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Administrative Procedures, Bureaucracy, and Transparency: Why Does the FCC Vote on Secret Texts?

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Abstract

The U.S. Federal Communications Commission (FCC) does not reveal the text of regulations on which it votes. Instead, after the vote the Commission grants the relevant bureau “editorial privileges” to continue drafting the order. It then releases the final version days, weeks, or even months after the vote. As a result, it is not possible to know if everything in the final rule was actually subject to a vote. In particular, it raises the question of whether the delay between vote and publication is truly for “editorial” changes or if more substantive changes occur after the vote.

In this paper, I assemble a dataset of every vote back to the Commission’s origin in 1934 to examine when this practice began, as well as a more detailed dataset of every vote from 1994 – 2013 to explore this question. I use a two-stage model to explore the relationship between aspects of the rule, the vote, and the delay between vote and publication. I find, first, that the FCC has not always delayed publication after the vote: until the early 1970s orders were almost always made public immediately following the vote. Second, the more controversial an order, as measured by the *ex partes* filed, the fewer commissioners vote in favor. The length of the order, as measured by the number of paragraphs, is not correlated with the length of the delay, suggesting that it is not simple copy editing that is responsible for the delay between vote and publication.

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Introduction

On February 9, 2011 the Federal Communications Commission (FCC) released a proposed rule that included, among many other provisions, capping the Universal Service Fund at \$4.5 billion.¹ The FCC voted to approve a final order on October 27, 2011. But when the order was finally released on November 18, 2011, the \$4.5 billion ceiling had effectively become a floor, with the order requiring the agency to forever estimate demand at no less than \$4.5 billion.² Because payments from the fund had been decreasing steadily, this floor means that the FCC is now collecting hundreds of billions of dollars more in taxes than it is spending on the program.

How did this bait and switch happen? A unique quirk of the FCC rulemaking process makes it impossible to find out. Unlike other federal agencies, the FCC does not make public the text of the rules on which it is voting at the time of the vote. Instead, at the time of the vote the bureau in charge of writing the order is given “editorial privileges” to continue working on the order, which is then released days, weeks, or even months after the vote. As a result, there is no way to know what changed between the vote and the final rule.

This approach to rulemaking raises obvious transparency questions since the public has no way of knowing whether the changes between the vote and publication in the document detailing the new rules are truly editorial or of a more substantive nature.³ The FCC has steadfastly asserted a right to keep secret the text of the documents it votes on. In response to a Freedom of Information Act request by the Associated Press in 2008, the FCC argued that it had no obligation to make public these texts on the somewhat puzzling grounds that they were “predecisional.”⁴

To be sure, it is unlikely that major aspects of rules have been changed between the vote and publication. Long comment periods on proposed rules mean that large changes would surely be noticed. Nevertheless, minute details of regulations can matter and can be tweaked to benefit interest groups. The lack of transparency in the voting process means it is never possible to know if the commissioners actively approved the order as ultimately implemented.

¹ Federal Communications Commission, *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service Lifeline and Link-Up*, NPRM, (February 9, 2011), para. 79 and fn 123, http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/FCC-11-13A1.pdf.

² Federal Communications Commission, *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service Lifeline and Link-Up Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking (Washington, DC, November 18, 2011), para. 560, http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1118/FCC-11-161A1.pdf.

³ Some analysts, including this one, have made this observation in the past. In August 2014 Commissioner Michael O’Rielly proposed making public the text subject to a vote. Michael O’Rielly, “Post Text of Meeting Items in Advance,” *Official FCC Blog*, August 7, 2014, <http://www.fcc.gov/blog/post-text-meeting-items-advance>.

⁴ Associated Press, “Voted Items at FCC May Be Secret Till Final, Agency Says,” June 19, 2008, <http://www.firstamendmentcenter.org/voted-items-at-fcc-may-be-secret-till-final-agency-says>.

While we cannot determine which, if any, constituencies benefit or lose during the time between vote and publication, it is possible to evaluate whether any observable factors are related to delays between vote and publication. To do so, I assemble a dataset of all “major”⁵ orders passed from 1994 through 2013, including information on the delay in days, chairman, commissioner votes, length of the order, issues covered, bureau responsible for the order, outside comments filed with the FCC, and the number of *ex partes*—notices of direct, nonpublic, communication (typically in-person meetings) between FCC staff or commissioners and an interested party.⁶

A great deal has been written about the objectives of regulatory agencies, their incentives, and their relationships with Congress and the courts.⁷ We know little empirically, however, about how the mechanics of an agency’s rulemaking process itself affects votes and regulatory outcomes. This feature of the FCC can provide some insight into an agency’s internal workings and how those workings can affect outcomes. In particular, I ask how this unique approach to rulemaking developed and what factors affect the delay between vote and release.

First, the data show that the FCC did not always delay publication as a matter of course. From 1934 until the 1970s, the mean delay between vote and publication was about one day and the median delay was zero days. In the 1970s the typical delay began to increase radically, and while it has fallen since then, delays still remain the norm, especially for major orders.

