

***The Toothless Tiger: An Overview of the Structural and Partisan Issues that Affect the Federal Election Commission***

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The Federal Election Commission (FEC) is the primary agency to enforce campaign finance laws in the U.S. and it has long been portrayed as a toothless tiger. Given the importance of administering campaign finance regulations in a democracy, the characterization of the FEC as a failed enforcer is problematic as it decreases trust and integrity in the system. The criticism may be warranted given the agency was effectively closed from 2017 through 2020, with the exception of a 28-day period in 2019, as a result of being unable to maintain at least four commissioners on the panel, the number legally required to form a quorum and proceed with most business. This paper examines how the structure and partisanship of the FEC panel is ultimately the cause of these shutdowns and prevent the effective enforcement of campaign finance laws. The findings indicate that fewer commissioners present on the panel leads to a decrease in consensus. However, consensus rises when more Republican commissioners are present on the panel.

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## *The Toothless Tiger: An Overview of the Structural and Partisan Issues that Affect the Federal Election Commission*

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The Federal Election Commission (FEC) faces a crisis of confidence in the last few years that is the result of too few commissioners present to conduct agency business. As discussed previously, empty seats effectively shut down the agency during most of the 2020 election. This is the second presidential contest in the last twelve years for which the FEC was non-functioning, the previous one was in 2008. These shutdowns are occurring during an era of extraordinary campaign fundraising; the last few presidential election cycles saw at least a billion (or more) dollars in campaign spending (opensecrets.org 2021). As a result of the shutdown, a large backlog grew of cases either waiting to be heard or waiting for decisions (Derysh 2020). In her comments on Trump's new appointments in December 2020, Commissioner Weintraub (2020) reported a backlog of 446 matters awaiting some action by the Commission, including staff reports, recommendations to find Reason to Believe (RTB), 35 "SOL-imperilled" cases which means that they were close to the five-year statute of limitations to investigate and punish. These matters include a variety of offenses including those examining alleged foreign financing of campaign related activities.

A functional FEC is important because the agency's mission is "to protect the integrity of the federal elections by providing transparency and fairly enforcing and administering federal campaign finance laws." (FEC 2020, 1). This agency's primary goal is to ensure that those involved in financing (both fundraising and spending) campaigns for federal offices abide by the laws governing the conduct of campaigns and elections (Mann 2005). The agency's role in campaign finance oversight is one of the most important elements in the election cycle and it

ends long after an election concludes (Norris, Cameron, and Wynter 2019). The agency's success in carrying out its mission is essential to the integrity and fairness of the political process and to building public trust in our election system (Norris 2014; Potter 2020).

To achieve these ambitious goals, the agency was tasked with four primary duties: 1) to disclose campaign finance information, 2) to administer public presidential election funds, 3) to serve as a clearinghouse for election related material, and 4) to enforce federal campaign finance laws (Sheppard 2007, 60). To implement these goals requires the agency to investigate claims of wrongdoing, to issue fines, and to explain new rules when new campaign finance laws are passed that require further explanation or when federal court decisions require additional clarity. The duty that requires the most resources, in terms of money, personnel, and time, is investigating claims of wrongdoing (Sheppard 2007). Claims investigated by the FEC may be brought by any person or committee accusing another person or committee of wrongdoing, or by the FEC itself if it uncovers discrepancies or evidence of illegalities from the reports filed with the agency. Claims made to the agency about potential violations of campaign finance laws are referred to as Matters Under Review (MURs). Each MUR is assigned a number and receives an initial investigation conducted by FEC staff. The staff reports their initial findings and recommendations to the Commission to vote on. The staff may recommend further investigation or recommend disciplinary action if they find a Reason to Believe (RTB) or they may recommend the case to be dropped if they find No Reason to Believe (NRTB).

Staff recommendations are made to the FEC Commission, a six members panel of commissioners.<sup>1</sup> FEC Commissioners are nominated by the president and approved by Congress

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<sup>1</sup> The FEC is led by a chairperson chosen from the current bench of commissioners. The chairperson serves a one-year term and has limited powers. Members rotate into this role with no member serving more than once per six-year term (Sheppard 2007).

to serve a six-year term.<sup>2</sup> Their terms are staggered so that two new commissioners are seated every two years. If retiring, or otherwise leaving, commissioners were replaced in a timely manner the design of the agency should effectively produce a steady turnover of members and create a politically balanced commission. However, for reasons that will be discussed shortly, there is not a steady rotation of new commissioners being appointed to the FEC and this is causing problems for the agency.

Another interesting part of the design of the FEC that may be impacting the agency's ability to function is that Congress chose to have openly partisan commissioners serve on the Commission. Although they required that no more than three Commissioners hail from one party at any given time. This legal requirement of no more than three partisans to come from one party allows Congress to infuse politics openly into the decision-making while promoting the idea of bipartisanship. Further enhancing the idea of bipartisanship is the legal requirement that a minimum of four of the six members must agree to proceed on any action, whether it be rulemaking, extensive investigations, levying of fines, approving audits, and/or advisory opinions (Gallagher 2018). The requirement that four members vote together to proceed, or the rule of four, is considered an important element in obtaining bipartisan consensus when conducting agency business and making decisions about the enforcement of campaign finance law. The decision may be to proceed with an investigation, or it may be to not proceed, either way the case reaches a conclusion with bipartisan consensus. Given the nature of the agency's business and the design of the commission, the need for bipartisan consensus is crucial if the

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<sup>2</sup> Initially only two of the members were appointed by the president, the other four were appointed by Congress, and the House Clerk and Senate Secretary served as ex officio members. Congress amended the Federal Election Campaign Act of 1979 (FECA) shortly after it was passed to give the president the power to nominate all of the members, with two of these seats being subject to appointment every two years (Sheppard 2007).

agency is going to be controlled by partisans. If bipartisan consensus is achieved a majority of the time, it prevents partisanship from driving the decision making at the agency.

If commissioners vote successfully (four consensually vote yea or nay) it signifies that the agency is effective in reaching a bipartisan consensus. The consensus may be to proceed with an investigation, or it may be to not proceed, either way the case reaches a conclusion with bipartisan consensus and therefore is considered successful. If four or more commissioners are unable to reach a bipartisan consensus, this signifies that the agency is unable to reach a conclusion and therefore is considered unsuccessful. If four commissioners do not vote together then the MUR closes by default, rather than proceed (four commissioners cast an affirmative vote) or close with consensus (four commissioners cast a dissenting vote). A case closing by default is unsuccessful because it is the same as a consensual decision to not proceed for lack of merit. Either way it effectively kills the investigation. Since it only requires three commissioners to block consensus from occurring it is easier for a vote to fail than it is for it to succeed. If a consensus is reached, then it was reached with bipartisan consensus. However, given that only three commissioners may hail from one party, getting four commissioners to agree to proceed is a difficult threshold to meet. The number of commissioners set at six is a structural problem for the FEC. It is often too few to meet the quorum of four required to proceed on most agency actions (La Forge 1996; Skahan 2018). Challenges to maintaining a legal quorum seem to be the result of a confluence of factors.

First, it is difficult to achieve bipartisan consensus on matters related to campaign finance laws, especially in today's hyper partisan political environment (Weiner 2019). Congress required that no more than three of the six commissioners may hail from one party at any given time to prevent the capture of the commission by either party. However, since there are only six

total commissioners, achieving a consensus to proceed is indeed a difficult task. To achieve four concurring votes, all three commissioners from one party must agree plus one from the other party or two commissioners from both parties. The intense political polarization prevalent in the U.S. (Klein 2020) is spilling over into the FEC and it is increasingly preventing the commissioners from reaching a consensus (Streb 2013; Potter 2019; Franz 2018).

