

Ideology versus Partisanship: Regulatory Behavior and Cyclical Political Influence

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ABSTRACT: We employ a unique data set of 41,137 commissioner votes in 8,252 Federal Communications Commission (FCC) decisions and orders, reflecting every voted commission decision from 1976-2003, in order to examine those factors that determined commissioner voting at the FCC. We discover a cyclical relationship between commissioner party-line voting and the presidential election. We hypothesize a partisanship effect, tied to the presidential election cycle, which works separately from commissioners' ideological preferences.

Legal commentary is divided over the manner and extent of political control over independent agencies, such as the Federal Communications Commission (FCC), the Federal Electricity Regulatory Commission, and the Securities Exchange Commission. Because fixed term appointees, whom the President cannot remove at will, lead most independent agencies, debate continues over whether they are consistent with separation of powers principles.¹ Some argue that independent agencies are, on a practical level, subject to presidential control; others argue that they respond more to congressional or outside pressure than do executive agencies.²

The political science literature is also divided, focusing more on how the President and Congress exert power over independent and executive agencies. Broadly stated, many argue that Presidency and its appointees influence bureaucracy but face information

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¹ Compare Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593-99 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-71 (1992); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 228 with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 40-42 (1994); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH L. REV. 596, 597 (1989) Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 792-94.

² WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 4 (1967) (former Securities and Exchange Commission Chair stating that “[g]overnment regulatory commissions are often referred to as ‘independent’ agencies, but this cannot be taken at face value by anyone who has ever had any experience in Washington”); Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 936-37 (1985) (“The ‘independence’ of most regulatory agencies is little more than a public-relations gimmick. There are only three branches of government. The President exercises considerable practical and legal control over independent agencies, particularly in their policymaking role.”).

asymmetry, opportunism, and monitoring costs.³ Considerable debate exists on whether the President, Congress, or special interests have greater influence over agencies.⁴ Researchers also argue about the true goals of agencies, questioning whether agencies maximize their discretionary budgets,⁵ personal or institutional preferences,⁶ or something else.

This article sheds empirical light on these questions by estimating the drivers of independent agency commissioner voting. Commissioners, who by statute or custom are appointed from both political parties, run most independent agencies. Major regulatory action, such as rulemaking or transaction approval, requires a majority vote. Examining the factors that influence commissioner voting indicates how political considerations control agency action.

We hypothesize two sets of factors. First, there are ideological and constituency-drivers. These factors stay relatively constant. Second, we also examine a cyclical driver: the election cycle. This reflects the changing costs and benefits to the commissioner of agreeing or disagreeing with one's party or the FCC Chair, at particular points in the election cycle.⁷

We estimate a multinomial choice model in which a commissioner can choose to agree with the majority, dissent in part, or fully dissent. Consistent with our hypothesis, we find that minority party commissioners dissent more in general, reflecting a non-cyclical ideological difference. In addition, the minority party is significantly more likely to vote against the majority party the year after a presidential election. At the same time, a commissioner from the majority party is less likely even to partially dissent. This

³ See John D. Huber & Charles R. Shirpan, *The Costs of Control: Legislators, Agencies, and Transaction Costs*, 25 LEG. STUD. Q. 1 (2000); Matthew McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); B. Dan Wood & James E. Anderson, *The Political of U.S. Antitrust Regulation*, 37 AM. J. POL. SCI. REV. 1 (1993) (connecting political influences to FTC decision-making); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991) (identifying events, such as appointments, resignations, budget appropriations, and showing a bureaucratic response).

⁴ Compare Barry Weingast & Mark J. Moran, *Bureaucratic Discretion of Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (examining congressional control of the FTC) with Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982) (examining the presidential impact on independent agencies) with Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16J. LAW, ECON. & ORG. 269 (2000) (arguing that the Senate and the President influence agency appointments) with Steven D. Stehr, *Top Bureaucrats and the Distribution of Influence in Reagan's Executive Branch*, 57 PUB. ADMIN. REV. 75 (1997) (survey data indicates bureaucrats respond to presidential, congressional, and special interest influence); ANN M. KHADEMIAN, *THE SEC AND CAPITAL MARKET REGULATION: THE POLITICS OF EXPERTISE* (1992)..

⁵ William Niskanen, *Bureaucrats and Politicians*, 18 J. LAW & ECON. 617 (1975) (bureaucrats maximize their discretionary budgets).

⁶ Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCIENCE. 336 (1995); Todd Kunioka & Gary Woller, *Bank Supervision and Limits of Political Influence over Bureaucracy*, 59 PUB. ADMIN. REV. 303 (1999).