Second, using a two-stage instrumental variables approach to examine major orders since 1994, I find first that the number of *ex partes* (notices of private meetings between interested parties and FCC officials) filed before the vote is correlated with a smaller share of commissioners voting “yes” on the order. A lower share of “yes” votes translates to a longer delay between vote and publication. Delays differed significantly across chairman, with the longest delays (since 1994) occurring under Kevin Martin and the shortest under William Kennard and Julius Genachowski. I find no statistically significant difference in delay across bureaus, although commissioners are most likely to vote yes on orders covering public safety than any other topic while orders that cover spectrum have significant longer delays than orders on other issues. The length of the order, as measured by the number of paragraphs in it, is not correlated with voting outcome or delays.

Broadly speaking, the results suggest that different chairmen orchestrate the rulemaking process differently and that the more controversial the order, the fewer commissioners vote yes and the longer the delay between vote and publication. One reasonable explanation is that orders on more important and controversial issues are more likely to be challenged in court and, all else equal, the FCC is more likely to lose such cases. As a result, the Commission has a greater incentive to make sure important and controversial orders are carefully written in order to if not avoid a court challenge, increase its chances of winning one. The lack of correlation between the

⁵ Defined later.

⁶ According to the FCC’s website, an *ex parte* “describes a communication directed to the merits or outcome of a proceeding that, if written, is not served on all of the parties to the proceeding and, if oral, is made without giving all the parties to the proceeding advance notice and an opportunity to be present.” <http://www.fcc.gov/exparte>

⁷ See, for example, Barry R. Weingast, “Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships,” *Law and Contemporary Problems* 44, no. 1 (1981): 147, doi:10.2307/1191389; Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, and Organization* 3, no. 2 (1987): 243–77.

length of the order and the delay suggest that “editorial privileges” are not granted merely to copy edit a document.

The FCC Rulemaking Process

The FCC is an independent agency, meaning that it is not part of the Executive branch like, say, the Department of Justice. It has five commissioners, three from the President’s party and two from the other party.⁸ They are appointed by the President, confirmed by the Senate, and serve five-year, overlapping terms.⁹ The chairman (and all appointed chairs have, to date, been men) is from the President’s party and, by tradition, leaves the FCC when the President leaves office even if his term has not expired.

Like other regulatory agencies, the FCC’s rulemaking process is done in accordance with the Administrative Procedures Act. As a gross oversimplification, a rulemaking begins when the FCC issues a Notice of Inquiry, then in response to public comment releases a Notice of Proposed Rulemaking (NPRM), and finally issues an Order based on feedback from the NPRM.¹⁰ The commissioners vote on orders at monthly “open commission meetings.”¹¹

To my knowledge there is little empirical analysis of voting at the FCC. A notable exception is Candeub and Hunnicutt (2012).¹² They assemble a dataset of all FCC votes and find that Commissioners are more likely to vote in favor of orders when the chairman is in the same political party. They also find that when the government is divided commissioners in the chairman’s (and, therefore, President’s) party are less likely to dissent while commissioners in the other party are more likely to dissent. This result is generally consistent with the McNollGast view that politicians use government agencies—even supposedly “independent” ones, in this case—to advance their own agendas.¹³

Candeub and Hunnicutt also find that “the greater number of judges on the D.C. Circuit belonging to the opposite party of the President (and thus Chair) is correlated with more dissenting.”¹⁴ They interpret this result as evidence of commissioners signaling the court. This interpretation is especially interesting given that, according to my own discussions with several former FCC Chiefs of Staff, commissioners, and others, the Commission writes orders with the general understanding that they will be challenged in court.

When an order is brought to a vote it already broadly reflects the preferences of the chairman and at least two other commissioners. In other words, the chairman does not bring an order to a vote unless it has enough support to pass. Commissioners understand that some opponent to the new order is likely to challenge it in court. Eisner (1989) notes that “strict judicial review of agency

⁸ Originally, the Commission had seven commissioners, but this was reduced to five in 1983.

⁹ <http://www.fcc.gov/leadership>

¹⁰ The process is, of course, rarely so neat and can involve Notices of Further Proposed Rulemaking, Order and Notice of Further Proposed Rulemaking, and so on.

¹¹ <http://www.fcc.gov/open-meetings>

¹² Adam Candeub and Eric Hunnicutt, “Political Drivers and Signaling in Independent Agency Voting: Evidence from the FCC,” January 23, 2012, <http://dx.doi.org/10.2139/ssrn.1990546>.

¹³ McCubbins, Noll, and Weingast, “Administrative Procedures as Instruments of Political Control.”

¹⁴ Candeub and Hunnicutt, “SSRN Working Paper Series,” 13.

policy decisions is a strong conservative pressure in favor of the status quo.”¹⁵ Such pressure may affect the types of orders brought to a vote, but, conditional on an order coming to a vote, are also likely to induce the chairman to constrain the breadth of an order and otherwise maximize the likelihood that the FCC will win a legal challenge.

At these meetings the relevant bureau typically presents an order to the commissioners, who discuss it and vote. Although an order has generally gone through earlier public comment periods as a “notice of inquiry” or a “notice of proposed rulemaking,” the precise text on which the commission votes is not made public at the open meeting. Instead, it has become routine for the presenter to request, and for the Chairman to grant, “editorial privileges” to continue working on the text of the order after the vote.

In principle, editorial privileges are intended to allow the relevant bureau to clean up the text of the rule—crossing the i’s and dotting the t’s, as it were. Given the lack of a public version of the text of the order subject to vote, however, it is impossible to know whether the changes between passing the order and publishing it are merely copy edits or more substantial changes. The large variance, as discussed below, in the length of the delay and the significant correlations between substantive aspects of orders and the delay suggests that mere copyediting seems unlikely.

