STRATEGIC PLAINTIFFS AND IDEOLOGICAL JUDGES IN TELECOMMUNICATIONS LITIGATION

John M. de Figueiredo[*]

Massachusetts Institute of Technology
Sloan School of Management E52-546
50 Memorial Drive
Cambridge, MA 02142-1347
Email: jdefig@mit.edu

August 2003

ABSTRACT

This paper examines the effect of judicial of ideology on the selection and outcome of telecommunications regulatory cases. Using a dataset on Federal Communications Commission orders and trials from 1990 to 1995, this paper shows that changes in the make-up of the bench of the D.C. Circuit Court of Appeals affects not only who wins the cases, but also the cases selected for litigation. Specifically, firms are more likely to bring cases when the agency decisions are ideologically distant from the bench than when the two are actors are close ideologically. Judges, who are subsequently randomly selected, vote ideologically as the firms' actions predict they will, with Republicans judges overturning Democratic agency decisions and vice versa. The effect of judicial ideology on case selection is much larger than the effect of judicial ideology on case outcomes. Additionally the paper also shows that plaintiff characteristics have little impact in determining case outcomes, but a statistically significant impact on cases selected for litigation. Finally, the paper provides initial results that regulatory uncertainty may lead to more litigation.

STRATEGIC PLAINTIFFS AND IDEOLOGICAL JUDGES IN
TELECOMMUNICATIONS LITIGATION

I. INTRODUCTION

There is a growing body of literature in judicial politics that argues that judges, with

preferences over policy outcomes, vote ideologically when rendering their decisions (Segal and

Spaeth 1989; Segal 1997; Segal, Epstein, Cameron, and Spaeth 1995; Segal and Cover 1989;

Spiller 1992, Gely and Spiller 1990, de Figueiredo and Tiller 1996, Epstein 1995, McNollgast

1995, Cross and Tiller 1998). Although outside influences have been shown to affect judicial

decision-making,[1] the mainstay of the empirical and theoretical literature in this field has argued

that case decisions are driven by judges' backgrounds, ideology, attitudes toward the law, and

the desire of judges to place their lasting imprint upon policy outcomes. Empirical work in the

field has tended to focus on highly visible civil and criminal issues such as the death penalty

(George and Epstein 1992) and civil rights (Segel 1997).

While theoretically appealing, the literature on judicial ideology suffers from an

empirical shortfall. Much of the empirical literature on judicial politics examines only the

outcomes of cases that are actually litigated and judicial decisions rendered. If ideological

judicial behavior is as pervasive as the literature suggests, then one would expect that litigants

would be aware of this behavior and act strategically in choosing the cases they bring to trial.

That is, litigants should take into account the ideology of the judges who will hear the cases, and

select cases that are likely to prevail despite an ideological divide. If litigants are strategic, or at

1

a minimum knowledgeable, this then means the cases on which ideological judges rule are not drawn randomly from a sample.

Put more concretely, if there is a conservative, anti-civil rights, Republican judge who is hearing cases, and litigants are strategic, then the judge is unlikely to hear cases from litigants who seek a pro-affirmative action outcome. Either, the cases will not be filed at all, because the costs of litigating may be substantial, and the negative outcome a foregone conclusion, or the litigant will seek some kind of settlement with their adversary that takes into account the likely outcome of the case in the absence of settlement. In either situation, the cases in which there is an obvious foregone conclusion will not be heard by the judge. The cases that will be heard, and on which the judge will rule, are those cases which are on the margin—for example those cases in which a Republican judge is likely to vote for a pro-civil rights cause. As this example illustrates, the sample of cases that judges will hear in the presence of strategic litigants is anything but a random sample.[2] But many empirical studies that measure the ideological effects rely on the random sample assumption. This problem is magnified at the Supreme Court, where the judges are known ex ante.

The early law and economics literature recognized this problem, and used deductive methods to solve this problem. The general methodology followed in these studies is to create theoretical predictions on who will win and lose at trial based on the settlement behavior, and to

---

[1] There are a number of reasons cited, included the need for judges to protect budgets (Toma 1991), insulate decisions from higher courts (Tiller and Spiller 1999, Revesz 1997), and cater to or affect public policy (Caldeira 1987, Flemming, Bohte, and Wood 1997, Hall 1992).
[2] Note that this suggests that cases tend toward a what Priest and Klein have called a 50% rule. That is, cases which are marginal on both sides of outcomes (winning and losing) are the most likely to be litigated. Whether a litigant wins or loses will be a random event—leading toward a 50% win rate for defendants. For a complete exposition of the theory, please see Priest and Klein (1984), where there is symmetry in the outcomes, or de Figueiredo (1997) for asymmetric outcomes.

then examine trial outcomes (Priest and Klein 1984, 1985; Wittman 1985, Kessler et al 1996).[3]

However, if new factors arise after cases reach the court (such as the make-up of the judicial panel), then superior estimation techniques are available.

A recent set of studies conduct a joint estimation of the probability of bringing civil cases, and the probability of winning these cases, given they have been brought to trial. These studies examine conformance to, and deviations from, the Priest and Klein 50% rule (Waldfogel 1995), antitrust cases (Perloff, Rubinfeld, and Ruud 1996), and relative risk aversion of corporations and individuals in civil cases (Eisenberg and Farber 1997). We follow this latter methodology, jointly estimating the litigation and trial equations, correcting for sample selection bias. However, this paper innovates on the current empirical literature on in three ways. First, with respect to judicial politics, it explicitly examines the selection problem which has been largely overlooked in that literature. Second, with respect to law and economics, it applies the analysis to regulatory cases where the government is always the defendant at the circuit level rather than auto accidents, asbestos, or other civil law cases that are common in the literature. Finally, with respect to both law and economics and judicial politics, it explicitly incorporates judicial ideology into the joint estimation procedures, because ideological preferences are likely to be pronounced. Law and economics models do not generally consider individual judge ideology at the time of selection, and judicial politics models generally do not consider selection at all.

Empirically, we can correct for selection effects if two conditions are met. First, at the time of case filing, the ideology of the judges hearing the case must not be known to the litigants.

_____

[3] In a model that is the foundation for a the model that is presented in this paper, Priest and Klein (1984) found that plaintiffs won 50% of sampled cases in Cook County (Illinois) and Hamilton County (Ohio) courts. Wittman

3

This prevents the selection of cases filed from being biased events. Second, after the judges are announced, litigants must be willing or forced to litigate, rather than settle. This prevents the strategic litigants from backing out of the litigation after filing. In cases where these two conditions occur, we can use two stage methods to test the theory that judges vote ideologically.

Many types of regulatory cases that are heard before the appellate courts meet these criteria. Because three judge panels are chosen from a banc of five to twenty-seven judges on a given circuit, the identity of the judges is generally not known with certainty before filing. Second, in many types of regulatory cases, the litigants (most often firms and interest groups) have sunk most of the costs in the administrative phase of the case, and face small incremental costs afterwards through the trial. Thus, very small probabilities of winning generate expected gains to the litigant that overcome the cost to litigation. Moreover, in many types of regulation, cases can only be settled with the permission of the court, giving the potentially ideological panel oversight over any policy outcome that might occur. Taken together, regulatory cases before the appellate courts allow us to more precisely assess the impact of ideology on litigation.