⁷ The importance of the election cycle as a driver of administrative and executive action has long been recognized. See generally EDWARD R. TUFTE, *POLITICAL CONTROL OF THE ECONOMY* (1978).

indicates a cyclical pattern in which party-line voting coalesces the year after a presidential election, possibly indicating signaling behavior or the minority party's political gamesmanship with a new chair. Finally, the likelihood of dissent rises with the number of lobbying, *ex parte* meetings and comments submitted to the Commission.

These findings add significantly to the debates about independent agencies and political control of the bureaucracy. First, they suggest that independent agencies are neither immune from political control nor its complete captive. Rather, in a cyclical fashion, partisan considerations influence commissioners. In addition, comments and *ex parte* meetings drive the number of partial and full dissents. Further, the commissioner dummy variables greatly influence our coefficient estimations, suggesting that individual commissioner preferences and beliefs drive decision-making to a large degree. These findings are consistent with current trends in research suggesting the need to study, in detail, to how and when political influence is exercised—not simply whether it is exercised.⁸

Methods

We employ a unique data set of 41,137 FCC commissioner votes over 8,252 FCC orders, reflecting every Commission voted order and decision from 1976-2003 and those decisions that received subsequent judicial review.⁹ In particular, we observe the degree to which a commissioner's vote (dis)agrees with other commissioners of the same party (*i.e.*, is "party-line"). From the mid-1990s onward, we obtained docket information on rulemakings, in particular the number of comments submitted and the number of *ex parte* meetings with commissioners or staff.

FCC orders were identified by searching Westlaw[®], and subsequent appellate histories were obtained by using Westlaw's Keysite[®] service.¹⁰ 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. To obtain docket information, we employed the FCC's Electronic Comment Filing System (ECFS), which is searchable online.¹¹

⁸ See, *e.g.*, Huber & Shirpan, *supra* note 3, at 26 (arguing for examination not of "whether or not [political] control actually exists [but to] factions underlying variation in institutional choice . . . [and] conditions under which various mechanisms of control are used."); George A. Krause, *The Institutional Dynamics of Policy Administration*, 40 AM. J. POL. SCI. 1083 (1996).

⁹ 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, and were not included in the database.

¹⁰ The search string employed for each year in the study was: "order +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.

¹¹ ECFS is organized by docket number and any particular order can be part of several, though related, dockets. Further, not every document in a docket addresses issues considered in every order in a docket. We consider these docket data as variables indicating general interest or importance to the communications industries in the order's subject matter.

Results

We first examined the likelihood that a commissioner would engage in party-line voting by examining a commissioner's tendency to issue a partial dissent, a complete dissent, or join the majority. The Chair was in the majority for the vast number of orders and dissented in only a few—32 of the over 8000 orders voted. Given that the Chair is of the same party as two of the other four commissioners,¹² we theorize that dissents by the Chair represent situations of significant intra-party split and, therefore, treat them differently from those votes in which the Chair forms part of the majority. Finally, we ran the regressions with and without the Chair's vote to examine his influence on the other commissioners.¹³

Using multinomial logit regressions, we examined the effect of the following independent variables on the likelihood of a commissioner to dissent, partially dissent, or join the majority in any given order:

- the year (“year”);
- whether an “RBOC,” regional Bell operating company, one of the Baby Bell telephone companies created after the break-up of AT&T was involved (“RBOCvar”);
- whether the Chair affirmed the order and was of the opposing party from the voting commissioner and whether the vote occurred in each of the election year, 1 year before/3 years after the election year, and 3 years before/1 year after the election year (“diffpartyChairAffirmelectionyear,” “diffpartyChairAffirmelectionyear1,” “diffpartyChairAffirmelectionyear3”);
- whether the Chair dissented and was of the opposing party from the voting commissioner and whether the vote took place in each of the election year, 1 year before/3 years after the election year, and 3 years before/1 year after the election year (“diffpartyChairDissentelectionyr,” “diffpartyChairDissentaway1,” “diffpartyChairDissentaway3”);
- whether the Chair dissented and was of the same party as the voting commissioner and whether the vote took place in each of the election year, 1 year before/3 years after the election year, and 3 years before/1 year after the election year (“samepartyChairDissentelectionyr,” “samepartyChairDissentaway1,” “samepartyChairDissentaway3”); and,
- whether the Chair affirmed and was of the same party as the voting commissioner and whether the vote took place in each of the election year, 1 year before/3 years after the election year, and 3 years before/1 year after the election year (“samepartyChairAffirmelectionyr,” “samepartyChairAffirmaway1,” “samepartyChairAffirmaway3”)
- whether the Chair did not participate and was of the same party as the commissioner voting and whether the vote took place in each of the election year, 1 year before/3 years after the election year, and 3 years before/1 year after the

¹² For a small part of the test period in the 1970s, there were seven commissioners.