A second factor that decreases the likelihood of achieving a bipartisan consensus happens when commissioners recuse themselves from voting. Commissioners self-recuse from particular FEC cases because they have a conflict of interest with a party in the case. This is done to prevent decision-maker bias. Given that the commissioners are partisan and often come from political backgrounds, serving as campaign finance consultants and attorneys for the political parties and their candidates and some have even run for and/or held elective office, this presents a conflict of interest and increases the likelihood of self-recusals. Although self-recusals are not the main cause of dysfunction at the agency, they are certainly an impediment as they decrease the ability of the commission to achieve the number of votes required to meet the legal threshold required to proceed on an investigation or finalize a decision. When commissioners self-recuse from voting it decreases the odds that a case will proceed or close with consensus because it reduces the numbers of members voting because the number required to proceed does not change. Therefore, the simple majority requirement of four commissioners becomes a super majority requirement with a reduction of even one member from the Commission. Although there is literature addressing self-recusals that examines legislators or judges, the topic, as it relates to the FEC, is not broached by administrative, legal, or political scholars and represents a gap in the literature probing the topic of politicized decision making.

This leads to the third factor that makes achieving a bipartisan consensus difficult, empty seats on the commission. Congress established the commission so that commissioners serve one six-year term and that two of the six seats rotate every two years. However, that does not appear to be occurring (Confessore 2014; Garrett 2015; Derysh 2020; Lee 2020; Potter 2020). Empty seats, much like recusals, threaten the agency's ability to function because the legal requirement that a quorum of four commissioners be present to conduct agency business does not change. When there are empty seats the number of commissioners legally required to proceed does not change, but the simple majority requirement becomes a super majority requirement when there are fewer commissioners present making it less likely a case will proceed. If there are fewer seats and self-recusals, then it reduces the chances further and may even threaten the quorum. However, self-recusals occur on a case-by-case basis, but a commission seat may sit empty for months or, shockingly, years may pass before a seat is filled (Weiner 2019).

Empty seats result from commissioners who exit before the expiration of their six-year term. Early exits are problematic because the seats left empty could stay empty for quite some time afterwards. This is a plausible scenario because the appointment timeline is not a legally mandated. There is also not a legal requirement that the president or Congress follow this appointment timeline. During the last half of President Trump's term multiple seats sat empty, debilitating the agency in the run-up to the 2020 election. He did nominate at least two candidates, but their appointments were not confirmed by the Senate until December of 2020.

At best, this provides evidence that there is no longer the senatorial courtesy for presidential appointments that used to exist, especially when operating under a divided government (Binder and Maltzman 2004) and, interestingly, even if the majority party in Senate is the same as the president's party. At worst, this provides evidence that there was a coordinated

effort between the President and the Majority Leader to slowdown the nomination process in order to disable the agency in the lead up to the 2020 elections. Given the control that President Trump had over the Republican Party during his time in office (Binder 2018; Heersink 2018), it is hard to believe that he was unable to push the Republican controlled Senate to approve his appointments to the FEC earlier than at the end of his one term in office. If President Trump had pushed the Republican Senators, he would have ensured that the FEC was up and running before the 2020 election and thus prevented the backlog that grew as a result. President Trump chose not to push his party, which he probably could have managed to make happen with one or two tweets.

If it were not for the commissioners serving in “hold-over” status, meaning they continue to serve the commission past their initial six-year term, this agency, at times, might not have had any commissioners serving at all. By the time the new appointments were confirmed to their posts restoring the quorum on the commission, which was in December of 2020, Commissioner Weintraub (2020) reported a backlog of at least 446 matters awaiting some action by the Commission, including staff reports, recommendations to find Reason to Believe (RTB), 35 that were “SOL-imperilled” which means close reaching the five-year statute of limitations to investigate and punish. When that threshold is reached matters before the commission must be released without further investigation or enforcement. Matters waiting to be heard may include a variety of offenses, from low level violations like illegal use of campaign funds to higher level ones like the foreign financing of campaign related activities.

The fact that the Republicans in office at the time were derelict in their duty, raises suspicions about the power of political elites to control the status quo on campaign finance enforcement and other matters. Their willingness to allow seats to sit empty at the agency and to



replace the hold-over commissioners indicates the agency's relationship between the FEC and the elected officials that it regulates is problematic (Olson 1982; Oldaker 1986; Datta 2020; Potter 2020). The president and members of Congress are regulated by the agency, but at the same time they have powerful controls over it. Even though the agency is designated as independent, it is unique in that it is one of the few agencies in the U.S. that must police the behavior of those that sustain it in one form or fashion; Congress and the President (Olson 1982; Oldaker 1986; Sheppard 2007). These elected officials are the primary fundraisers and spenders of campaign contributions in U.S. elections and therefore they are also the primary targets of FEC regulations. Regulations which are mostly "by or for the political officials who control or sustain the FEC, and many believe that as a result the agency has not been sourced properly to keep up with the growing needs of the agency," (Sheppard 2007, 33). This conflict of interests makes it seem highly unlikely that the FEC is truly independent (Olson 1982; Oldaker 1986; LaForge 1996; Skahan 2018; Potter 2020).

The recent developments at the FEC leads many (Skahan 2018; Sheppard 2007; Potter 2020) to believe the agency was designed to fail, believing that the FEC was not established to mitigate partisanship nor prevent electoral corruption. The agency is administered by partisan commissioners representing their own political parties while rendering verdicts on claims of political wrongdoing and violations of campaign finance law. The claims they investigate and vote on may be brought by any person, by any committee, or by the agency itself when they uncover violations from the reports filed with the agency accusing another person or committee, known as the respondent, of wrongdoing. The design of the agency allows for one party to easily block an investigation, and this leads to exactly what Congress stated it was attempting to avoid, the capturing of the agency by one party (Potter 2020). The decision to allow partisans to render

verdicts on campaign finance matters is debatable given that it makes reaching a consensus difficult and makes it unlikely that complaints proceed to an investigation (Arceneaux 2019).

It is difficult to dispute that the empty seats and stalled confirmations at the agency have debilitated it at times, which is a function of structure. From the start of the agency, its unique mission, which is to oversee the campaign finance activity of the principles that have indirect control over it, was capricious. There were bound to be problems at the Commission when control over the agency’s appointments, budgets, and actual design was given to the primary recipients of the agency’s investigations and enforcements. This relationship has created an institutional sclerosis at the agency and essentially rendered the agency useless, and not at all independent. An appropriate metaphor is the aphorism ‘the foxes guarding the henhouse’ (Oldaker 1986). To know if this expression correctly captures the agency, we have to consider whether the agency has been rendered ineffective. To do this we need to answer if the agency is functioning. Functioning is defined by the periods of time that the commission panel has the number of seats needed to make quorum. To determine if the commission panel is able to make quorum the membership of the panel was explored (see Table One below). The members were ordered by entrance and exit on to the panel and then the members were organized by ‘sets’ to assess the unique panels that form as members enter and exit the panel. This provides us the opportunity to assess the panel is able to make the legal quorum required to proceed with most agency business. It also provides an opportunity to assess partisanship of the members on the panel and the partisan balance of the panel.