The empirical setting of this paper is rule-making by the Federal Communications Commission (FCC) in telecommunications and the subsequent litigation that arises from those orders from 1990 to 1995. The effect of FCC oversight in telecommunications has been profound. Since the break-up of AT&T in 1984, the FCC has presided over the issuance of wireless licenses, the expansion of satellite technology, the deregulation of long distance and local networks, the fusion of CATV, wireless, and telephone technology, and the increasing importance of spectrum in radio, broadcast television and other forms of communication.

(1985), however, found that plaintiffs won 83% of rear-end accident cases that reached the bench.

This paper considers the decisions of firms to challenge FCC regulations in the courts and the outcomes of those cases. The focus of the paper is the political and ideological factors that account for case outcomes in regulatory proceedings. The transition of the FCC from a majority-Republican to a majority-Democratic commissioners during this time period allows for a natural experiment in the data. Moreover, shifts in the make-up of the Court for an additional source of identification for the econometric models. The paper corrects for the selection bias of cases judges hear, using a two-stage estimation procedure, considering in the first stage, which cases are brought to trial, and in the second stage, how judges rule.

Controlling for strategic behavior by plaintiffs, the paper shows that judges do vote in ideologically predictable ways in regulatory cases. In particular, the results show that despite the strategic behavior of plaintiffs, the main results of the judicial ideology literature stand. More striking, however, is the effect ideology has on the selection of cases for litigation. The paper demonstrates that firms, anticipating judges' ideological votes, select regulatory cases for litigation strategically, and that this selection effect is much larger than the effect on litigated case outcomes. In this sense, the impact of judicial ideology is underestimated in previous papers. The empirical analysis also demonstrates that industry effects, firm effects, and case type, all influence the outcomes of cases selected for litigation, but have little influence in the win or loss by the firm once in litigation. This result is expected if plaintiffs take into account at the time of case selection all of these characteristics. In addition, the paper shows that regulatory uncertainty may lead to more litigation. Finally, the paper sheds light on the cases selected for regulatory litigation in general, and telecommunications litigation in particular. This type of knowledge is of interest in its own right, given the paucity of work in the area.

The next section reviews rule-making in the FCC and discusses how cases reach the litigation stage. It also examines the unique characteristics of judicial review of regulation that differentiate it from traditional civil cases. Section III offers a theoretical framework for analyzing the litigation decision of firms and the subsequent trial outcomes. In Section IV, an empirical test is offered using a database of 240 FCC orders and 286 litigated cases, every FCC order challenged in the D.C. Circuit from 1990-1995. The conclusion is in Section V.

II. LITIGATING GOVERNMENT REGULATIONS

The process for creating administrative decisions and administering rulings differs from agency to agency. The remainder of this paper will focus on the FCC. Since 1934, the FCC has been charged with the regulation of interstate and international telecommunications at "just, fair and reasonable prices." The FCC has been granted administrative powers in telephone and wireless communication services, radio, television broadcast, emerging communications technologies such as satellite, high frequency bandwidth communications, and, in some instances, cable television. Although the Communications Act of 1934 is silent about deregulation and competition, the FCC, since the *Above 890* decision in 1959, has overseen the gradual deregulation of the industry (Temin 1989).

The FCC derives its authority to regulate telecommunications and mass media from the Communications Act of 1934 and its various amendments. Since 1934, there have been very few fundamental changes in the regulatory authority of the FCC, until the Telecommunications Act of 1996.[4] Thus, the remainder of this paper examines events through 1995. The procedures that

---

[4] Ancillary legislation and amendments to the Communications Act include the Communications Act Amendments of 1954, the Submarine Cable Landing Act, and the Communications Satellite Act of 1962.

govern the rulemaking and internal appeals process for the FCC are outlined in the

Administrative Procedures Act of 1946 as amended, and in the Code of Federal Regulations.

These two sets of guidelines allow the FCC to regulate, through rules and orders, the

telecommunications industry. Rules are generally generated by the FCC bureaus, after extensive

public comment, and then sent to the Commission for approval.[5] In complex situations, the FCC

may modify the initial order or offer a series of rulings on the issue.

In cases where the rules have been accepted and there is a question about the

implementation of rules to a particular firm, the FCC will often engage in administrative

adjudication. An Administrative Law Judge will hear the case and render a decision. This ruling

can be appealed to the FCC Review Board. In some cases, the individual case will also be

appealed subsequently to the Commission. The Commission, like the Supreme Court, maintains

the discretion whether or not to hear the dispute. If the Commission chooses not to hear the

dispute, the Review Board's order is considered a final agency position. If the Commission does

make a ruling on the dispute, the decision of the Commissioners is final. Only after a final

decision has been made by the FCC, may the firm appeal the order or its implementation to the

judicial branch of government.

The Communications Act of 1934 specifies two categories of disputes which might

arise.[6] The first is regarding license applications. Any dispute that arises over the awarding of

license applications, construction, or license renewal or transfer, is required, by the Act, to be

litigated in the D.C. Circuit Court of Appeals.[7] The second category of disputes, non-license

---

[5] For an extensive description of the FCC rule-making process, see de Figueiredo (1997) or Fagan (1995), for a summary.
[6] For an overview of judicial review of FCC rules, see Botein (1995).
[7] See 47 U.S.C.S. 402b for the detailed description of what is considered a license. The precise rationale for this distinction is unclear. However, the apparent goal of this provision was to centralize control over what was

appeals, can generally be heard in one of two places: in either the circuit court of appeals where the company is headquartered, or in the D.C. Circuit Court of Appeals, which has general jurisdiction in regulatory matters. As a matter of practice, approximately 91% of all FCC order challenges are heard in the DC Circuit. Thus, the remainder of this discussion will focus on the D.C. Circuit.

A case filed in the D.C. Circuit is governed by Title 28 of the U.S. Code as well as the specific procedures of the D.C. Circuit. The D.C. Circuit is structured similarly to other appellate courts and has 12 permanent judgeships assigned to it. Each judge is appointed for life by the President, with the advice and consent of the Senate. A firm challenging an FCC order must file a petition with the court within 30-60 days of the final decision of the FCC. In the filing the firm is the plaintiff (appellant) and the FCC is always the defendant (appellee).[8] Only after a case is filed in the court, a three-judge panel, selected randomly from the banc of 12 judges, hears the case. Once in court, the case moves expeditiously, with concise motions, briefs, and other filings all required within weeks of the case being docketed by the Clerk of the Court. Oral arguments, if required, are often heard in a matter of hours. Thus, unlike other forms of civil litigation in the federal courts, FCC order challenges are relatively inexpensive and are carried out swiftly, often within the same judicial term.[9] After all arguments are heard, the three judge panel takes a vote on whether to uphold the order, vacate the order, or remand it back to

considered to be a "new technology." Indeed, Chief Justice Taft, commenting on the Radio Act of 1927, noted, "Interpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural." (Chief Justice Taft, as quoted in Botein, 1995: 324)

[8] The FCC is the defendant because it is always defending the order. Thus, the defendant does not change from case to case, nor does it select the venue. This is quite different from other forms of litigation where both the plaintiffs and defendants change over time. Other parties that have an "interest" in the case can also file as intervenors. These intervenors normally file briefs in support of one side.

the FCC for further consideration. A decision that receives a majority of judges votes is binding, unless appealed.[10]

Because nearly 91% of FCC order challenges are heard in the D.C. Circuit, litigants who appear in the D.C. circuit are frequently repeat players before the court, often before the same judges. In addition, the membership on the bench changes only slowly over time. In contrast, other forms of litigation, such as antitrust, product liability, and professional negligence, may be litigated in federal or state district courts, sometimes by juries, other times by individual judges, and still other times by panels of judges. Some of the judges are elected, others appointed for fixed terms, and others appointed for life. These civil cases are most often heard in the appellate courts only on appeal. Often times, plaintiffs can extensively forum shop for venues that they perceive attractive to their case. Regulatory litigation avoids many of these issues, making it attractive for empirical study.