This custom of voting on secret texts appears to be unique to the FCC. Consider, for example, the Federal Energy Regulatory Commission (FERC). FERC is similar to the FCC in many substantive ways. They both regulate network industries. They both have five commissioners. The FCC employs about 1,700 people¹⁶ and has an annual budget of about \$370 million.¹⁷ The FERC employs about 1,500 people and has an annual budget of about \$300 million.¹⁸ Both agencies follow Administrative Procedures Act guidelines, including issuing Notices of Proposed Rulemakings for public comment before voting on Orders and voting at open meetings. But while FCC orders are released at some undefined time after the vote, FERC orders are released the day of the vote

The next section explains the empirical analysis of FCC voting and publication delays, including explaining the data and the empirical approach.

Data and Analysis

The data on FCC orders come from several sources. The date on which the commissioners voted on an order, the date it was released, and the bureau responsible come from the FCC’s Electronic Document Management System (EDOCS) database, which contains information on all documents released by the FCC.¹⁹ EDOCS contains information back to the FCC’s establishment in 1934 and the data can be extracted in (mostly) machine-readable form.²⁰ As a

¹⁵ Neil R. Eisner, “Agency Delay in Informal Rulemaking,” *The Administrative Law Journal* 3, no. 1 (1989): 8.

¹⁶ <http://www.fcc.gov/encyclopedia/employee-profile-fcc>

¹⁷ <http://www.fcc.gov/document/fcc-fy-2014-budget>

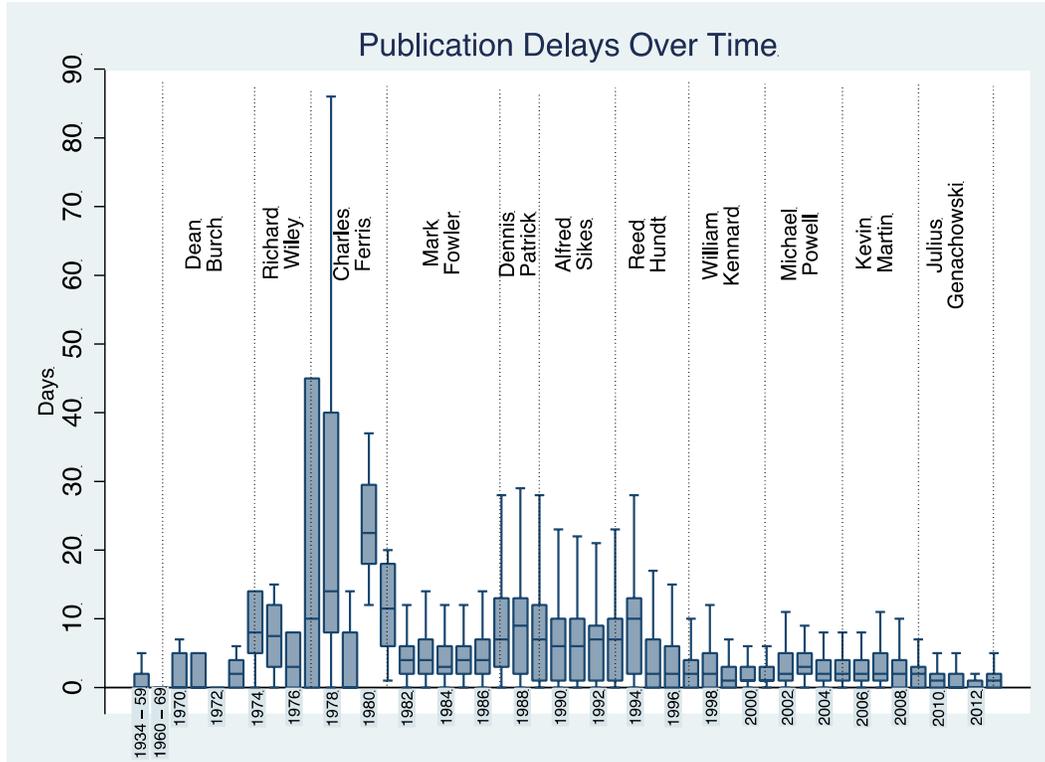
¹⁸ <http://www.ferc.gov/help/faqs/about.asp>

¹⁹ https://apps.fcc.gov/edocs_public/edocsLink.do?mode=basic&type=n

²⁰ The data are not quite machine-readable-ready, and, unfortunately, the FCC’s API does not seem to allow extraction of only certain variables.

result, it is possible to look at the evolution of this curious custom of delay. Due to the quantity of data Figure 1 shows this information for FCC orders issued since 1934.²¹

Figure 1: Publication Delays Over Time



Note: Names are chairman during indicated time period.

Prior to the early 1970s the mean delay between vote and publication was one day and the median was zero days. Delays began to increase in the late 1970s before decreasing to a steady mean of five to seven days until the late 1980s. Delays averaged closer to ten days until 1995, when it decreased to three to five days, finally decreasing further after 2010.