Table One: Characteristics of the Commissioner Sets

Set	Duration of Each Set	Total Number of Members	Quorum Present	No of Democrats	No of Republicans	No of Independents	Partisan Balance	Party with Majority
1	990 Days	6	Yes	3	3	0	Yes	Neither
2	141 Days	5	Yes	3	2	0	No	Democrats
3	429 Days	6	Yes	2	3	1	No	Republicans
4	288 Days	5	Yes	2	2	1	Yes	Neither

5	179 Days	3	No	1	1	1	Yes	Neither
6	1,684 Days	6	Yes	2	3	1	No	Republicans
7	221 Days	5	Yes	1	3	1	No	Republicans
8	41 Days	4	Yes	1	2	1	No	Republicans
9	1,246 Days	6	Yes	2	3	1	No	Republicans
10	329 Days	5	Yes	1	3	1	No	Republicans
11	618 Days	4	Yes	1	2	1	No	Republicans
12	194 Days	3	No	1	1	1	Yes	Neither
13	105 Days	4	Yes	1	2	1	No	Republicans
14	113 Days	3	No	1	1	1	Yes	Neither

Table One (see above) illustrates more precisely the structural and partisan differences of each set and the imprecise nature of the characteristics of these sets over an 18-year period that have resulted from empty seats and partisan imbalance. This table illustrates the duration of each set, total number of members per set, whether there was a quorum present, the number of members by partisanship, if the set has partisan balance, and which party controlled the most seats. The illustration of the differences by set also indicates the erratic differences in the commissioner sets as they vary widely regarding the duration of time served, the number of commissioners serving at a time, and the resulting partisan balance at the FEC.

First, these sets vary widely regarding the number of days per set, the number of commissioner's present, the number of delegates from each party, whether there is a quorum present, and overall partisan balance. In the period which is the focus of this research there are a total of 6,578 days and the sets last, on average, 470 days. The range is wide, from a low of 41 days in Set Eight to a high of 1,684 days in Set Six. Often these sets last for a shorter time because a commissioner exits early and of the time it takes to replace them. In a few instances, the set lasts longer than expected because commissioners do not exit at the end of their term.

The number of members also varies widely from set to set. There are only four sets when six members are present, Sets One, Three, Six, and Nine. This represents a total 4,349 days of the total 6,578 days, or 66.11% of the time that the Commission had a full bench over the last 20 years. There are three sets with less than four members present, Sets Five, Twelve, and Fourteen.

This represents a total of 486 days, or 7.39% of the days that the FEC lacked a quorum. This information answers the first research question. How often is the agency unable to form a quorum? When looking at this question from the angle of sets, then, as stated, there are three sets out of 14 that were unable to form a legal quorum. This is a small percentage of time compared to the amount of time when the Commission has a full bench. However, the period of time that the agency was unable to function represents a year and four months. This is an excessive amount of time that the agency lacked a quorum in the last 20 years, especially given the important task of the FEC. It is notable that a third of that time occurred in the last few sets, beginning in late 2019, when the Republican dominated government failed to fill the seats. For the bulk of time in the last 20 years, or the scope of this study, the agency was functioning, with the one exception noted in 2008. That period without a quorum lasted six months. This is not to deflate concerns over the lack of a quorum, but rather to add some perspective that this appears to be a more recent phenomenon. It should be noted that each of the periods without a quorum occurred during a presidential election cycle, the busiest time for the election commission. The rule of four is not an impossible threshold to reach most of the time but there have been more than enough days that the FEC could not proceed, and the threat of a lack a quorum is prevalent enough to be of concern.

The periods of time that the commission has a quorum, but still fewer than six commissioners, may give them the looming feeling that the quorum is always under threat. There are four sets when only five members are present, Sets Two, Four, Seven, and Ten. This represents a total of 979 days, or 14.88% of the days that they hovered just above the number required to form a quorum. There are three sets when only four members are present, Sets Eight, Eleven, and Thirteen. This represents a total of 764 days, or 11.61% of the days that were right at

the number required to form a quorum. These sets combined represent, seven of the fourteen sets, or a whopping 26.5% of the sets that hover at, or right above, the number require to proceed with most agency business. If you combine the duration of days of these sets with the duration of days of sets that have less than four commissioners, then that is 33.89% of the days that have less than six commissioners or about a third of the time the bench has empty seats. These findings reiterate that there is always the threat of an absence of a legal quorum hanging over the agency's head, which may present interesting psychological effects in the members as they consider and vote on agency business.

Although the periods where they hover above the number required to make quorum only represent 14.88%, this is still substantial and provides evidence that political tactics have damaged the agency. This leads to the next research question, how often is the agency politically imbalanced, or does not have an even ratio of Democrats to Republicans? If comparing the overall number of Republicans to Democrats that have served on the Commission in the last 20 years when looking at the total of 16 commissioners, nine of them are Republicans, six of them are Democrats, and one is an Independent. This indicates that there has been one third more Republicans than Democrats. This is not a huge number, but when some stay longer than others this deficit is more pronounced evidenced by the uneven ratio of Democrats and Republicans in most sets. In only five of the 14 unique sets of commissioners (Sets One, Four, Five, Twelve, and Fourteen) are there an even number of partisans or partisan balance. This represents a total of 1,764 days, or 26.82% of the total days that the Commission had a partisan balance.

Unfortunately, during three of five sets there was the absence of a quorum (Set Five, Twelve and Fourteen) which represents 7.39% of the days in the study, therefore the commission only had an even ratio of Democrats to Republicans, 19.43% of the days in the study. There is not an even

ratio of Democrats and Republicans in nine of the 14 unique sets of commissioners (Sets Two, Three, Six, Seven, Eight, Nine, Ten, Eleven, and Thirteen). This represents a total of 4,814 days, or 73.18% of the days in the study that the Commission did not have a partisan balance and answers the second research question.

Even more alarming than the inordinate lack of partisan balance in the sets is the partisan asymmetry that is occurring as a result of this imbalance. This partisan asymmetry occurs as a result of the balance of power held by one party when they control the majority of seats for a long period of time. That balance of power does not lie with the Democrats, as they have only one set (Set Two) where they hold the majority of seats when compared to the Republicans who have eight sets (Sets Three, Six, Seven, Eight, Nine, Ten, Eleven, and Thirteen) where they hold the majority of seats. Put another way, the Republicans have held the majority of seats 71% of the days in the study compared to the Democrats who only held the majority of seats 2% of that time. This is clear example of partisan asymmetry in government. That does not represent partisan balance whether you frame the result in sets, days, or number of partisans. Clearly, in the last 20 years, this has been a Republican dominated FEC.

This has undoubtedly been caused by seats left open from several early exits. A large reason for the partisan imbalance is that too many of the commissioners stay well past their six-year term, and this throws off the scheme of two new members joining every two years. Although we do not know for sure it is suspected that many of holdover commissioners stay past their six-year term because they do not want to leave the commission in a bind. They cannot help but be aware that the president and the Senate often fail to do their job in nominating and confirming candidates in a timely manner. The terms of two of the longest serving commissioners are going to expire. The president or the Senate, perhaps sensing these

commissioners do not wish to leave the FEC with no ability to act, do not prioritize the appointments. When commissioners finally do retire, after serving terms long past six years, the president and the Senate have clearly failed to act quickly in replacing them, especially when they are Democrats. Several commissioners might as well have had a lifetime appointment as they have served longer than some Supreme Court justices.

However, this situation has also unmistakably been caused by the partisan maneuvers that have been executed to block the other party from being represented on the Commission. The history of the confirmations described earlier prove that the appointment of Democratic commissioners has been blocked by at least two former Republican presidents. Republican President Bush filled a Democratic seat with an Independent Commissioner and President Trump failed to push his nominees through for years. Democrats failed to confirm in a timely manner in 2008 followed by the Republicans from 2017-2020 and both parties have failed to name replacements for several members who have served well past their appointed six-year terms. This political maneuvering has had long-term effects on the partisan balance of the commission. Recently one party, the Republicans, clearly has had the opportunity to drive the decision-making at the FEC.