¹³ In those regressions that employed the Chair's vote, we are implicitly assuming that the Chair's vote was not endogenous.

- election year (“samepartyChairNotParelectionyear,”
“samepartyChairAffirmaway,” and “samepartyChairAffirmaway3”)
- whether the Chair did not participate and was of the opposing party from the commissioner voting and whether the vote took place in each of the election year, 1 year before/3 years after the election year, and 3 years before/1 year after the election year.” “diffpartyChairAffirmaway,” and “diffpartyChairAffirmaway3”)

In addition, in some of the regressions we employed three additional “docket” variables:

- whether the Chair participated in the decision (“ChairNotPar”);
- the number of dockets of which the order was a part (“numDockets”), and
- the total number of notices and comments submitted in the dockets of which the order was a part (“sumNotices”).

We performed additional regressions using individual commissioners as dummy variables.

Table 1 shows our results for multinomial logit regression without the Chair’s vote. We did not include his vote so as to eliminate any endogenous effects from his vote affecting other commissioners. Table 2 runs these regressions again, adding the three additional variables: ChairNotPar, numDockets, and sumNotices.

Table 1

	No dummies		Commissioner Dummies	
	Partial Dissent	Dissent	Partial Dissent	Dissent
ChairRep	-0.239 (2.29)**	-0.184 (2.15)**	0.008 (0.05)	-0.153 (1.24)
Year	0.040 (5.14)***	-0.034 (5.44)***	-0.004 (0.21)	-0.019 (1.14)
RBOCvar	0.965 (6.96)***	0.384 (2.18)**	0.860 (5.94)***	0.306 (1.69)*
diffpartyChairAffirmelectionyear	0.424 (3.04)***	0.453 (3.76)***	0.079 (0.51)	0.225 (1.68)*
diffpartyChairAffirmaway3	-0.347 (1.69)*	0.384 (2.67)***	-0.367 (1.66)*	0.414 (2.63)***
diffpartyChairAffirmaway1	-0.034 (0.20)	0.013 (0.09)	-0.431 (2.44)**	-0.105 (0.68)
diffpartyChairDissentelectionyr		1.200 (1.15)		0.796 (0.75)
diffpartyChairDissentaway3		0.946 (0.92)		1.066 (1.00)
diffpartyChairDissentaway1				
samepartyChairDissentelectionyr		3.490 (6.51)***		3.798 (6.77)***
samepartyChairDissentaway3		3.421 (6.34)***		3.268 (5.75)***
samepartyChairDissentaway1		3.359 (7.31)***		3.640 (7.32)***
samepartyChairAffirmelectionyear	-0.889 (3.96)***	-0.743 (4.05)***	-0.483 (1.86)*	-0.484 (2.49)**
samepartyChairAffirmaway3	-0.919 (3.56)***	-0.237 (1.30)	-0.819 (2.95)***	-0.177 (0.90)
samepartyChairAffirmaway1	-0.574 (2.94)***	-0.676 (3.73)***	-0.288 (1.37)	-0.456 (2.43)**
samepartyChairNotParelectionyear		0.746 (0.73)		0.603 (0.60)
samepartyChairNotParaway3		-0.148 (0.25)		-0.141 (0.24)
samepartyChairNotParaway1				
diffpartyChairNotParelectionyr		1.380 (1.85)*		0.970 (1.25)
diffpartyChairNotParaway3	-0.252 (0.25)	1.086 (3.01)***	-0.504 (0.50)	0.862 (2.37)**
diffpartyChairNotParaway1				
Constant	-83.260 (5.41)***	63.581 (5.12)***	3.385 (0.08)	32.661 (0.97)
Observations	32520	32520	32520	32520