Discussions with people who were high-level FCC officials during the time delays became common in the 1970s has not revealed any particular explanation for that development. Some recalled delays due to physical printing issues and other delays in having the rules appear in the Federal Register.²² Recollections regarding the Federal Register are consistent with information in the official history of the Federal Register:

In 1977 Congress for the first time required agencies to pay GPO for publication of their documents in the Federal Register. One result of this new policy was a trend among agencies to publish fewer documents for informational purposes only.

²¹ These are pure orders only and do not include documents like Memorandum and Orders, Report and Orders, and so on.

²² Rules do not take effect until they are published in the Federal Register.

Another result was to add a new dynamic to the interaction between the Office of the Federal Register and agencies publishing documents – give and take over the adequacy of documents submitted by agencies motivated by reducing their costs of publishing in the Federal Register.²³

The obvious problem with the Federal Register explanation is that the recorded delay is from the time of the vote to publication by the FCC, not when it appears in the Federal Register. Even so, whoever drafts a rule will want to be sure it meets any Federal Register standards, so confusion regarding new procedures could conceivably spill over into the drafting time period. Regardless of the reason this practice began, it appears to have been a permanent fixture.

The potentially interesting variables associated with each order aside from the simple length of delay include how each commissioner voted, counts of outside comments and *ex partes* filed, bureau responsible for the order, and the topics covered. These variables come from the FCC’s Electronic Comment Filing System (ECSF). ECSF, however, does not yield its treasures easily, and generally required reading part of the actual order.

Given the time-consuming nature of assembling the ECFS data it was necessary to narrow the sample of orders considered.²⁴ Focusing on votes of “major” orders is reasonable since these are the ones likely to get the most attention at the FCC and have the largest economic effects.²⁵ These orders are probably also likely to have longer delays, so the mean delay between vote and publication is likely to be longer for these than for all orders combined.

Identifying “major” issues is somewhat subjective.²⁶ The rules used here come from the list of accomplishments published by the FCC at the end of each chairman’s tenure.²⁷ We were unable to find such a document for Reed Hundt, so the list of major rules under his tenure is derived from published statements, speeches, and his bio.²⁸

²³ The Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register March 14, 1936*, 2006, 12, <http://www.ofr.gov/documents/FR-History.pdf>.

²⁴ One bias inherent in any approach that relies on published orders or other documents is that the chairman only brings orders to a vote if he knows it will pass. As a result, it is not possible (at least through this approach) to learn anything about the process by which issues rise to the level of a vote.

²⁵ One might argue, however, that delays could potentially be of more consequence for less significant orders since those are less likely to be scrutinized carefully. Those who make this argument, however, do not face the problem of assembling this dataset.

²⁶ The Office of Management and Budget names and evaluates “major” rules, but only for executive agencies and not systematically for independent agencies. See, for example, Office of Management and Budget, *2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT*, 2013, http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

²⁷ Accomplishments Kennard: <http://transition.fcc.gov/Speeches/Kennard/Statements/2001/achievements.pdf>, Powell: https://apps.fcc.gov/edocs_public/attachmatch/DOC-256206A2.pdf, Martin:

<http://transition.fcc.gov/commissioners/previous/martin/achievements.pdf>, and Genachowski: <http://www.fcc.gov/document/significant-fcc-actions-and-key-developments-broadband-economy>

²⁸ Speeches and Statements Hundt: <http://transition.fcc.gov/commissioners/previous/hundt/speeches-statements.html>
Biography: <http://transition.fcc.gov/commissioners/previous/hundt/biography.html>

Voting Patterns

Because the delay to publication comes after a vote, it is worth examining voting patterns in the data. A commissioner can vote in favor, dissent, or partially dissent. All orders on which the Commission votes pass; if not enough commissioners support it the chairman will not bring it to a vote. As a result, every vote has at least three votes in favor of the order.²⁹

Figure 2 shows how commissioners tend to vote. By far most votes cast are in favor. Voting outright against an order is relatively rare. Commissioners are more likely to partially dissent than to vote completely against. Two possible reasons explain the general absence of no votes. The first is banal. Orders can be detailed and complex, making it understandable that a commissioner would approve of some parts of an order but not others.

The second is related to the publication delay. As discussed earlier, the text on which the commissioners voted is secret, and the final version is written after the vote. Each commissioner is supposed to approve the final text before publication. A partial dissent (or, a “part no vote”) is likely to leave the commissioner with little power to influence the final rule; a partial dissent can make it more likely the commissioner will have a role in the final text.