These findings indicate that the Commission does not have the bipartisan balance intended by the original design of the FEC and provide a clear example of partisan asymmetry in governing. The only thing stopping Republican domination of the FEC is the empty seats at that occasionally open up and the rule of four. This structural requirement may make it difficult to proceed in a quick manner, but it is also stopping obvious one-party rule of the agency given that they cannot legally have four members, although, as proven in this chapter they have found ways around that. Current proposals to reform the FEC by reducing the number of commissioners

would only make things worse. Does the structure and partisan balance affect the time to process an MUR? Does the structure and partisan balance affect the ability to achieve consensus? If so, is one party less likely to agree than the other and if so, on what subjects and decisions?

## Research Design

The next figures presented will answer the research questions posited above by exploring the number of commissioners and the percentage that represent the Republican party to test if that increases the rate of consensus on MURs. Decisions on MURS between December 06, 2002 through December 08, 2020 were collected for this study. This included a total 3,761 unique decisions by the panel on 1,981 unique MURs. This included a total of 19,783 individual commissioner votes. The number of commissioner recusals/did not votes totaled 878.<sup>3</sup>

Specifically, the following data for each panel decision was collected: number of commissioners present, number of recusals, the affirmative votes by party, and the negative votes by party.

Votes were tallied for each decision to produce an overall vote count. If there were four or more votes cast in the affirmative for a decision, then it was coded as a success (achieved consensus).

If the affirmative votes for a decision totaled three or less, then it was coded as a failure (unable to achieve consensus). The overall vote count was coded as unanimous if all commissioners

reached the same decision, as a super majority if all but one voted for the decision cast by the

majority, a simple majority if it was only the required four commissioners that cast the

consenting vote, and if it was three or less commissioners voting for the resolution then it was

coded as no consensus. The dates of the decisions were also used to code them by commissioner

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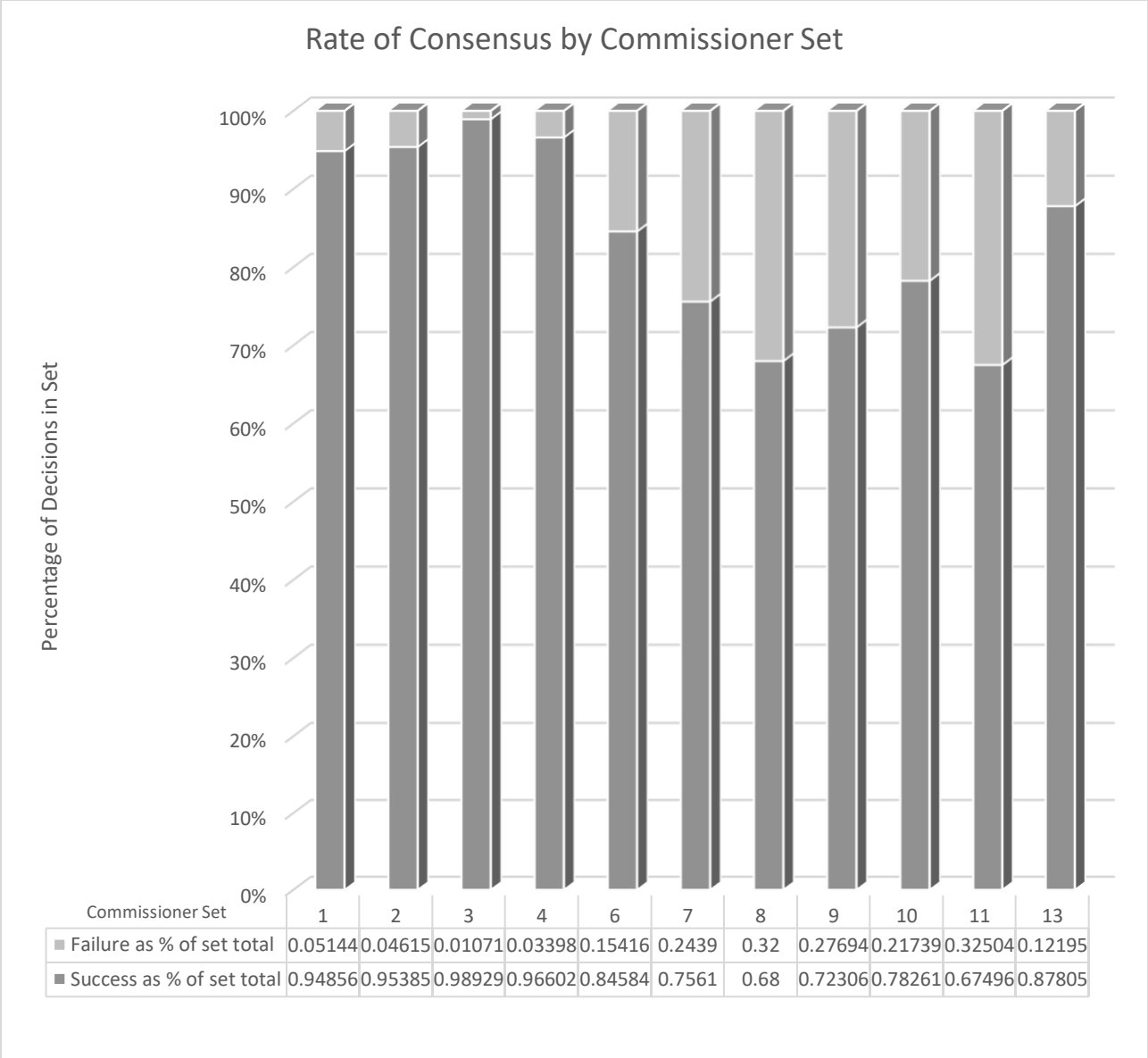
<sup>3</sup> There were a handful of decisions that were redacted; therefore, these cases were not included in the set. In 17 decisions, the posting date of the decision was after the fact and into the next set of commissioners, in these cases the actual date the letters were signed was used for the date of the decision.



set and by partisanship of the commissioners voting. The time covered in this study represents fourteen unique sets of commissioners made up of 16 individual commissioners: nine Republicans, six Democrats, and one Independent. The findings are presented in multiple figures and further explanation of concepts, definitions, and the design of the illustrations are provided as necessary. The first illustration (see Figure One below) presents the rate of consensus on MURs by commissioner set.