Robust z statistics in parentheses

* significant at 10%; ** significant at 5%; *** significant at 1%

Table 2

	No dummies		Commissioner Dummies	
	Partial Dissent	Dissent	Partial Dissent	Dissent
ChairRep	-1.104 (2.50)**	0.185 (0.89)	-0.318 (0.50)	0.440 (0.99)
Year	0.245 (2.99)***	0.049 (2.05)**	0.238 (1.69)*	-0.060 (0.91)
RBOCvar	0.415 (2.49)**	0.208 (0.92)	0.421 (2.50)**	0.207 (0.89)
diffpartyChairAffirmelectionyear	0.280 (1.08)	0.672 (2.14)**	-0.311 (1.06)	-0.096 (0.29)
diffpartyChairAffirmaway3	-0.012 (0.04)	0.849 (3.31)***	-0.352 (0.92)	0.540 (1.66)*
diffpartyChairAffirmaway1	0.695 (2.96)***	-0.064 (0.18)	0.103 (0.38)	-0.963 (2.44)**
diffpartyChairDissentaway1				
samepartyChairDissentaway1				
samepartyChairAffirmelectionyear	-1.356 (3.26)***	-2.440 (2.39)**	-0.739 (1.63)	-1.474 (1.39)
samepartyChairAffirmaway3	-0.884 (2.20)**	-0.341 (0.92)	-1.025 (1.94)*	-0.553 (1.01)
samepartyChairAffirmaway1	-0.183 (0.66)	-1.061 (2.23)**	0.418 (1.14)	-0.352 (0.71)
samepartyChairNotParelectionyear				
samepartyChairNotParaway3		1.831 (2.32)**		0.976 (0.99)
samepartyChairNotParaway1				
diffpartyChairNotParelectionyr				
diffpartyChairNotParaway3		1.336 (1.26)		0.390 (0.37)
diffpartyChairNotParaway1				
numDockets	0.178 (2.45)**	-0.062 (0.56)	0.181 (2.51)**	-0.105 (0.97)
sumNotices	0.000 (2.46)**	0.001 (3.51)***	0.000 (2.87)***	0.001 (4.19)***
Constant	-493.947 (3.01)***	-102.380 (2.14)**	-482.624 (1.72)*	114.593 (0.86)
Observations	6715	6715	6715	6715

Robust z statistics in parentheses

* significant at 10%; ** significant at 5%; *** significant at 1%

In the second set of regressions, we again used a multinomial logit regression to relate the likelihood of whether a commissioner will dissent to our independent variables. These regressions, however, did include the Chair’s vote as an independent variable (“chairvar”) and we also included a variable as to whether he was Republican (“ChairRep”). In addition, we included other independent variables:

- whether the Chair was of the same party as the commissioner casting the vote and whether the vote was cast in each of the election year, 3 years before/1 year after the election year, 2 years before/2 years after the election year (“SamePartyChairelectionyear” “SamePartyChairelectionaway3” “SamePartyChairelectionaway2”)
- whether the Chair was of a the opposing party from the commissioner casting the vote and whether the vote was cast in each of the election year, 3 years before/1 year after the election year, 2 years before/2 years after the election year (“DiffPartyChairelectionyear,” “DiffPartyChairelectionaway3,” “DiffPartyChairelectionaway2”)

Table 3

	No dummies		Commissioner Dummies	
	Partial Dissent	Dissent	Partial Dissent	Dissent
ChairRep	-0.247 (2.40)**	-0.226 (2.73)***	-0.131 (0.75)	-0.198 (1.73)*
Chairvar	-1.622 (6.04)***	-1.458 (6.80)***	-1.862 (3.73)***	-0.559 (1.50)
Year	0.039 (5.21)***	-0.042 (6.94)***	-0.004 (0.19)	-0.031 (1.96)*
RBOCvar	0.979 (7.25)***	0.343 (1.96)**	0.883 (6.25)***	0.294 (1.63)
SamePartyChairelectionyear	-0.554 (2.79)***	-0.495 (3.07)***	-0.191 (0.84)	-0.285 (1.65)*
SamePartyChairelectionaway3	-0.570 (2.60)***	-0.013 (0.08)	-0.430 (1.79)*	0.041 (0.24)
SamePartyChairelectionaway2	-0.431 (2.28)**	-0.376 (2.36)**	-0.141 (0.70)	-0.142 (0.87)
DiffPartyChairelectionyear	0.561 (3.98)***	0.543 (4.52)***	0.195 (1.22)	0.304 (2.29)**
DiffPartyChairelectionaway3	-0.071 (0.37)	0.521 (3.75)***	-0.100 (0.48)	0.496 (3.28)***
DiffPartyChairelectionaway2	0.081 (0.47)	0.048 (0.32)	-0.330 (1.82)*	-0.092 (0.59)
Constant	-82.758 (5.50)***	78.906 (6.61)***	1.865 (0.05)	56.491 (1.78)*
Observations	40673	40673	40673	40673

Robust z statistics in parentheses
 significant at 10%; ** significant at 5%; *** significant at 1%
 DiffPartyChairelectionaway1 dropped due to collinearity.