III. THE GENERAL FRAMEWORK

The two-stage nature of the problem under investigation is illustrated in Figure 1. In the first stage, firms must make a decision of whether to litigate or not. In the second stage, a set of factors will determine whether the firm wins or loses at trial, given it has decided to litigate. We examine each of these stages in turn.

---

[9] The judicial term normally runs from September to June. Cases that lag between judicial terms are the exception rather than the norm on the D.C. Circuit. Briefs are presented and, if necessary (in about 30% of cases) oral arguments are heard.

[10] Litigants can appeal a panel ruling to the entire banc of judges for hearing. Two en banc petitions have been granted over six years.   A litigant who has not encountered favorable outcomes in the D.C. Circuit can also request a hearing from the Supreme Court. The Supreme Court has granted cert (a hearing) to a litigant challenging an FCC order only once from 1990-1995.

We are interested in understanding to what extent judges are ideologically motivated and to what extent the litigants take this into account. The theoretical and empirical literature on the first stage, settlement versus litigation, follows from the law and economics literature and dates back to the work of Landes (1971) and Posner (1973). (For an overview of the literature, see Cooter and Rubinfeld 1989.) A stream of literature in this field, derived from formal models, argues that judges may be ideologically motivated, and that as long as the ideology is well known, the litigants will select cases with the ideology in mind (Priest and Klein 1984, Priest 1985, Wittman 1985, 1988, Waldfogel 1995, de Figueiredo 1997).[11] It is precisely this effect that causes the draw of cases judges hear to be a non-random sample of disputes. Indeed, these authors show that there should be little systematic ideological effect of judicial voting, because all potential information about judicial ideology and behavior will be taken into account by the litigants. If a case is weak, the plaintiffs will not bring the case, because the costs of litigating the case will exceed the potential benefits. If the plaintiffs have a strong case, then the defendants will have the incentive to settle, and avoid the costs of litigating. Here strong and weak are meant to mean relative to the judicial ideology of the bench.[12] All that is needed is judicial ideology that is known ex ante, and strategic litigants to generate a nonrandom draw of cases.[13]

---

[11] There is a second stream of game theoretical models (e.g. Bebchuk 1984) that consider the court as a truth-teller, with no utility function of its own and, thus, not a strategic actor in the model.

[12] In the formal development of the theory, if both parties can act strategically, the result is that each side is willing to settle cases which are obvious winners or obvious losers, leaving a zone of uncertainty around the judge's ideology over which cases are actually litigated. In this zone, some cases are lost and others won. There are no systematic variables that are determinative, because these are taken into account at the time of settlement. In the limit, fifty percent of cases are won by plaintiffs and fifty percent are won by defendants. For a fuller exposition of this model see Priest and Klein (1984), and Priest (1985).

[13] Regulatory litigation is different from others forms of litigation. Settlement, as is more common in civil litigation, is almost absent in administrative regulation resulting in little bargaining over settlement. Because of administrative constraints, when the FCC issues an order, it is in essence a "take-it-or-leave-it" offer. This may cause truncation in the standard Priest and Klein model. As more information is revealed, only the firm can act strategically.

In this paper, we allow the possibility that judges are ideological. As has been well established in the literature, judges may have some set of preferences over case outcomes (e.g. Segal and Spaeth 1989, Segal 1997, Spiller and Gely 1992, de Figueiredo, Gryski, Tiller and Zuk 2000). In regulatory cases, these may be ideological or political preferences. The judge is constrained by the case as to what she can rule. Because the judge's ruling is binding (until overruled), the judge is able to put her preferences on regulatory outcomes, and within boundaries, a judge can choose an outcome that is close to her preferences (Tiller 1998). In the case of regulatory litigation, where outcomes are often dichotomous, a judge can accept or reject the ruling of the FCC. In the case of rejection, the outcome is the policy before the FCC ruling, or the status quo. Whichever outcome is closer to the judge's preferences has a higher probability of prevailing in court, if ideology is operative.

If judges vote ideologically, then firms should select cases that reflect the ideology of the court. That is, firms should bring cases that are more likely to win in court based on the judges they expect to get. In regulatory litigation, when appeals go to the circuit court, firms do not know at the time of case filing, which judge will receive the case. Rather, they have a measure of the ideological make-up of the bench, the political affiliation of each judge. This will be a measure of the make-up of the banc of judges. Firms can then make a probability estimation about the outcome of the case, based on the probability that they will obtain a certain panel of judges. As the agency ruling becomes ideologically further apart from the ideology of the judges who sit on the bench, firms will be more likely to bring cases to the court for litigation. After filing, a set of judges is randomly selected and impaneled to hear the case. If judges vote ideologically, then one would expect that they would vote in a way that is consistent with the

ideology, and firm expectations. That is, the random draw of three judges from the banc of 12

judges should vote to overturn cases that are far, ideologically, from their own views.

A relevant question is why the agency and firm don't settle after filing of cases, once the

panel is announced. Practically, it is difficult for the agency to change its ruling. Common law

dictates that once a case has been filed, the agency cannot change its ruling without the

permission of the court.[14] Although courts might allow the agency some discretion, that

discretion is limited by the moves of the court. Moreover, any changes in rulings would have to

be introduced into the internal bureaucratic and entire rulemaking process to insure the agency is

not arbitrary and capricious. Indeed, interviews at the FCC suggest that the litigation division of

the FCC rarely discusses opportunities for settlement with the Bureaus. We discuss this broader

point (the agency tempering its decision) in Section IV,F. For the firm, the incremental cost of

litigating, once a case has been filed and panel announced, is relatively small.[15] If cases have

large precedental effect (e.g. are not independent), then there might be concern. However, if

cases are relatively independent, the firm would likely carry on. In the data, we see withdrawal

almost never occurring. Thus, we expect to see observed judicial politics correlating with actual

politics in judicial decision-making provided a) panels are selected randomly after filing, and b)

there are limitations to the settlement.

In order to operationalize elements of the theory, we need to consider how the politics of

the bench will enter into the probability assessment of the firm at two levels. If judges are

ideological, in the decision to litigate or not will affect the firm's ex ante belief of winning.

Specifically, a firm that disputes a Democratic agency order will examine the political make-up

---

[14] See Greater Boston TV Corp v. FCC (1971), 463 F.2d 268, as it relates specifically to FCC rulemaking.

of the banc of judges on the court. If that banc is made up largely of Republicans, and the firm

believes the bench is politically motivated so that it is likely to overturn Democratic agency

decisions, the firm will be more likely to bring a case against the agency rather than not litigate.

(The same would apply to Republican agency decisions and Democratic judges.) However,

politics will enter at the second stage as well—winning or losing in litigation—if judges are

indeed ideological. This is because the ideologically motivated panels are likely to be the

realization of a probability estimation of the political makeup of the bench that the firm makes at

the time of settlement. If Republican judges are prone to stifling pro-Democratic agency rulings

and vice versa, then the panel composition determined after filing should have an important

effect on the outcomes of cases at trial. Specifically, in an ideological world, Republican-

oriented panels should be more prone to overturning Democratic agency orders and vice versa.