*Are the Commissioners Able to Achieve Consensus?*

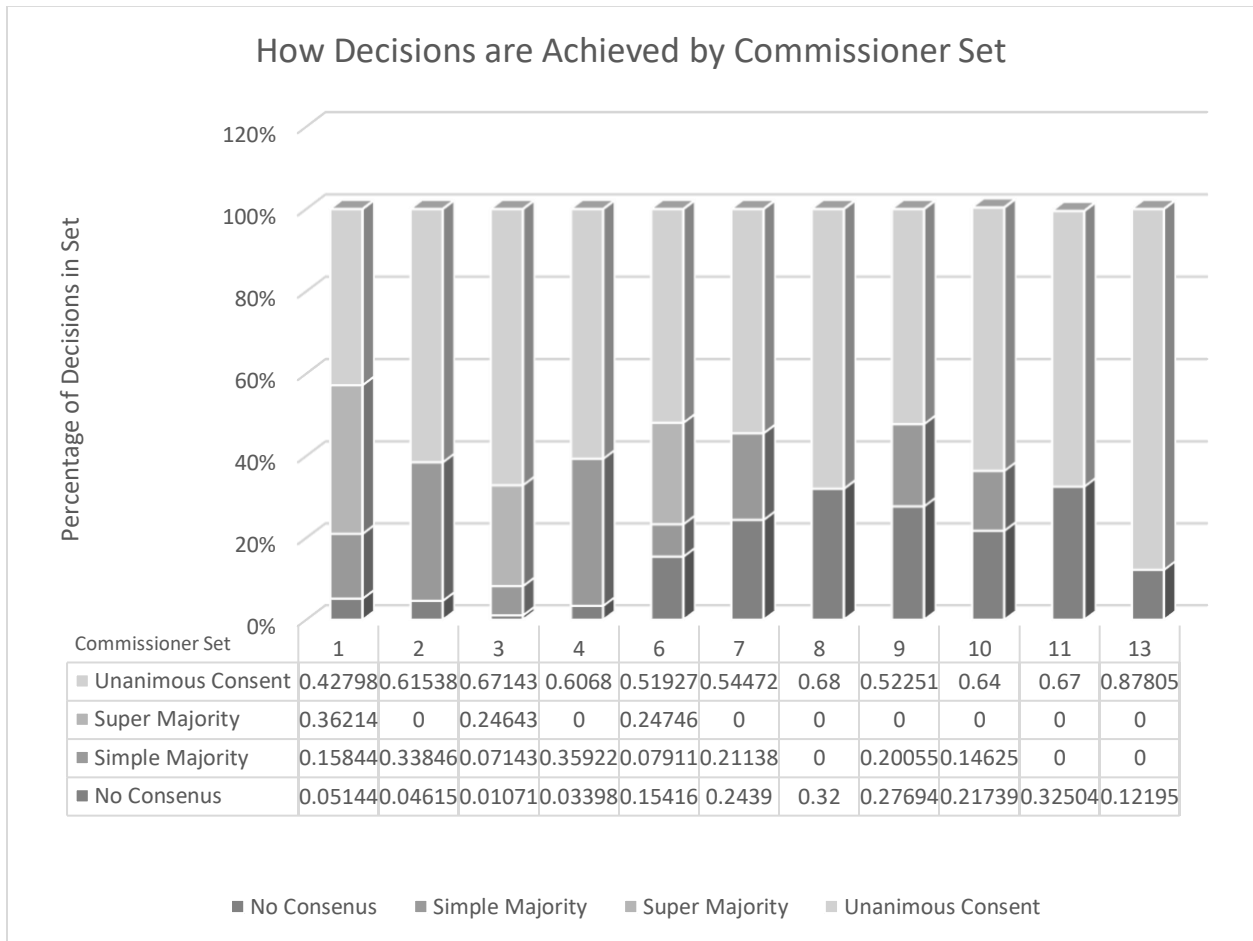
Figure One: Rate of Consensus by Commissioner Set



The panel is achieving consensus a majority of the time when making decisions on MURs, although the trendline is decreasing with time (see Figure One above). The panel is shown to achieve a higher rate of consensus in the earlier sets, achieving a rate of 95% or higher, compared to the later sets, which dip to a low of 67%. The rate of consensus on the panel appears to begin dropping in Set 6, to around 83%, then drops by a few percentage points in each successive commissioner set. The rate of consensus on the panel increases slightly in Sets 9 and 10 but then dips to the lowest level in Set 11, at 65%, before reaching a high in Set 13, about 85%.

The rate of consensus on the panel recovers by about 20% in Set 13, which is promising, but that might be the result of this set following a non-functioning set. Interestingly Set 13 only has four commissioners present which one might think would decrease the rate of consensus. Especially given the sets with the least consensus (Sets 7-11) only have four or five commissioners present, except for set 9 which has six commissioners. These findings indicate that the panel is achieving consensus on decisions on MURs most of the time, but the rate is certainly waning. This is significant enough in these findings to raise more questions. The next graphic (see Figure Two below) illustrates the data by commissioner set to determine if this is the case for some the panels with fewer commissioners present.

Figure Two: How Decisions are Achieved by Commissioner Set



*RQ: How are decisions achieved by commissioner set?*

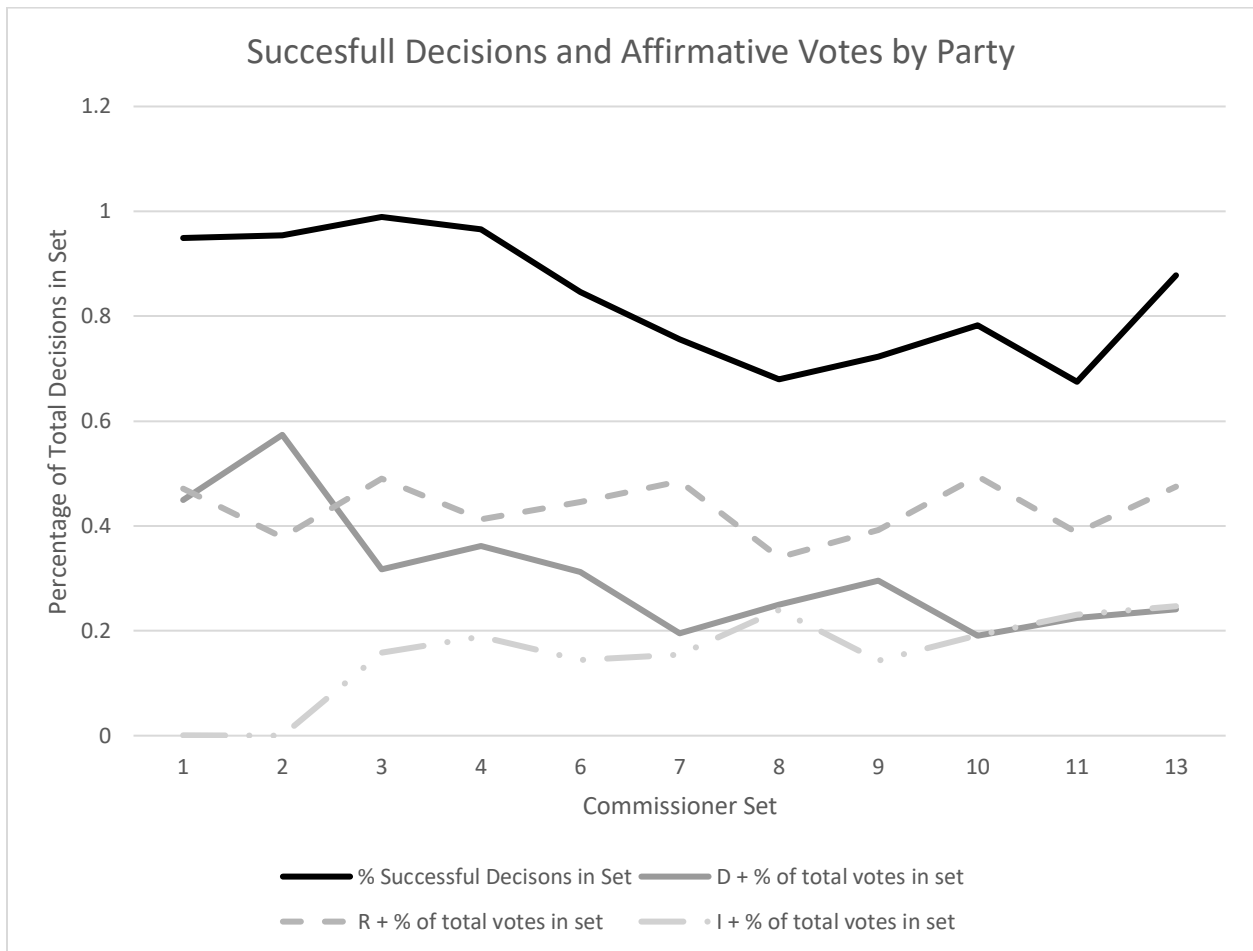
Decisions are achieved with a majority consensus most of the time and unanimous consent some of the time for most of the duration of the study (see Figure Two above). Interestingly, unanimous consent on the panel is achieved at a higher rate in the earlier sets as the later sets are unable to achieve a high rate of consensus. The earlier sets are also more likely to have a higher rate of simple or super majority on the panel. This is likely a result of the earlier sets having more numerical range to make decisions since they are more likely to have more commissioners present on the panel than in the later sets. Sets 1, 3, 6, and 9 have all six commissioners present on the panel and therefore have the best ability to achieve consensus. Sets 2, 4, 7, and 10 have five commissioners present on the panel giving them some range. The sets with fewer commissioners, which tend to be the later sets, are left with only the options to unanimously agree or not agree. Sets 8, 11, and 13 only have four commissioners on the panel and therefore are in this predicament. In spite of this challenge, the later sets with fewer commissioners present on the panel seem to be able to achieve unanimous consensus at a higher rate than the earlier sets, even though they have more commissioners present. These findings indicate that when there are more commissioners present on the panel, they are not more capable of achieving unanimous consent at a higher rate, but overall, they achieve consensus at a higher.