Figure 2: Share of Votes by Type

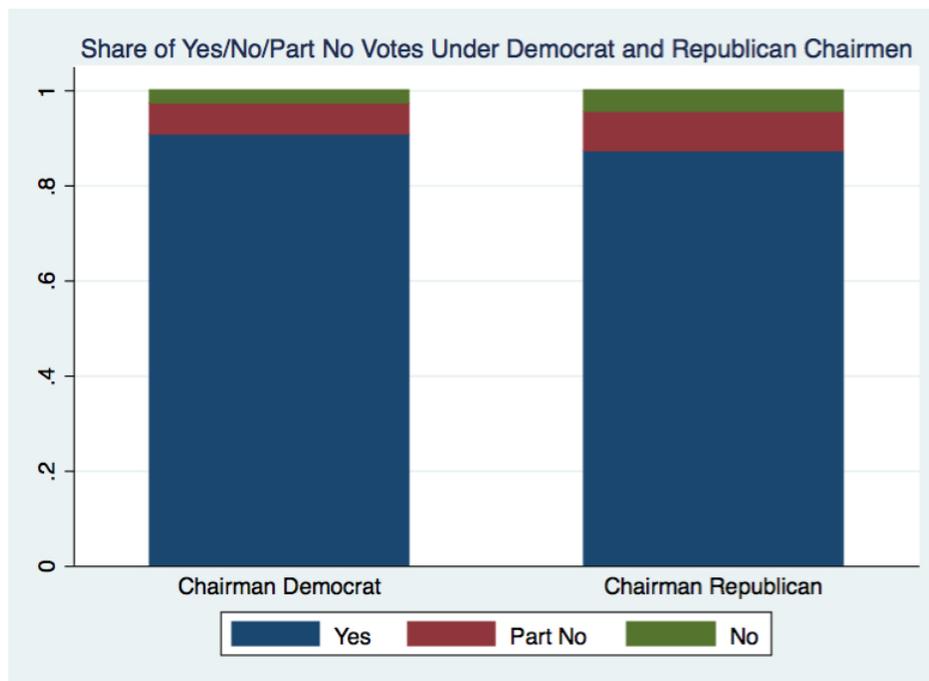


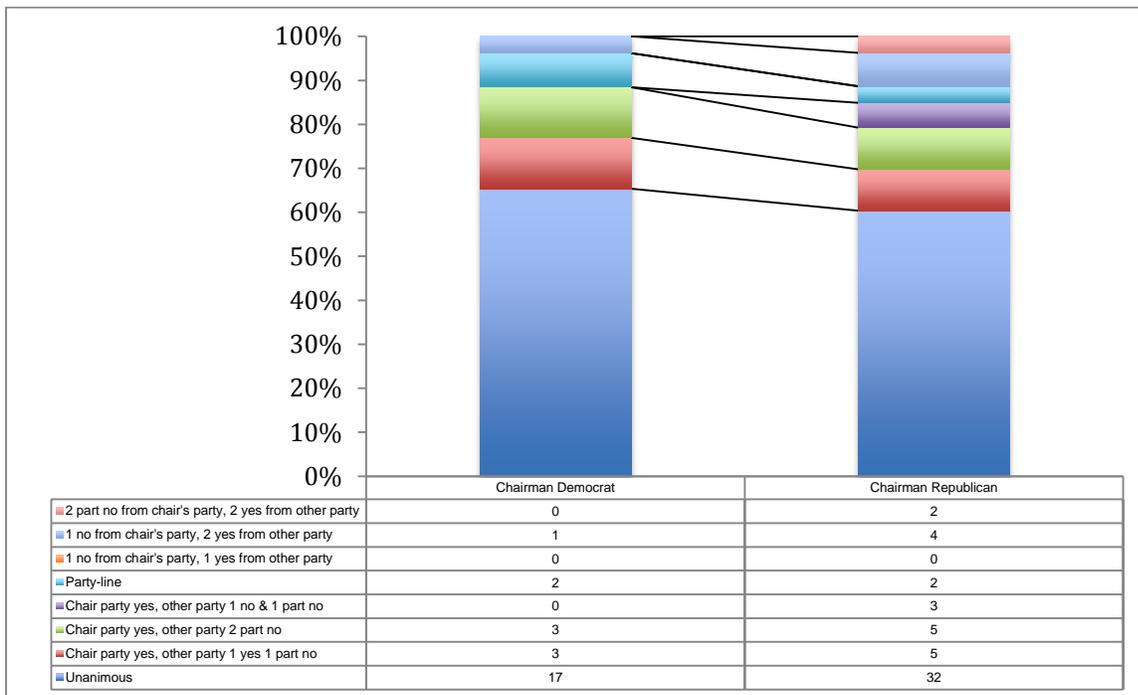
Figure 3 shows how votes split by party affiliation. Most votes under a Republican or Democrat chair are unanimous. This share of unanimous votes is similar to trends observed in much earlier

²⁹ Occasionally the Commission operates with four, or even more rarely, three commissioners. Because votes pass with a simple majority some votes in the data pass with two votes.

FCCs. Cannon (1969) found that 35.8 percent of FCC votes had any dissent between 1956 and 1969.³⁰

Party-line votes in which all commissioners from the chair’s party vote yes and both commissioners from the other party vote no are rare. A more common party split is to have two affirmative votes from the chair’s party (the chairman always votes yes) and one no and one partial no from the minority party. Only rarely do commissioners from the chairman’s own party vote no, though it was more common among Republican commissioners than Democrats.

Figure 3: Commissioner Voting Combinations by Party



Note: Only votes with five commissioners present represented in the figure.

Figure 4 provides more information on voting patterns by commissioners. The chairman always votes yes, leaving two additional commissioners from each party.³¹ Each has the option of voting yes, no, or part no. The figure uses the following notation for each commissioner’s vote:

- D1y = first Democrat commissioner votes yes
- D2y = second Democrat commissioner votes yes
- D1pn = first Democrat commissioner votes part no
- D2 pn = second Democrat commissioner votes part no
- R1y = first Republican commissioner votes yes
- R2y = second Republican commissioner votes yes
- R1pn = first Republican commissioner votes part no

³⁰ Bradley C. Canon, “Voting Behavior on the FCC,” *Midwest Journal of Political Science* 13, no. 4 (November 1969): 591, doi:10.2307/2110073.