Thus, if judges have preferences over ideology and firms recognize this, two outcomes

should result. First, firms have a higher probability of bringing cases to the appellate court when

the ideology of the agency is far from the ideology of the banc of judges. Second, judges who

are opposed to agency ideology are more likely to overturn the agency than to uphold the

agency, as the firms expect. That is, judges are ideologically motivated, and firms react

rationally to this in the cases selected for trial.

IV. EMPIRICAL TEST

A. BACKGROUND

---

[15] One telecommunications lawyer has estimated that the average case costs about $150,000 to litigate in external legal fees, and about $300,000 overall, a large number, but relatively small compared to antitrust, product liability, and other economic cases which can run into the millions of dollars for legal fees and last years.

A two-part dataset, supplemented with over fifty interviews of corporate lawyers, FCC litigators, and FCC regulators, has been compiled in order to test the propositions in the previous section. The first part contains 286 litigated cases, which includes what we believe is every case brought to the D.C. Circuit from 1990-1995 (six years) where an FCC order or ruling is challenged.[16] All cases where the appellant is an individual and all cases which are solely emergency petitions are omitted, resulting in 234 litigated cases for analysis

The second part of the data set includes cases that are not litigated. Two-hundred forty, firm-specific, FCC rulings from 1990 to 1995 that did not reach the litigation stage have been randomly sampled.[17] These rulings include primarily Memorandum Opinion and Orders (MOO), but also include other orders such as Certificates and Orders, Letters, Orders and Authorizations, Order Upon Reconsideration, and Review Board Decisions. The data has been purged of 6 orders that are strictly procedural (i.e. notification of hearings, public notices, requests for comments), for a result of 234 orders. To examine whether these orders are indeed disputed orders (note: they did meet a prima facie test for disputed), 78 FCC case files have been sampled from 7 different FCC bureaus of cases that are not litigated and are in the dataset. In all the cases, a dispute has arisen. This gives us confidence that the sample is representative of the remaining 156 cases. An order has been classified as a dispute if one or more of the following four criteria are met: (1) an order is challenged by the FCC or another firm, (2) an order results in a specific monetary loss to the firm (such as monetary forfeiture like a fine--as opposed to loss

---

[16] Cases are drawn from LEXIS, WESTLAW, and PACER. The PACER database includes all cases that are filed in the DC Circuit. We have omitted all decisions by the Court that involve a mandamus rejecting summary judgment or injunctive relief (this composes literally hundreds of orders issued by the court). In addition, we have coded a case as a case consolidated by the court.

[17] These have been drawn from the FCC Record from 1990-1995. The FCC Record includes every published order and ruling that the FCC makes, and is published bi-weekly. Every year, the FCC makes approximately 1200 published orders.

opportunity), (3) an order is directly against the FCC's stated objective of increased competition in markets, or (4) an order which has an attached MOO or Review Board Designation to it, suggesting that there is a dispute in the order.

C. THE EMPIRICAL METHOD

We specify the following model that is illustrated in Figure 1. Let the decision to litigate or not litigate (litigation or selection equation) be modeled as a first stage probit of the following form:

$$I_i^* = Z_i \gamma + \varepsilon_i \qquad \text{Eq. (8)}$$

such that
$$\begin{aligned} I_i &= 1 \text{ if } I_i^* > 0 \\ I_i &= 0 \text{ otherwise} \end{aligned}$$

and whether a firm wins or loses at trial (trial or level equation) be modeled as a second probit equation of the form:

$$Y_j^* = X_j \beta + u_j \qquad \text{Eq. (9)}$$

such that
$$\begin{aligned} Y_j &= 1 \text{ if } Y_j^* > 0 \\ Y_j &= 0 \text{ otherwise} \\ j &\in i \end{aligned}$$

We define, I_i^* as the latent variable that measurs the firms' own expected probability of winning the case before filing with the court. Above some expected probability, we observe litigation, as indicated by $I_i = 1$. Otherwise we observe no litigation, $I_i = 0$. Whether a firm litigates or not

is determined by the explanatory variables in the matrix Z_i (discussed below). In the trial

equation, Y_j^* is the panel's assessment of the quality of the case. When the quality of the case is

sufficiently high, the firm wins its case. This is given by the observed $Y_j = 1$. If the firm loses at

trial, then we observe $Y_j = 0$. The probability of winning is determined by the exogenous

variables in matrix X_j (described below), where $Z_i \neq X_j$. We assume that the error terms, ε_i

and u_j are jointly normally distributed with mean (vector) zero and a variance-covariance matrix

of the form:

$$\Sigma = \begin{bmatrix} 1 & \rho \\ \rho & 1 \end{bmatrix}$$

so that $E(\varepsilon_i, u_j) = \rho$. Thus there may be sample selection bias. Whether you win or lose at trial

may be correlated with the decision to litigate or not litigate. This two equation probit model,

then characterizes the model for the not litigate v. litigate and win v. lose equations.

We can estimate this model using a bivariate probit with adjustment for sample selection

bias.[18] Assuming that ε_i and u_j are bivariate standard normally distributed with correlation

coefficient ρ, the univariate cumulative distribution function is Φ, and the bivariate cumulative

normal distribution function is Φ_2, the likelihood function is:

$$L = \prod_{I=1,Y=1} \Phi_2\left(X_j\beta, Z_i\gamma \; ; \rho\right) \bullet \prod_{I=1,Y=0} \Phi_2\left(-X_j\beta, Z_i\gamma \; ; \rho\right) \bullet \prod_{I=0} \Phi(, Z_i\gamma) \qquad \text{Eq. (10)}$$

This accounts for the three possible outcomes. The first term encompasses observations where there has been litigation and litigation is won by the firm. The second term encompasses those observations where there is litigation and the litigation is lost by the firm. The final term includes those observations for which there is no litigation. This estimation technique allows us to jointly estimate a two equation probit model, adjusting for potential sample selection bias.

Note that the matched sampling method used yields consistent estimates for all parameters except the constant. The constant is a biased estimate. This sampling technique was used to economize on the data collection because so few cases are litigated relative to the number of cases that are not.

D. THE DATA

The dependent variable in the litigation equation is equal to one if an order was challenged in the Circuit Court, and is equal to zero otherwise. In the trial equation, the dependent variable is equal to one if the firm wins in the D.C. Circuit, and is equal to zero otherwise.[19] In the current sample of cases, the agency wins 67% of the time. There are two sets of independent variables (Z_i and X_j). We first discuss the independent variables of the selection equation (Z_i).

The first and second independent variables of interest are REPUBLICAN AGENCY *BANC IDEOLOGY and DEMOCRATIC AGENCY*BANC IDEOLOGY. These variables are designed to pick up the information about politics entering into judicial decision-making, with a focus on the D.C. Circuit. An ideology score is assigned to each judge that sits on the D.C.

[18] See Van den Ven (1981) for a more complete discussion.

Circuit. The ideology score is a weighted measure of appointing President (2/3) and the confirming Senate (1/3).[20] Republicans are given a value of 1, Democrats 0. Table 1 provides the ideology scores of the judges. For example, let us consider Judge Henderson. She was appointed by a Republican President, but confirmed by a Democratic Senate. Thus, she receives the score of $2/3(1) + 1/3(0) = 0.66$. Because politics may determine outcomes of cases, we consider the possibility that a Republican-oriented panel will overturn a Democratic agency order, and a Democratic-oriented panel will overturn a Republican agency order, where the agency represents the party of the president at the time of case filing.