Interestingly, the inability to achieve consensus increases significantly beginning with Set 6 (at 15%), then climbs in Sets 9 (28%) and 10 (22%), but spikes at the highest rate in the study in Set 11 (33%). Part of that might be the result of fewer commissioners in the later sets however it might also be the product of the rise in partisanship or ideological voting on the commission which is explored in more detail in the next chapter. To determine if the decrease in affirmative voting correlates with the decreasing rate of consensus, the next illustration (see Figure Three

below) considers the direction of votes by commissioner set. Affirmative votes are defined as yeah votes and negative votes are defined as nay votes. This is one way to measure ideological voting on the panel given the different approaches held by each party toward investigating and prosecuting violations of campaign finance laws.

*Are There Differences in Affirmative and Negative Voting by Party?*

Figure Three: Rate of Successful Decisions and Affirmative Votes by Party



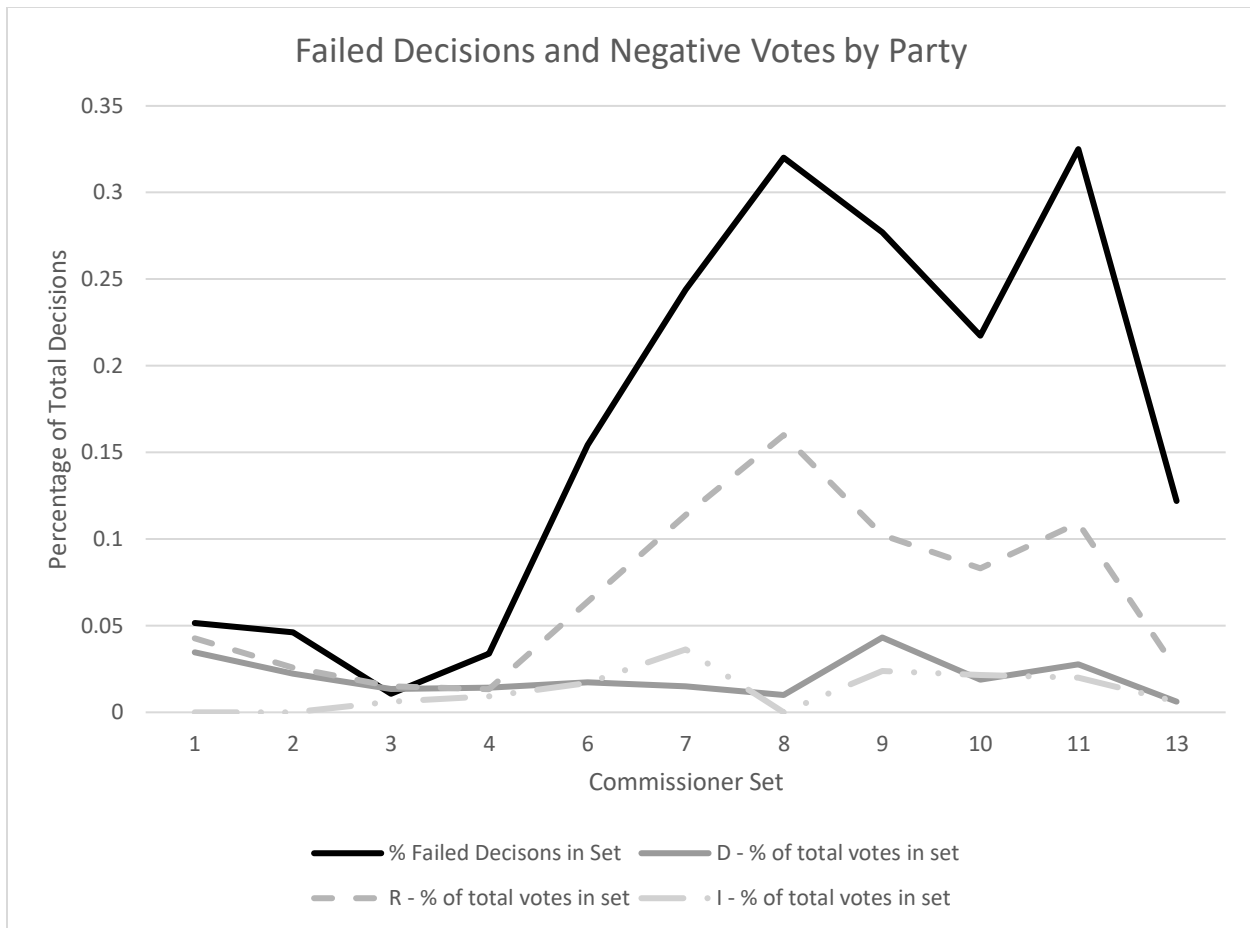
*RQ: Is there a difference by party in the rate of affirmative voting on successful decisions?*

The data shows differences in affirmative voting by party (see Figure Three above). The Republican commissioners have steadily voted in the affirmative, with slight abbreviations,

averaging around 40% per commissioner set, with less than a 15% difference observed in most sets, even as the number of successful decisions wane. Democratic commissioners have a steady percentage decrease when voting in the affirmative, initially voting at a higher percentage than Republicans, around 60% in earlier sets, but their rate declines to around 20% in the later sets. The Independent commissioner arrives in Set 3 and votes in the affirmative steadily through the sets, making up around 20% of the affirmative votes per commissioner set. Overall, the percentage of successful decisions is declining in later sets but beginning to recover in the later sets. The rate was near 100% then declines in the middle sets to below 70% with slight curtailments.

These findings are not surprising given that the Democratic commissioners have held fewer seats over the years, therefore accounting for a smaller percentage of votes. Republican commissioners have controlled a larger number of seats and thus account for a higher percentage of voting overall. It was expected they would be more likely to vote in the negative out of loyalty to their ideology on campaign finance matters therefore their steady rate of affirmative voting is a little surprising. However, the rate of consensus is also dropping simultaneous to the steady affirmative voting by the Republicans. Therefore, it is important to consider the subject matter and decisions considered by the panel when they cast their votes in the affirmative or negative. Before that is considered, the next illustration (see Figure Four below) illustrates the percentage rate of failed decisions and negative votes to determine whether there are partisan differences that correspond with the trend in affirmative voting and successful decisions.