³¹ Except when a commissioner slot is empty.

R2 pn = second Republican commissioner votes part no

The figure again shows the prevalence of unanimous votes (R2y and D2y) and how infrequently any commissioner votes no. It also shows Democrats more often voting with a chair from their own party than do Republicans.

Figure 4: Voting Distribution by Commissioner

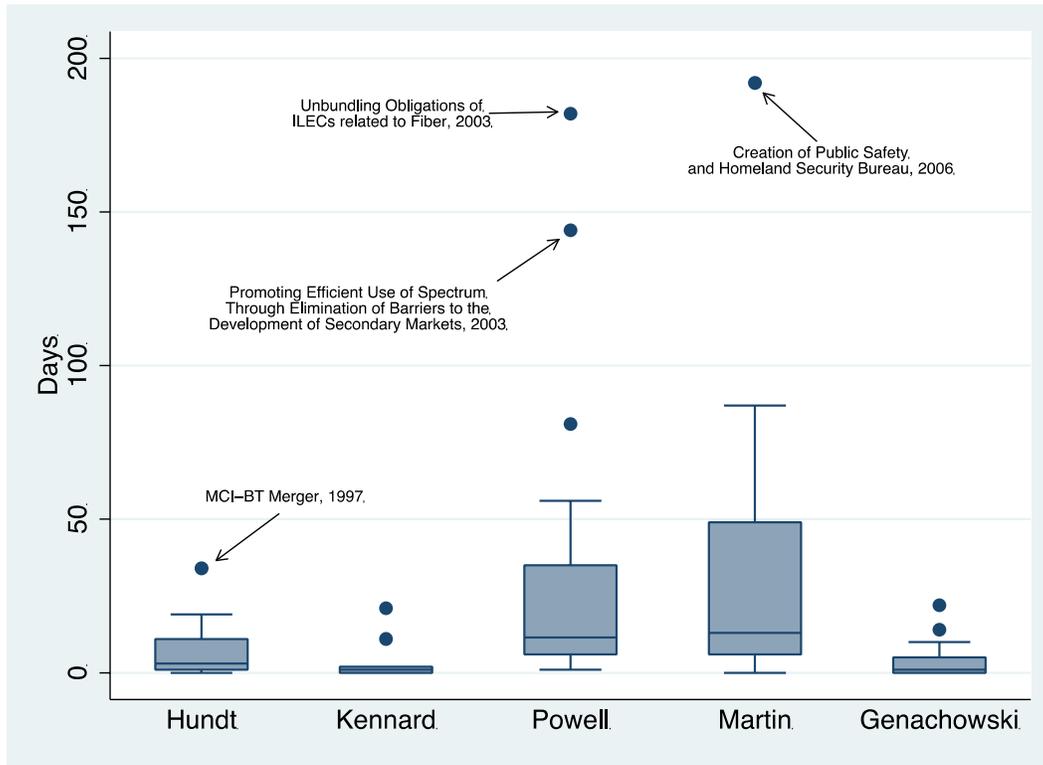
		TOTAL					
		Democrat					
		D1y	D2y	D1pn	D2pn	D1n	D2n
Republican	R1y	82	71	15	6	9	2
	R2y	58	50	13	5	9	2
	R1pn	13	10	1	1	0	0
	R2pn	3	3	0	0	0	0
	R1n	4	4	0	0	0	0
	R2n	4	4	0	0	0	0
			DEMOCRAT CHAIR				
		Democrat					
		D1y	D2y	D1pn	D2pn	D1n	D2n
Republican	R1y	32	30	0	0	1	0
	R2y	19	18	0	0	1	0
	R1pn	9	7	0	0	0	0
	R2pn	3	3	0	0	0	0
	R1n	2	2	0	0	0	0
	R2n	2	2	0	0	0	0
			REPUBLICAN CHAIR				
		Democrat					
		D1y	D2y	D1pn	D2pn	D1n	D2n
Republican	R1y	50	41	15	6	8	2
	R2y	39	32	13	5	8	2
	R1pn	4	3	1	1	0	0
	R2pn	0	0	0	0	0	0
	R1n	2	2	0	0	0	0
	R2n	2	2	0	0	0	0

Note: Chairman always votes yes. The data do not include the breakdown of votes by commissioner for all orders. As a result, these counts do not include votes from the entire dataset.

Delays From Vote to Publication

Figure 5 shows delays in publication of major orders. Similar to Figure 1, it shows notable differences in delay times across chairman. These differences may be due to the chairman's approach to process, but, since a new president always appoints a new chairman, the difference might reflect an administration's preferences rather than the chairman, *per se*.

Figure 5: Delay Between Vote and Publication by Chairman



Conditional on coming to a vote, delays between vote and publication may depend on several factors. Some factors are related to the drafting process itself. A long order may be more complicated and take more time to draft. A large number of comments might require the order to address more issues than an order that receives fewer comments. Certain bureaus may be more or less efficient or deal with inherently more complex issues than others. Similarly, certain issues might be inherently more complex, increasing the time between vote and publication.