INSERT TABLE 1 HERE

When the firm is deciding whether to litigate or not, it does not know the composition of the panel, only the composition of the banc of judges from which the panel will be drawn. Thus, two variables have been constructed, REPUBLICAN AGENCY*BANC IDEOLOGY (abbreviated REPUBLICAN BANC) and DEMOCRATIC AGENCY*BANC IDEOLOGY (abbreviated DEMOCRATIC BANC). For REPUBLICAN BANC, a dummy variable is created that is the political partisanship of the agency (measured by the President's party) at the time of case filing. It is equal to 1 for Republicans and 0 for Democrats. This dummy variable is then

[19] The data has been coded liberally to favor the firm wherever possible. If the case is remanded to the agency or overturned in part, it is considered a win for the firm. Summary judgments represent over 50% of case decisions.
[20] This measure is designed to incorporate the bargaining that occurs between the Senate and President on new judicial appointees. Smart (1994) has shown that political appointees have an ideology somewhere between the two bodies involved in the appointment process. Here, we assume that the President has more weight than the Senate in determining the appointee ideology, but that a bargain takes place. This is consistent with the findings of Zuk et al (1993) who note that every president since President Grant has successfully appointed to judicial vacancies people from his own party at least 80% of the time. The overall average same party appointment rate during that 120 year

multiplied by the average ideology score of the banc to obtain REPUBLICAN BANC. Similarly, for DEMOCRATIC BANC, a dummy variable is created with the partisanship of the agency being equal to 1 for Democrats and 0 for Republicans, and multiply this by the average ideology score of the banc. In order to take advantage of the natural experiment in the data and examine if the ideological behavior of the court and the response of the firm crosses political parties, the sample is bifurcated for the statistical analysis. One subset of the data is created to include all orders issued, and litigation initiated 1990-1992 during a Republican administration, and second subsample for 1993-1995, during a Democratic administration. The fundamental argument being posed here is that Democratic-oriented panels are likely to overturn Republican-controlled agencies, and vice versa. The best information the firm has about the panel it will draw at the time it must decide whether to litigate or not is the make-up of the banc of judges from which the panel will be drawn. Thus, if firms expect to exploit the ideological divide, we should see higher probabilities for firms bringing cases to court when an order is issued by an agency of a different political affiliation from that of the banc. Therefore, we would expect REPUBLICAN BANC to have a negative coefficient and DEMOCRATIC BANC to have a positive coefficient.

Table 2 presents the ideological scores for the FCC and DC Circuit as a whole. The ideological separation is calculated at the date of case filing. Although the vast majority of cases are filed in 1989-1995, there are a handful of cases that are filed in 1985-1988. The ideological separation between the two institutions various from as far as .56 to as close to .41.

---

period is 93%. The empirical test has been repeated for Presidential weightings of 1, .75 and .5, and the results are largely the same.

19

The second through fifth reported independent variables in the selection equation control for the nature of the cases and industries. RADIO, TELEVISION, and WIRELESS, are equal to 1 if the case relates to that specific industry, and are equal to 0 otherwise. If these industries are more likely to litigate that the telephone industry (the omitted category), the coefficients on these variables will be positive. Likewise, a fifth independent variable is PRICING, which encompasses cases which involve pricing or tariff filings, some of which involve high stakes.

Five additional variables are included. In interviews at the FCC, regulators suggested that the regional bell operating companies (RBOCs) were more litigious, or brought different types of cases, than their other telecommunications counterpart. To explore this notion, a variable, RBOC, has been included which is equal to 1 if the firm is an RBOC or GTE and 0 otherwise. FORTUNE 1000 is equal to 1 if any of the appellants or their parent companies is a Fortune 1000 firm, and 0 otherwise. Following previous work on litigation and settlement, this variable controls for any effects of deep pockets (which allows larger firms to litigate more frequently) and relative risk aversion in the settlement and litigation decision. LICENSE CASES controls for forum shopping, as these are the only cases that cannot be forum-shopped.[21]

---

[21] Some commentators have suggested that forum shopping may be of concern. Forum shopping is possible when a case can be heard in more than one court. Between 1990 and 1995, there was little forum shopping for FCC litigation. Often, non DC Circuit Courts often allowed change of venue motions to send the cases back to DC. Moreover, an initial look at the data indicates that forum shopping may not be a big concern. First, 91% of all cases are litigated in the D.C. Circuit. That then leaves only 9% of cases that are litigated in different forums. Second, the 27 cases that are litigated in other venues include six cases that are litigated on procedural motions. The remaining 21 cases include 4 cases that are heard on a rehearing basis (at different levels of appeal), bringing the number of cases to 17. Finally, of the remaining 17 cases, the win-loss ratio for the firm is 6-11, which is roughly the same win-loss ratio for the firms in the D.C. Circuit. It is important to note that it is difficult to test the politics hypotheses in the other circuits because they hear so few challenges to FCC orders. For example, over a six -year period, the D.C. Circuit heard 286 cases challenging FCC orders. In contrast, the 3rd, 4th, and 5th Circuits all heard

ADJUDICATION controls for cases which challenge the implementation of rules and their

application to a specific firm, rather than the more general rule-making process. Finally, FCC

CASE EXPERIENCE is a proxy for the firm's knowledge of the judicial process at the time of

the decision to settle or litigate. It measures the number of cases the firm has brought against the

FCC in the D.C. Circuit during the previous two years. Priest and Klein (1984: 19) have stated

they "would imagine error to diminish with experience with a legal standard...." Thus, firms

who have been the court repeatedly in the past might be expected to litigate less in the future. If

this is true, the parameter estimate on this variable should be negative.

In the trial equation, we have a number of independent variables (X_j). After a case is

filed, justices are impaneled to hear the case. Two variables are created to focus on the politics

of judicial decision-making on the D.C. Circuit, REPUBLICAN AGENCY*PANEL

IDEOLOGY (abbreviated REPUBLICAN PANEL) and DEMOCRATIC AGENCY*PANEL

IDEOLOGY (abbreviated DEMOCRATIC PANEL). These variables are constructed in a very

similar way as DEMOCRATIC BANC and REPUBLICAN BANC, except they include the

ideology score of the opinion writer (or the median justice, if no opinion is written).[22] In all

other respects, the variables are created the same way as the previous ideology variables, and the

coefficients should be signed in the same way. That is, when there is a Democratic agency

decision and a tendency toward a Republican panel, firms should be more likely to win, and vice

versa. The coefficient on REPUBLICAN PANEL will be negative and statistically significant,

---

none, the 1st and 10th Circuits heard one each, and the 7th and 9th Circuits, with the most cases, heard 6 and 7 cases respectively.
[22] We are primarily concerned with the ideology of the opinion writer (or the median justice when there is no opinion written). It has been shown that opinion writers, as agenda setters, are able to craft decisions that most closely reflect their ideology, especially in multiple dimension ideology space. See, for example, Maltzman and Wahlbeck (1996).

and the coefficient on DEMOCRATIC PANEL will be positive, if the judges that are randomly selected, actually do vote ideologically.

The variable DOJ is introduced. These are cases where the Department of Justice assists the FCC and becomes a party to the case. Many of these cases involve civil rights or antitrust. This variable, along with PRICING variable, is designed to pick up effects for cases that may have large awards at stake. In addition, many of the same control variables are included as before. RBOC and FORTUNE 1000 control for the effects that the RBOCs and the large firms are more likely to win at trial, respectively. LICENSE CASES, again, controls for superior court performance where forum shopping is permitted. If forum shopping has a noticeable effect, then this should have a negative coefficient.