Figure Four: Rate of Failed Decisions and Negative Votes by Party



*RQ: Is there a difference by party in the rate of negative voting on failed decisions?*

There are differences in negative voting by party on the panel (see Figure Four above). The Republican commissioners on the panel vote in the negative at a higher percentage rate than Democratic commissioners until the later sets. The percentage of negative voting by Republican commissioners increases from a low of less than 5% in Set 3 to a high of more than 15% in Set 8. The Democratic commissioners have a steady increase to right around 30% in the middle sets before their percentage rate also wanes in later sets. This is in spite of having the Democrats holding fewer seats, indicating they too are likely increasingly voting in the negative when considering decisions on MURs. The Independent commissioner arrives in Set 3 and has a fairly steady percentage, around 5% or less, of negative voting as time proceeds, which is consistent

with this commissioner's pattern of affirmative voting. Overall, the percentage of failed decisions significantly increases in later sets. The rate was near zero then increases in the middle sets to a high near 35% with moderate decrease to below 15% in the later sets.

The Republicans have held a larger number of seats on the panel and therefore it is not surprising they account for a higher percentage rate of the negative voting. However, it is surprising that the Democrats maintained their steady percentage rate of negative voting given their deficit in the number of seats they have controlled on the panel compared to Republicans. It is, therefore, important to consider the subject matter and decisions being considered to understand these patterns. The next illustration (see Figure Five below) describes the affirmative voting by party on successful decisions on contribution cases. To determine if there is a statistical effect of structure on the rate of success (decisions that achieve consensus among four or more commissioners), the following hypothesis and analysis are presented below.

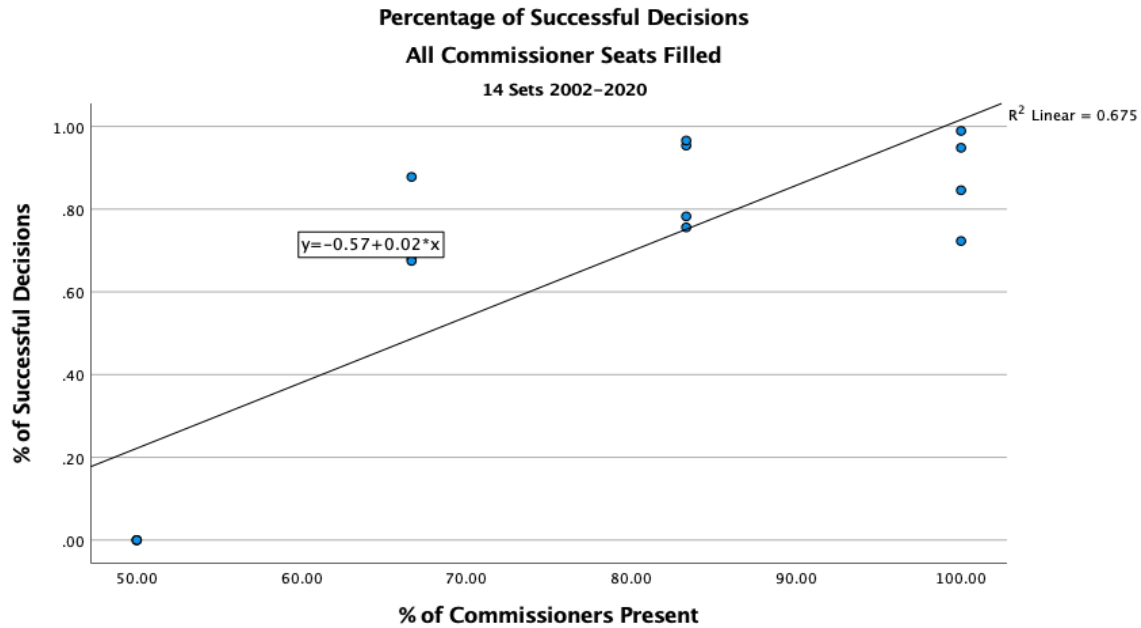
#### Hypothesis 1:

There is no association between the number of commissioners present and the rate of successful decisions.

To test the hypothesis, scale variables are used to determine if there is a relationship between the number of commissioners present on the panel and the rate of successful decisions. The percentage of seats filled on the commissioner panel is the independent variable and percentage of successful decisions is the dependent variable.

Figure Five: The Number of Commissioners and the Rate of Successful Decisions





The scatterplot indicates that the hypothesis is not true and there is a relationship between the percentage of commissioners present on the panel and the percentage of successful decisions (see Figure Five above). The  $R^2$  is .68 indicating that the percentage of commissioners present on the panel accounts for some 68 percent of the variance in the rate of success. That is, commissioners present predicts success in decision-making. When one more commissioner is present on the panel, there is a 10 percent increment of success in decision-making. When there is only three commissioners present, there is a zero chance of success.

These findings make sense given they are unable to proceed with agency business. When there is four commissioners present, or 67 percent of the seats are filled, 70 percent of the decisions are successful. When there is five commissioners present, or 83 percent of the seats are filled, 80 percent of the decisions are successful. When there are all six commissioners present, or 100 percent of the seats are filled, 90 percent of the decisions are successful. This gives us a basic idea about the relationship between seats and successful decisions and presents is visually.

Next, a linear regression (see Table Two below) is presented to provide the statistical significance and confidence intervals.

Table Two: Commissioners Present and Successful Decisions

Analysis of Commissioners Present and Successful Decisions					
Variable	B	95% CI	$\beta$	t	p
(Constant)	-0.57	[-1.13, -.02]		-2.3	0.4
Percentage of Commissioners Present	0.02	[.01, .02]	0.82	5.00	<.01

\* Note. R<sup>2</sup> adjusted = .65. CI = confidence interval for B

This table shows the B-coefficients that are presented in the scatterplot above (see Table Two above). This linear regression equation estimates that success from the percentage of commissioners present on the panel [Success = -.57 + .016 \* Percentage of Commissioners Present]. The null hypothesis is rejected since the B coefficient for percentage of commissioners present has “sig” or p = <.001 therefore is not significantly different from zero. Its 95 percent confidence interval -roughly, a likely range for its population value – is [0.009, .023]. Thus, B is probably very close to zero. The confidence interval is not precise at all-, and this is due to the minimal sample size on which the analysis is based.