Other factors might speak to more meaningful reasons for delay. An opponent of a controversial rule may be more likely to challenge it in court and probably more likely to win. Thus, one might expect delays to be longer for more controversial orders as the bureau and commissioners try to ensure the order is written in such a way to increase the odds of the Commission winning in court. The relevant factors available here are the share of commissioners voting in favor of the rule, the number of *ex parte* filings (indicating the number of meetings between FCC staff or commissioners and interested parties), and the number of comments received.

Table 1: Summary Statistics

Variable	n	Mean	Median	Min	Max
Delay in days	113	19.6	7	0	192
Number of paragraphs	113	180.3	118	4	1430
Number of ex partes before vote	105	96	42	0	1552
Number of ex partes filed between vote and publication	105	3	0	0	40
Outside comments received	105	10360	990	20	234940
FCC documents related to the docket	105	57.9	16	1	2323
Share of commissioners voting yes	108	0.89	1	0.2 ³²	1

Two-Stage Estimation: Vote to Delay

To explore the effects of these factors on the delay between vote and release I estimate a two-stage model. The first stage regresses the share of yes votes on the number of ex partes filed before the vote (and other independent variables), and uses the fitted value of the share of yes votes in the second stage. In particular, I estimated the two equations below simultaneously using two-stage least squares.

- (1) $yes_share_i = f\{ex\ partes\ before\ the\ vote_i, outside\ comments_i, Z_i\}$
- (2) $days\ delay_i = f\{yes_share_i, ex\ partes\ between\ vote\ and\ release_i, Z_i\}$

Where $Z_i = chairman_i, FCC\ releases_i, number\ of\ paragraphs_i, number\ of\ years\ chairman\ has\ been\ chair_i, issues_i [or\ bureau_i]$ and i indicates the order. I estimate the system including either issues or bureau, but not both simultaneously as they are, not surprisingly, strongly collinear.

The endogenous variable, yes_share_i (share of commissioners voting yes) is overidentified, with the number of *ex partes* and *outside filings* acting as instruments. These are reasonable instruments given that meetings with FCC officials and filings related to the order prior to the vote are intended to influence commissioners’ votes. The number of FCC releases prior to the vote could make sense as an instrument based on their timing (i.e., before the vote), but are probably more related to the complexity of the proposed rule rather than meant to influence commissioner votes, per se. That is, while ex partes and outside filings are intended to affect votes, which, in turn, might affect the delay, the number of FCC releases is more likely to be directly related to the delay rather than through the endogenous variable.

Finally, the docket typically contains items other than the order subject to vote, so remains open after the vote. I therefore include in the second equation the number of *ex partes* received between the vote and publication. If these communications are not regarding the order we should expect that variable to be uncorrelated with delays. If, however, the number of communications following the vote is statistically significant and positive it could indicate changes made to the order following the vote in response to outside pressure.

³² Every order that comes to a vote passes. This minimum—20 percent of commissioners voting in favor—is due to four commissioners dissenting in part on Docket 01-338, *Unbundling Obligations of ILECs related to Fiber*.

The length of an order, measured by the number of paragraphs in it, could affect votes if longer, and presumably more complicated, orders make it less likely for a commissioner to be either fully in favor or fully opposed. We also might expect the delays between vote and publication to be longer if bureaus are simply involved in copy editing an order.

The orders that come to a vote will depend at least in part on the chairman, who wants to ensure passage and, presumably, resilience of the order to legal challenge. Each chairman is also likely to have his own unique approach to various aspects of rulemaking. For at least these reasons the regression includes chairman indicator variables.

Results and Discussion

Table 2 shows the results. The number of *ex partes* before the vote is significantly and negatively correlated with the share of commissioners voting yes. That is, fewer commissioners vote in favor of the order the more outsiders interact with the commission during the rulemaking period. On the one hand, this result may simply show that issues controversial outside of the FCC are also controversial inside the FCC. On the other hand, it may show that meetings and comments can influence commissioners, at least to vote against an order.

The number of *ex partes* filed between the vote and publication is positive, but statistically significant in only one of the three specifications. On the one hand, if we believe the relationship does exist, it raises the possibility that meetings with interested parties after the vote can affect the final rule. On the other hand, the relationship could be spurious: complex dockets may result in longer delays due to complexity, while the complexity also means parties remain engaged for other potential orders in the docket.

The topic of the order does not appear to have much relationship to the share of commissioners voting in favor, with the exception of orders involving public safety. A higher share of commissioners tends to vote in favor of public safety orders than they do for orders involving other topics. A likely explanation is that commissioners, like politicians, are wary of appearing to be opposed to anything sold as being necessary for security. Additionally, almost certainly firms that would benefit from any infrastructure or services sold as part of the order lobby in favor of it while few argue against it. In short, a commissioner is probably almost always better off voting in favor of an order involving public safety than against it.

Among the five chairman in this sample, a larger share of commissioners voted yes, on average, under Reed Hundt's tenure than during others'. The second stage shows significant differences across chairmen in the length of the delay. Additionally, the instrumented share of commissioners voting yes is negatively and significantly correlated with days of delay—the fewer commissioners that vote yes, the longer the delay before publication. These differences across chairman, even when controlling for other factors, are consistent with Macher, Mayo, and Nickerson (2013), who demonstrate significant heterogeneity across regulators within a given agency (the Federal Trade Commission in the case of their study).³³ The effect is not small. Each lost vote is associated with 27 more days of delay.