ADJUDICATION controls for the possibility that judges are not likely to go the effort to overturn the agency on cases with firm-specific, rather than wide-ranging precedent. Finally, FCC CASE EXPERIENCE controls for the possibility of the selection effect described earlier having an influence at trial.

Table 3 offers descriptive statistics for the variables at each stage of the estimation by subsample. The first sample includes all those cases 1990-1992, when there was a Republican dominated FCC; the second subsample includes all those cases 1993-1995, when there was a Democratic-controlled FCC. It is interesting to note that the raw probability of firms winning cases has risen from 30% to 40% over this time period.

INSERT TABLE 3 HERE

22

E.   RESULTS

    1.   THE ESTIMATES

The maximum likelihood coefficients are reported in Table 4, with their standard errors

in parenthesis below. The significance of each coefficient is noted in the table, and the

significance is measured by a two-tailed t-test. The top half of the table provides the variables

and estimated coefficients for the litigation equation where the dependent variable is equal to 1 if

the firm has decided to litigate, and zero otherwise. A positive coefficient on the variables in

this equation indicates that the probability of the firm litigating is higher as the variable increases

in magnitude, *ceteris paribus*. The bottom half of Table 4 shows the variables and estimates for

the trial equation, where the dependent variable is equal to 1 if the firm wins at trial, and 0

otherwise. A positive coefficient on the variables in this equation indicates that the probability of

the firm winning at trial is higher as this variable increases in magnitude, *ceteris paribus*.

Models 1 and 2 cover the sample for cases that are decided by the FCC or filed in court

during Republican administrations (1990-1992); Models 3 and 4 cover those cases during

Democratic administrations (1993-1995). Models 1 and 3 estimate the model without the

political variables, while the specifications in Models 2 and 4 present the full estimation as

would be predicted by the theory, and includes variables to measure politics.

****INSERT TABLE 4 HERE****

One method of examining goodness of fit of the model is to compare the actual outcomes

against the predicted classifications of each observation. If the predicted probability of going to

trial is greater than 0.5, I have classified the case as going to trial; otherwise I classify it as not

23

litigated. Likewise, if the predicted probability of winning is greater than 0.5, the case is

classified as a win for the firm; otherwise it is classified as a loss. Models 1 and 3 correctly

predict 54% and 66% of the cases, respectively, while Models 2 and 4 correctly predict 73% and

76% of the cases, respectively. The control variables with the variables of theoretical interest

increase the predictive power of our model by 35% in the first subsample, and by 15% in the

second subsample.

2. INTERPRETING THE DIRECTION AND MAGNITUDE OF THE EFFECTS

A log-likelihood ratio test allows us to reject the hypothesis that Models 2 and 4, with all

the variables in the specification, have the equivalent explanatory power as Models 1 and 3, with

only the control variables, at the 95% level of confidence. Therefore, only Models 2 and 4 are

discussed in more depth in the remainder of this paper.

We consider the non-political variables first in the litigation estimation. In Model 2,

none of the of coefficients are statistically significant in the litigation estimation except for

FORTUNE 1000 and ADJUDICATION. Both have negative coefficients, suggesting larger

firms were less likely to litigate, as were cases before the Commission that were adjudicated, as

opposed to rule-making. Model 4 suggests these nonpolitical factors changed in the 1993-1995

time-period as well. The coefficients on TELEVISION and WIRELESS are now positive and

significant. The coefficients on RBOC and LICENSE CASE are also positive and statistically

significant at the 90% level of confidence. This suggests that the winning coalitions might have

changed with the shifts in political control of the Commission after the Clinton election.

In both models it is important to note that the relative magnitude of the effects; they correspond to the age of the industry, except for wireless in Model 2.[23] That is, older industries (e.g. radio, telephone) litigate less frequently than younger industries (e.g. television, wireless). This may point to the fact that companies use litigation to resolve regulatory uncertainty in their industry. This is speculation, and only further research can determine if this is the cause of the litigation behavior.

We also see a shift in the behavior of large firms. They are less likely to bring cases in the early period, but bring cases with increasing frequency in the latter period. Adjudicated cases are also brought with increasing frequency during the latter time period. Whether a firm has experience in litigating FCC cases before the D.C. Circuit Court of Appeals or not, has little statistical or substantive effect on its decision to litigate. The coefficient on RBOC suggests that FCC's perception of increased litigousness on the part of the RBOCs is weakly true. Of course, the cause of this increased litigation is not explored in this paper, but it could be due to the FCC's increased willingness to regulate the RBOCs or the Democratic Commissioners' tendencies to disfavor the RBOCs in their rulings, relative to their Republican counterparts.

Now we turn to the trial equation non-political variables. In Model 2, only FORTUNE 1000 and LICENSE have statistically significant coefficients, both of which are positive. In Model 4, none of the nonpolitical variables are statistically significant. There is a shift in the court's disposition from favoring the large firms and license cases, to treating all equally.

The insignificant results in Model 4 are consistent with the theory to date on settlement. That is, firms have unbiased estimates of their probability of winning and incorporate that into

---

[23] The FCC held a number of wireless auctions in the 1993-1995 time-period, which may contribute to the significance of the results in Model 4.

their decision about whether or not to litigate, thus leaving little systematic action happening in the trial phase of the rule challenge. Note, the panel ideology variables are an exception to this theory, because these are revealed only after a decision to litigate.

We now can consider the results for the ideological or political variables in Models 2 and 4. REPUBLICAN BANC has a negative and significant coefficient and DEMOCRATIC BANC has a positive and significant coefficient. These coefficients have the signs predicted. The coefficient on REPUBLICAN BANC suggests that companies are more likely to bring cases to the court when the political make up of the D.C. Circuit is increasingly Democratic and the FCC is issuing orders from Republican Commissioners. The coefficient on DEMOCRATIC BANC suggests the converse, namely, that firms are more likely to bring cases to the court when the make up of the D.C. Circuit is increasingly Republican and the FCC's orders are issued by Democratic Commissioners.

The lower half of Table 4 also shows that judges vote in a partially ideological way, as firms predict. REPUBLICAN PANEL has a negative and statistically significant coefficient, and DEMOCRATIC PANEL has a positive coefficient that is statistically significant at the 90% level of confidence for the two-tailed test. Republican panels tend to overturn Democratic agency decisions, but not Republican agency decisions, and Democratic panels tend to overturn Republican agency decisions, but not Democratic agency decisions, during this time period.

If we convert the coefficients into shifts in probabilities, and hold all other values of the variables at their mean values, we realize the large shifts in behavior that these political variables cause. If George Bush, in 1992, had replaced a Democratic-appointed judge with a Republican-appointed judge, firms would be 47% less likely to bring cases to court. Likewise, for additional judge appointed by Clinton in his first term as President, replacing a Republican retiree, the

26

firms are 46% less likely to litigate. Had the Senate been held by Republicans during his first

term, the drop in the probability of litigation would have been 38%. Although judges behave

ideologically in a way that engenders firm action, the actual shifts in decision-making by judges

are smaller than the shifts in litigation behavior by firms. A Republican opinion writer is 12%

more likely to support a Republican agency decision than a Democratic agency decision. A

Democratic opinion writer for the court is 20% more likely to support a Democratic agency

decision than a Republican agency decision.

The correlation coefficient, RHO, is estimated to be -.37 in Model 2 and -.35 in Model 4.

This raises the possibility that the more likely firms are litigate, the less likely they are to win,

which is consistent with the selection literature, that indicates that firms which are more selective

with the cases they bring the trial, choose better cases, and thus are more likely to win.

