10%	4.90%	1.90%	8.50%	7.60%	1.60%
Dissent Part	0.30%	2.40%	0.10%	0.40%	1.60%	0.20%	1.80%
Dissent	0.40%	1.10%	19.70%	0.80%	1.10%	1.50%	0.80%
Absent	0.10%	0.30%	0.20%	0.10%	0.20%	0.40%	0.00%
Duggan No RBOC							
Affirm	97.60%	79.90%	84.10%	97.00%	89.20%	90.40%	96.20%
Concur	1.70%	16.30%	5.10%	1.80%	8.10%	7.20%	1.50%
Dissent Part	0.30%	2.40%	0.10%	0.40%	1.60%	0.20%	1.80%
Dissent	0.20%	0.50%	10.00%	0.30%	0.50%	0.70%	0.40%
Absent	0.30%	0.90%	0.70%	0.50%	0.60%	1.60%	0.10%
Furchtgott-Roth No RBOC							
Affirm	88.40%	46.00%	26.50%	82.70%	59.80%	22.20%	66.80%
Concur	3.20%	20.00%	3.40%	3.20%	11.60%	3.80%	2.20%
Dissent Part	4.50%	27.30%	0.60%	7.40%	20.70%	70.20%	25.10%
Dissent	3.70%	6.30%	69.30%	6.40%	7.50%	3.60%	5.90%
Absent	0.20%	0.40%	0.20%	0.30%	0.30%	0.30%	0.10%
Hooks No RBOC							
Affirm	79.00%	29.80%	16.10%	73.20%	45.20%	28.90%	68.30%
Concur	11.80%	53.20%	8.60%	11.70%	35.90%	20.10%	9.20%
Dissent Part	1.80%	7.70%	0.20%	2.80%	6.80%	39.80%	11.20%
Dissent	5.80%	7.20%	74.40%	10.00%	10.10%	8.20%	10.60%
Absent	1.70%	2.10%	0.80%	2.20%	2.00%	3.00%	0.60%

Table 7. Inference from Multinomial Logit Results. Commissioner Dummies; "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party

Commissioner Votes	Same Party Chair Affirms	Same Party Chair Concurs	Same Party Chair Dissents	Different Party Chair Affirms	Different Party Chair Concurs	Different Party Chair Dissents in Part	Different Party Chair Dissents
Pre-1997 RBOC							
Affirm	94.60%	65.10%	61.80%	90.60%	66.80%	59.00%	88.80%
Concur	4.10%	27.50%	10.00%	5.80%	25.80%	13.60%	4.00%
Dissent Part	0.60%	5.30%	0.20%	1.70%	4.70%	25.20%	5.10%
Dissent	0.80%	2.10%	28.00%	1.90%	2.70%	2.20%	2.00%
Post-1997 RBOC							
Affirm	93.00%	58.60%	47.20%	85.70%	60.60%	33.00%	75.50%
Concur	2.80%	17.30%	5.30%	3.80%	16.30%	5.30%	2.40%
Dissent Part	2.60%	19.90%	0.60%	6.60%	17.70%	59.00%	18.30%
Dissent	1.60%	4.10%	46.80%	3.90%	5.40%	2.70%	3.80%
Pre-1997 No RBOC							
Affirm	97.20%	79.50%	71.00%	94.90%	80.50%	75.00%	93.90%
Concur	1.90%	15.60%	5.30%	2.80%	14.40%	8.00%	2.00%
Dissent Part	0.30%	3.00%	0.10%	0.80%	2.60%	15.00%	2.50%
Dissent	0.60%	1.90%	23.60%	1.50%	2.40%	2.00%	1.60%
Post-1997 No RBOC							
Affirm	96.20%	74.20%	56.00%	91.70%	75.40%	50.80%	85.90%
Concur	1.30%	10.10%	2.90%	1.90%	9.40%	3.80%	1.30%
Dissent Part	1.20%	11.80%	0.40%	3.30%	10.30%	42.40%	9.70%
Dissent	1.20%	3.80%	40.70%	3.10%	4.90%	3.00%	3.20%

Table 8. Inference from Multinomial Logit Results. No Chair and no Commission Dummies; "majority party" refers to commissioner votes made when the chair belongs to the same party as the commissioner; "minority party" refers to votes made when the chair belongs to the opposing party

Commissioner Votes	Same Party Chair Affirms	Same Party Chair Concurs	Same Party Chair Dissents	Different Party Chair Affirms	Different Party Chair Concurs	Different Party Chair Dissents in Part	Different Party Chair Dissents
No RBOC 5 commissioners							
Affirm	95.80%	75.80%	66.60%	92.10%	78.00%	63.70%	90.60%
Concur	1.70%	13.70%	4.60%	2.50%	12.80%	6.00%	1.80%
Dissent Part	0.50%	4.60%	0.20%	1.40%	3.90%	23.70%	3.30%
Dissent	0.70%	2.30%	26.80%	1.80%	3.00%	2.30%	1.90%
Not Participate	1.20%	3.60%	1.80%	2.20%	2.40%	4.30%	2.40%
RBOC 5 commissioners							
Affirm	92.30%	60.00%	53.70%	85.70%	63.00%	39.30%	81.40%
Concur	3.30%	21.20%	7.20%	4.50%	20.10%	7.30%	3.10%
Dissent Part	1.70%	11.90%	0.40%	4.20%	10.30%	47.50%	9.80%
Dissent	1.20%	3.10%	36.70%	2.90%	4.10%	2.40%	2.90%
Not Participate	1.50%	3.80%	2.00%	2.70%	2.50%	3.50%	2.80%
No RBOC 7 commissioners							
Affirm	88.70%	55.70%	46.20%	80.70%	59.70%	49.50%	79.60%
Concur	3.90%	24.30%	7.60%	5.20%	23.60%	11.30%	3.70%
Dissent Part	0.50%	3.50%	0.10%	1.30%	3.10%	19.20%	3.10%
Dissent	1.50%	3.60%	39.80%	3.50%	4.90%	3.90%	3.60%
Not Participate	5.40%	12.80%	6.20%	9.40%	8.80%	16.20%	10.10%
RBOC 7 commissioners							
Affirm	82.40%	40.40%	33.70%	71.20%	44.00%	30.60%	68.50%
Concur	7.00%	34.50%	10.90%	9.00%	33.90%	13.60%	6.30%
Dissent Part	1.60%	8.30%	0.30%	3.60%	7.50%	38.50%	8.60%
Dissent	2.30%	4.50%	49.20%	5.20%	6.10%	4.10%	5.20%
Not Participate	6.60%	12.30%	6.00%	11.00%	8.50%	13.20%	11.40%

Table 9. Inference from Multinomial Logit Results. No Chair and no Commissioner Dummies; "majority party" and "minority party" have the same meaning as in Table 8