³³ Macher, Mayo, and Nickerson, “Regulator Heterogeneity and Endogenous Efforts to Close the Information

Among topics, orders involving spectrum appear to have delays 12 to 13 days longer than other issues. Although orders involving spectrum are correlated with longer delays, orders from the wireless bureau itself are not associated with longer delays. Indeed, no bureau appears to be particularly better or worse at avoiding delays, as none of the bureau dummies are statistically significant. Finally, the length of the order is not statistically correlated with the share of yes votes or the delay.

Table 2: Regression Results

		(1)	(2)	(1)	(2)	(1)	(2)
		Share yes votes	Days delay	Share yes votes	Days delay	Share yes votes	Days delay
Share yes votes			-119.255*** (0.002)		-127.566*** (0.004)		-118.710*** (0.002)
Instruments	Ex partes filed before the vote (hundreds)	-0.043*** (0.000)		-0.043*** (0.000)		-0.044*** (0.000)	
	Outside comments (thousands)	-0.001 (0.194)		-0.001 (0.194)		-0.001 (0.189)	
	FCC releases		-0.026* (0.053)		-0.023* (0.088)		-0.026** (0.049)
Ex partes filed between vote and release (hundreds)			81.583 (0.114)		97.279* (0.064)		76.511 (0.145)
Chairman	Hundt	0.161** (0.037)	25.650* (0.078)	0.161** (0.037)	26.896* (0.069)	0.183** (0.020)	28.122* (0.061)
	Powell	0.037 (0.571)	20.747* (0.059)	0.037 (0.571)	22.772** (0.043)	0.064 (0.334)	24.031** (0.036)
	Martin	0.043 (0.503)	30.342*** (0.005)	0.043 (0.503)	31.263*** (0.003)	0.061 (0.345)	32.506*** (0.003)
	Genachowski	0.087 (0.180)	3.154 (0.778)	0.087 (0.180)	5.495 (0.614)	0.111* (0.094)	5.833 (0.618)
	Years as chair					-0.023 (0.124)	-2.635 (0.326)
Number of paragraphs		0.000 (0.411)	0.022 (0.222)	0.000 (0.411)	0.018 (0.318)	0.000 (0.311)	0.024 (0.170)
Topic	Spectrum	0.013 (0.748)	12.653* (0.070)	0.013 (0.748)		0.008 (0.840)	12.101* (0.080)
	Mobile	-0.077 (0.256)	6.737 (0.578)	-0.077 (0.256)		-0.084 (0.217)	6.209 (0.608)
	Broadband	0.024 (0.642)	10.785 (0.214)	0.024 (0.642)		0.017 (0.730)	10.242 (0.235)
	Merger	-0.057 (0.305)	-7.457 (0.426)	-0.057 (0.305)		-0.051 (0.352)	-6.650 (0.476)
	Telephone	0.047 (0.415)	0.725 (0.943)	0.047 (0.415)		0.053 (0.356)	1.320 (0.896)
	Public Safety	0.113** (0.024)	9.474 (0.321)	0.113** (0.024)		0.112** (0.025)	9.236 (0.328)
	Rural Access	0.033 (0.588)	2.421 (0.819)	0.033 (0.588)		0.033 (0.591)	2.195 (0.835)
Bureau	Media				-11.657 (0.294)		
	Office of Engineering and Technology				-2.215 (0.843)		
	Wireless				5.130 (0.596)		
	Wireline				-7.544 (0.444)		

Asymmetry Gap.”

Public Safety				6.153 (0.656)		
Constant	0.847*** (0.000)	96.030*** (0.007)	0.847*** (0.000)	111.330** (0.015)	0.873*** (0.000)	98.535*** (0.007)
Observations	102	102	102	102	102	102
R-squared	0.371	0.363	0.371	0.303	0.388	0.371

pval in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Conclusion

Although transparency is recognized as a cornerstone of any regulatory agency, the U.S. Federal Communications Commission does not allow the public to see the text of orders subject to commission vote. Instead, commissioners vote, grant the relevant agency bureau “editorial privileges” and then later—sometimes months later—release the order publicly. Ostensibly this procedure is to allow the bureau to check the text for typos and other editorial mistakes, but of course there is no way to know what changes between the vote and publication if nobody can see the original text subject to a vote.

This paper assembles data on publication delays on every FCC order back to 1934 and detailed data on major orders from 1993 through 2013. The data show that the custom of delay between vote and publication began in the 1970s; prior to that orders were released immediately following the vote. A two-stage model also reveals significant differences across chairman in the share of yes votes and delays and that more controversial orders as measured by the number of private meetings by interested parties held with FCC officials prior to the vote is related to fewer commissioners voting in favor of the order, with a smaller share of yes votes translating into longer delays between vote and publication. Meanwhile, the length of the order is not correlated with either the share of commissioners voting in favor or the length of the delay.

Generally speaking, the data suggest that despite detailed instructions in the Administrative Procedures Act, the chairman can have significant influence on the rulemaking process. More importantly, the data suggest that “editorial privileges” are granted for more than mere copyediting. More controversial orders yield more dissent and longer delays, implying either that commissioners engage in substantive negotiating following a vote or that the commission pays extra attention to the details of an order the more likely they believe it will be challenged in court.

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