F. ALERNATIVE EXPLANATIONS

One possible concern about the specification of the model is the omission of lawyers

from the litigation and trial estimation. This problem has been dealt with in institutional and

empirical ways. Institutionally, firms can buy legal help on the market. They have some

expectation of the legal assistance they can obtain. One model might have them draw randomly

from a distribution of telecommunications lawyers. An alternative model might have the

company draw the best or second best lawyer overall. In either case, legal resources make up a

market, and to the extent that legal help can be obtained in a market, firms will not have differential abilities in the court.[24]

We can address the legal representation problem statistically as well. For a subset of the litigated cases (105), the top six lawyers that represented the appellant in each case have been coded. The lawyers' FCC case experience and their win-loss record in the DC Circuit on FCC cases is examined. We do not find a statistically significant effect for the coefficient on either of these variables for the subsample. Second, the original FCC case files for 29 of these cases have been reviewed and coded for all the lawyers involved in these cases that have not been litigated. (Lawyers are used within the agency.) There are 238 lawyers representing 53 firms in the 29 cases coded. Less than 5 lawyers have more than one case experience in the sample. Little can be inferred statistically from this subsample.

A final concern about specification is that the FCC may be acting strategically on these cases. That is, one might be concerned that the FCC behavior changes as the ideology of the Court changes. Statistical tests on the tendency for the FCC to change its behavior reject this hypothesis. The data suggest that while firms are strategic, the FCC is not. Why might this be? There are three possibilities. First, the FCC makes over 1,200 rulings every year. Many of these are mundane, and it may be difficult for the Commission to calculate court behavior and agency zones of discretion for each one. Some are not sufficiently important for the FCC to engage in this calculative behavior; others would take too much time. For the firms, on the other hand, each ruling is quite important, as a given firm might receive 2-3 rulings in a year (20-30 for the very large firms). Thus, they can afford to be strategic in choosing the cases they take to

---

[24] It is true that some companies have only one law firm represent them. Sometimes this is an exclusive relationship for the law firm, but other times it does not prevent the law firm from taking on other, unrelated telecommunications

litigation; what might be mundane to the Commission could be quite important to the firm.

Second, many rulings occur through "Delegated Authority." This occurs when civil service

employees (such as Bureau Chiefs and deputies) are permitted to issue orders without the direct

intervention of the Commissioners. This is done to economize on time and effort through

delegation. Without strong political agendas, these civil servants may be less responsive to the

ideological leanings of the judiciary. Third, like any other bureaucratic organization, the FCC

adheres to its policy and procedures, and operates by standard operating procedures.

It is important to note that this result does not mean that the separation of powers

literature, championed by Spiller (1992), McNollgast (1989), and Marks (1989) is not true. That

literature suggests that agencies are careful in their decision-making, and are constrained by the

court in their zones of discretion. Rather the data in this paper suggests that this strategic

behavior of agencies does not permeate down to each and every decision that is made by the

agency. It may still apply to important decisions made by administrative agencies;

unfortunately, the FCC dataset compiled does not contain sufficient observations to test this

statistically.

V. CONCLUSION

This paper has demonstrated that litigants are indeed strategic in the cases they bring to

court. That is, companies examine the make-up of the banc of judges from which it will draw its

panel, assesses its ideology, and determines whether or not to bring a given case to the court. In

particular, when the ideological division between the agency and the court is large, firms are more

cases or clients.

likely to bring cases. This seems to occur because the companies are attempting to take advantage of the ideological make-up of the bench.

After cases are filed, panels are drawn to hear the case. These panels vote in ideologically predictable ways that is consistent with the vast literature on ideological voting. This paper suggests that even in the presence of strategic litigants, the ideological component to judicial voting can still be measured. In correcting for a methodological shortcoming in many papers on judicial voting behavior, the paper yields results that are striking. The effects of selection based on ideology are much larger than the observed ideological voting behavior. Thus, the paper is bad and good news for those who believe that ideology matters. It is bad news in the sense that selection matters, and previous papers which do not control for it are generating biased estimates. It is good news in the sense that once one does control for selection, the effects of ideology are much larger than previously estimated. Plaintiffs against the government drastically change the cases they select for litigation based upon the ideological make-up of the bench.

The paper has also moved ahead on two other fronts. First, it has taken a more nuanced approach to regulatory litigation, which has received little attention in the literature on law and economics. Second, it has highlighted the sophistication of litigation strategies employed by corporate litigants and organized interests. Namely, it shows that these companies do take into account multiple factors, including those identified in the judicial politics literature over the past 15 years, when choosing which cases to bring to the court. This paper has, more broadly, integrated the law and economics approach with the literature in judicial politics to demonstrate that judicial ideology not only matters, but matters more in selection than in actual outcomes.

REFERENCES

Bebchuk, L. A. (1984). "Litigation and Settlement under Imperfect Information," Rand Journal of Economics 15: 404-415.

Botein, Michael (1995). "Judicial Review of FCC Action," Cardozo Arts and Entertainment Law Journal, 13: 317-343.

Caldeira, Gregory. A. 1987. "Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan," American Political Science Review 81: 1139-53.

Cooter, Robert D., and Daniel L. Rubinfeld (1989). "Economic Analysis of Legal Disputes and Their Resolution," Journal of Economic Literature 17: 1067-1097.

Cross, Frank, and Emerson H. Tiller (1998). "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal," Yale Law Journal 107, 2155-2176.

de Figueiredo, John M. (1997). "The Politics of the Court and the Strategy of the Firm." Ph.D. Dissertation, University of California, Berkeley.

de Figueiredo, John M., and Emerson H. Tiller (1996). "Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary," Journal of Law and Economics, 39(2): 435-462.

de Figueiredo, John M., Gerald Gryski, Emerson H. Tiller, and Gary Zuk (2000). "Congress and the Political Expansion of the U.S. District Courts," American Law and Economics Review 2(1): 107-125.

Eisenberg, Theodore, and Henry S. Farber (1997). "The Litigious Plaintiff Hypothesis: Case Selection and Resolution," Rand Journal of Economics, 0:S92-S112.

Epstein, Lee (1995). Contemplating Courts. Washington, D.C.: CQ Press.

Fagan, Keith (1995). "Federal Communications Commission," in eds. Gary Edles and Jerome Nelson, The Federal Regulatory Process and Agency Practices and Procedures (w/ 1995 supplement). Aspen Law and Business Publishing.

Fleming, Roy, John Bohte, and B. Dan Wood (1997). "One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92," American Journal of Political Science 41(4): 1224-1250.

Gely, Rafael, and Pablo Spiller (1990). "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases," Journal of Law, Economics, and Organization, 6(2): 263-300.

George, Tracey E., and Lee Epstein (1992). "On the Nature of Supreme Court Decision Making," American Political Science Review 86: 323-37.

Hall, Melinda Gann (1992). "Electoral Politics and Strategic Voting in State Supreme Courts," Journal of Politics 54: 427-46.

Kessler, Daniel, Thomas Meites, and Geoffrey Miller (1996). "Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation," Journal of Legal Studies, 25: 233-260.

Landes, William (1971). "An Economic Analysis of the Courts," Journal of Law and Economics, 14: 61-103.

Maltzman, F, and Paul J. Wahlbeck (1996). "May it Please the Court: Opinion Assignments in the Rehnquist Court," American Journal of Political Science 40(2): 421-443.

Marks, Brian (1989). "A Model of Judicial Influence on Congressional Policymaking: Grove City College v. Bell," Ph.D. Dissertation, Washington University.