This model indicates that independent variable is a good predictor of the dependent variable. The R is 82 percent, indicating that the percentage of commissioners present predicts a high level of the variance in successful decision-making by the panel. The R Square is high at 68 percent, indicating there is a high degree of variance predicted in the dependent variable by the independent variable. The Adjusted R Square is also high at 65 percent which applies the regression equation to the entire population. The Adjusted R Square is likely the most realistic estimate of predictive accuracy of the independent variable than the R Square given the sample size of only N = 14. However, both the difference between the R Square and Adjusted R Square

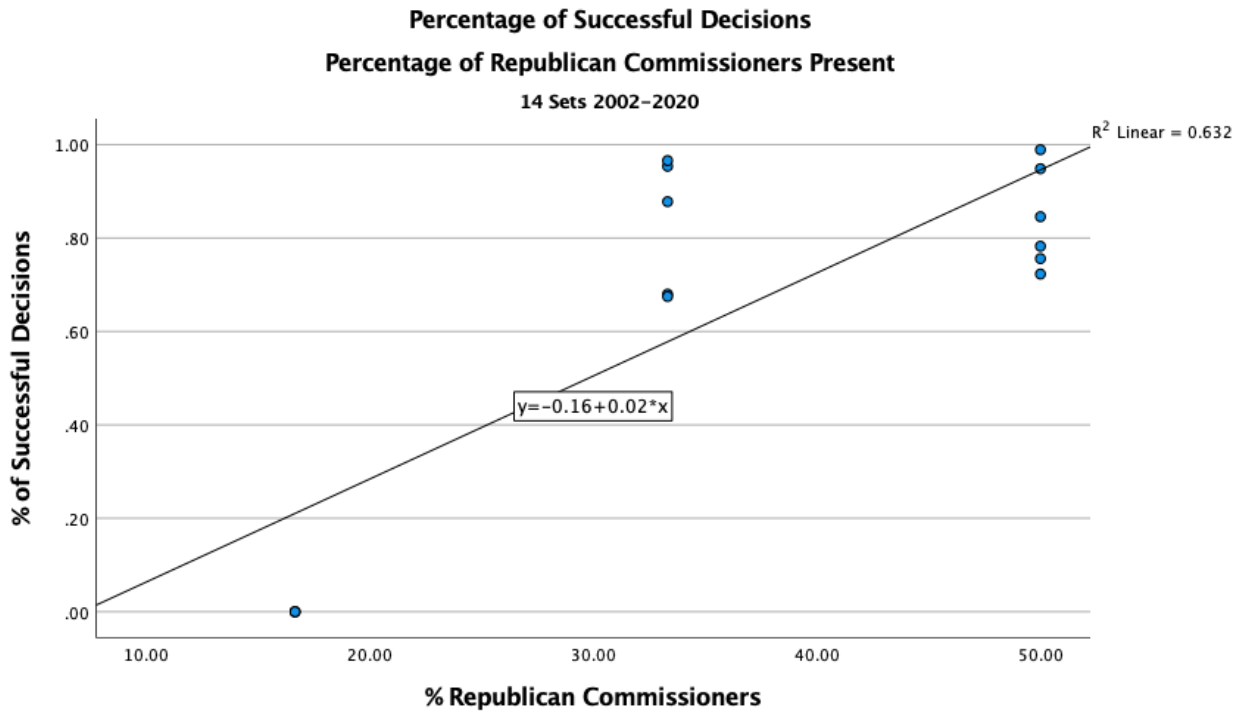
are relatively small indicating that percentage of commissioners present is a good predictor of percentage of successful decisions for the commissioner panel.

To determine if there is a statistical effect of structure or partisanship on the rate of success (decisions that achieve consensus among four or more commissioners), the following hypothesis and analysis are presented below (see Figure Six below).

#### Hypothesis 2:

There is no association between Republican commissioners present and the rate of successful decisions. To test Hypothesis 2, scale variables are used to determine if there is a relationship between the number of Republican commissioners present on the panel and the rate of successful decisions. The percentage of Republican commissioners on the commissioner panel is the independent variable and percentage of successful decisions is the dependent variable.

Figure Six: Number of Republican Commissioners and the Rate of Successful Decisions



The scatterplot (see Figure Six above) indicates that the hypothesis is not true and there is a relationship between the percentage of Republican commissioners present on the panel and the percentage of successful decisions. The  $R^2$  is .63 indicating that the percentage of Republican commissioners' present accounts for some 63 percent of the variance in the rate of success. That is, Republican commissioners present predicts success in decision-making well. When one more Republican commissioner is present on the panel, there is a 10 percent increment of success in decision-making. When there is two or less Republican commissioners present, there is a zero chance of success. When there are three Republican commissioners present, there is a 70 percent of the decisions are successful. When there is five Republican commissioners present, 90 percent or higher of the decisions are successful. This gives us a basic idea about the relationship between the number of Republican commissioners present and the rate of successful decisions. Next, a linear regression is presented to provide the statistical significance and confidence

intervals for the percentage of Republican commissioners present on the panel and the rate of success.

Table Three: Republican Commissioners Present and Successful Decisions

Analysis of Republican Commissioners Present and Successful Decisions					
Variable	B	95% CI	$\beta$	t	p
(Constant)	-.16	[-.57, .26]		-.83	.43
Percentage of Commissioners Present	.022	[.011, .033]	.795 <sup>a</sup>	4.54	<.01

R<sup>2</sup> adjusted = .60. CI = confidence interval for B

The table presented above (see Table Three above) shows the B-coefficients that are presented in the scatterplot above. This linear regression equation estimates that success from the percentage of commissioners present on the panel [Success = -0.39 + 0.03 \* Non-Republican Commissioners Present]. The null hypothesis is rejected since the B coefficient for percentage of commissioners present has “sig” or p = <.001 therefore is not significantly different from zero. Its 95 percent confidence interval -roughly, a likely range for its population value – is [0.011, .033]. Thus, B is probably very close to zero. The confidence interval is not precise at all-, and this is due to the minimal sample size on which the analysis is based. This model indicates that independent variable is a good predictor of the dependent variable. The R is 80 percent, indicating that the percentage of commissioners present predicts a high level of the variance in successful decision-making by the panel. The R Square is high at 63 percent, indicating there is a high degree of variance predicted in the dependent variable by the independent variable. The Adjusted R Square is also high at 60 percent which applies the regression equation to the entire population. The Adjusted R Square is likely the most realistic estimate of predictive accuracy of the independent variable than the R Square given the sample size of only N = 14. However, both the difference between the R Square and Adjusted R Square are relatively small indicating that

percentage of Republican commissioners present is a good predictor of percentage of successful decisions for the commissioner panel. These findings indicate that the percentage of seats has more of a negative relationship with success than the percentage of Republican commissioners present. In fact, when there are fewer Republican commissioners present, there is a lower rate of success.

## Conclusion

The rate of consensus is declining as the panel is disagreeing more often on the issues, they make enforcement decisions on. This paper reveals that the rate of disagreement or negative voting is asymmetric as the Republicans make up the largest percentage of negative voters. Of course, they also contribute the most votes as they have dominated the panel for years. Although the Democrats are also experiencing a decrease in affirmative votes like the Republicans however because they hold fewer seats, they make up a smaller percentage of the negative vote. There has also been a rise of recusals, and that too is asymmetric as the Republicans are more likely to recuse than Democrats.

At the beginning of the study, around late 2002, there was bipartisan agreement and bipartisan disagreement and that begins to change around 2010 to partisan agreements and partisan disagreements then by 2015 just partisan disagreement. These findings are likely the result of the decreasing percentage rate of affirmative voting. For the Democratic commissioners on the panel this begins around Set 3 and little later for the Republican commissioners. The Independent commissioner arrives in Set 3 also reducing the number of seats held by the Democrats by one for all future sets.

Simultaneous to the loss of a Democratic seat to an Independent, is the increasing time it takes to fill the seats after a commissioner exit, making it even more likely they hold fewer seats.

Although the Republicans are not immune to the slow appointment process, they still makeup a higher number of seats and therefore are able to maintain a higher rate of affirmative voting than the Democratic delegation. These findings are not surprising given the Democratic commissioners have fewer seats over the years, therefore they make up a smaller percentage of votes. The Republican commissioners hold a higher number of seats and therefore have a higher percentage of voting overall. It was expected they would be more likely to vote in the negative out of loyalty to their ideology on campaign finance matters therefore their steady rate of affirmative voting is a little surprising.

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