In Table 4, we repeat the previous regressions but add the three additional “docket variables”: numDockets, and sumNotices.

Table 4

	No dummies		Commissioner Dummies	
	Partial Dissent	Dissent	Partial Dissent	Dissent
ChairRep	-1.053 (2.62)***	0.239 (1.18)	-0.431 (0.72)	0.373 (0.89)
Chairvar	-1.625 (4.08)***	-1.694 (3.08)***	-2.733 (3.15)***	-23.959 (16.20)***
Year	0.234 (3.17)***	0.031 (1.47)	0.239 (1.78)*	-0.068 (1.03)
RBOCvar	0.434 (2.68)***	0.192 (0.86)	0.440 (2.67)***	0.180 (0.79)
SamePartyChairelectionyear	-1.148 (3.06)***	-2.542 (2.49)**	-0.603 (1.51)	-1.725 (1.64)
SamePartyChairelectionaway3	-0.719 (1.99)**	-0.344 (1.00)	-0.831 (1.88)*	-0.482 (0.97)
SamePartyChairelectionaway2	-0.195 (0.71)	-1.003 (2.29)**	0.365 (1.03)	-0.255 (0.56)
DiffPartyChairelectionyear	0.365 (1.44)	0.660 (2.15)**	-0.247 (0.86)	-0.118 (0.36)
DiffPartyChairelectionaway3	0.090 (0.29)	0.773 (3.05)***	-0.221 (0.62)	0.477 (1.42)
DiffPartyChairelectionaway2	0.726 (3.10)***	-0.108 (0.30)	0.141 (0.52)	-0.992 (2.52)**
numDockets	0.190 (2.73)***	-0.073 (0.67)	0.192 (2.76)***	-0.110 (1.03)
sumNotices	0.000 (2.89)***	0.001 (4.06)***	0.000 (3.37)***	0.001 (4.52)***
Constant	-470.540 (3.19)***	-65.939 (1.57)	-484.160 (1.81)*	131.236 (0.99)
Observations	8511	8511	8511	8511

Robust z statistics in parentheses

- significant at 10%; ** significant at 5%; *** significant at 1%

DiffpartyChairdissent electionaway1 always dropped.

Discussion

FCC voting demonstrates a partisan, cyclical nature. Certain patterns emerge. First, as observed in the `diffPartyChairDissentaway3` variables in Tables I and II and the `diffPartyChairAffirmelectionaway3` variables in Tables III and IV, the minority party dissents significantly *more* in the first year *after* a presidential election. Conversely, as observed in the `samePartyChairAffirmaway3` variables in Tables I and II `SamePartyChairelectionaway3` in Tables III and IV, commissioners in the majority party are *less* likely to partially dissent in the year after an election. These effects are observed in regressions with and without commissioner dummy variables.

These results demonstrate partisanship in voting, but the precise partisan mechanism involved is not clear. We hypothesize that party-line voting serves a signaling function, demonstrating the loyalty of a commissioner to his or her party. This signaling may be particularly important at the beginning of presidential administrations because commissioners might see advancement within the administration—as opposed to employment outside government—as more possible and desirable at the administration’s beginning. Alternatively, commissioners’ subsequent advancement could be a function of party or presidential loyalty, and reputations for loyalty must be established at the outset. It is also possible that the timing of rulemaking drives results. Subsequent research, with focus on orders the timing of which is exogenously driven, will rule out this possibility.

In addition to partisanship, there are clear trends in other drivers of commission voting. Not surprisingly, the number of *ex parte* meetings and comments submitted in a docket positively correlates to the likelihood to dissent as indicated by the `sumNotices` variable. These results are found in regressions with and without commissioner dummy variables. This suggests that commissioner voting responds to “face time,” or at least to the investments in lobbyists and lawyers that meetings and submissions to the FCC reflect. In addition, more controversial rulemakings may attract more attention.

The `numDockets` (the number of dockets in which a given order is a part) increases partial dissents, but not full dissents. The greater number of dockets involved in the order, the more complex the order generally is—and thus, there are more issues on which to agree and/or disagree.

Simple models of political control of independent agencies should likely be rejected, for there are numerous and often conflicting drivers of commission voting. As shown by the effect commissioner dummy variables have on our specifications, commissioners respond to their own unique set of preferences. As the docket variables indicate, voting is also influenced by effective lobbying and possibly docket complexity. At the same time, certain types of political influence are observed, including a cyclical partisanship effect.