McNollgast (1989). "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," Virginia Law Review, 75: 431-482.

McNollgast (1995). "Politics and Courts: A Positive Theory of Judicial Doctrine and the Rule of Law," Southern California Law Review 68: 1631-83.

Perloff, Jeffrey M., Daniel L. Rubinfeld, and Paul Ruud (1996). "Antitrust Settlements and Trial Outcomes," Review of Economics and Statistics: 401-409.

Posner, Richard A. (1973). "An Economic Approach to Legal Procedure and Judicial Administration," Journal of Legal Studies, 2: 399.

Priest, George L. (1985). "Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes," Journal of Legal Studies, 14: 215-243.

Priest, George L., and Benjamin Klein (1984). "The Selection of Disputes for Litigation," Journal of Legal Studies, 13: 1-55.

Revesz, Richard (1997). "Environmental Regulation, Ideology, and the D.C. Circuit," Virginia Law Review 83: 1717-72.

Segal, Jeffrey (1997). "Separation-of-Powers Games in the Positive Theory of Congress and the Courts," American Political Science Review 91(1): 28-44.

Segal, Jeffrey, and Albert Cover (1989). "Ideological Values and the Votes of U.S. Supreme Court Justices," American Political Science Review 83: 557-65.

Segal, Jeffrey, Lee Epstein, Charles Cameron, and Harold Spaeth (1995). "Ideololgical Values and Votes of U.S. Supreme Court Justices Revisited," <u>Journal of Politics</u> 57: 812-23.

Segal, Jeffrey A., and Harold J. Spaeth (1993). <u>The Supreme Court and the Attitudinal Model</u>. New York: Cambridge University Press.

Smart, Susan (1994). "The Consequences of Appointment Methods and Party Control for Telecommunications Pricing," <u>Journal of Economics and Management Strategy</u> 3(2): 301-324.

Spiller, Pablo (1992). "Agency Discretion Under Judicial Review," <u>Mathematical and Computer Modelling</u> 16(8/9): 185-200.

Spiller, Pablo T., and Rafael Gely (1992). "Congressional Control or Judicial Independence: The Determinants of US Supreme Court Labor Decisions: 1949-1987," <u>Rand Journal of Economics</u> 23(4): 463-492.

Temin, Peter (1987). <u>The Fall of the Bell System</u>. (Cambridge University Press: Cambridge).

Tiller, Emerson H., and Pablo T. Spiller (1999). "Strategic Instruments: Legal Structure and Political Games in Administrative Law," <u>Journal of Law, Economics, & Organization</u> 15:349-377.

Tiller, Emerson H. (1998). "Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making," <u>Journal of Law, Economics & Organization</u> 14, 114-135.

Van de Ven, Wynand P.M.M., and Bernard M.S. Van Praag (1981). "The Demand for Deductibles in Private Health Insurance: A Probit Model with Sample Selection," <u>Journal of Econometrics</u>, 17: 229-252.

Waldfogel, Joel (1995). "The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory," <u>Journal of Political Economy</u>, 103: 229-260.

Wittman, Donald (1985). "Is the Selection of Cases for Trial Biased?" <u>Journal of Legal Studies</u>, 14: 185-214.

Wittman, Donald (1988). "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data," <u>Journal of Legal Studies</u> 17: 313-352.

Zuk, Gary, Gerald Gryski, and Deborah J. Barrow (1993). "Partisan Transformation of the Federal Judiciary," <u>American Political Science Quarterly</u>, 21: 439-457.

Figure 1: Litigation

$$I_i^* = Z_i\gamma + \varepsilon_i$$
$$I_i = 1 \text{ if } I_i^* > 0$$
$$I_i = 0 \text{ otherwise}$$

$$Y_j^* = X_j\beta + u_j$$
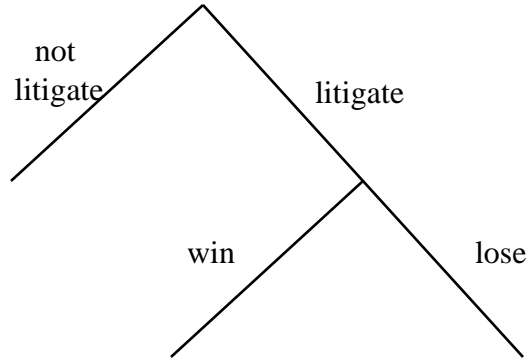$$Y_j = 1 \text{ if } Y_j^* > 0$$
$$Y_j = 0 \text{ otherwise}$$
$$j \in i$$

not
litigate

litigate

win

lose

TABLE 1: JUDGES OF THE D.C. CIRCUIT, 1985-1995

Judge	Year Appointed	President	President's Party	Senate	Ideology Score
Bork, Robert H.	1982	Reagan	R	R	1
Buckley, James L.	1985	Reagan	R	R	1
Edwards, Harry T	1980	Carter	D	D	0
Ginsburg, Douglas H.	1986	Reagan	R	R	1
Ginsburg, Ruth B.	1980	Carter	D	D	0
Henderson, Karen L.	1990	Bush	R	D	0.66
Mikva, Abner	1979	Carter	D	D	0
Randolph, A. Raymond	1990	Bush	R	D	0.66
Robinson, Spottswood W.	1966	Johnson	D	D	0
Rogers, Judith	1994	Clinton	D	D	0
Scalia, Antonin	1982	Reagan	R	R	1
Sentelle, David B.	1987	Reagan	R	D	0.66
Silberman, Laurence H.	1985	Reagan	R	R	1
Starr, Kenneth W.	1983	Reagan	R	R	1
Tamm, Edward A.	1965	Johnson	D	D	0
Tatel, David	1994	Clinton	D	D	0
Thomas, Clarence	1990	Bush	R	D	0.66
Wald, Patricia M	1979	Carter	D	D	0
Williams, Stephen	1986	Reagan	R	R	1
Wright, J. Skelly	1962	Kennedy	D	D	0

Table 2: Ideological Distance Between Agency and Court

Year Case Filed	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Agency Ideology	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	1.000	1.000	1.000
Court Ideology	0.409	0.542	0.555	0.555	0.515	0.553	0.553	0.544	0.544	0.498	0.544
Ideological Distance	0.409	0.542	0.555	0.555	0.515	0.553	0.553	0.544	0.456	0.502	0.456

TABLE 3: DESCRIPTIVE STATISTICS

Variable	Subsample 1: Mean	1990-1992 Std Dev	Subsample 2: Mean	1993-1995 Std Dev
		Disputed Cases		
Litigate	.5000	.5008	.5000	.5008
Republican Banc	.5468	.0150		
Democratic Banc			.5318	.0200
Radio	.2515	.4346	.1549	.3631
Television	.1503	.3579	.1549	.3631
Wireless	.1288	.3355	.1901	.3938
Pricing	.2055	.4047	.1972	.3993
RBOC	.1166	.3214	.1338	.3416
Fortune 1000	.2546	.4363	.3451	.4771
License Cases	.5061	.5007	.3944	.4904
Adjudication	.1380	.3455	.0704	.2568
FCC Case Experience	.3190	.7900	.8028	1.747
		Litigated Cases		
Win	.3006	.4599	.4085	.4950
Republican Panel	.5818	.3971		
Democractic Panel			.5942	.4172
Pricing	.1902	.3937	.1408	.3503
RBOC	.0920	.2900	.1549	.3644
Fortune 1000	.1472	.3554	.2958	.4596
License Cases	.4847	.5013	.5352	.5023
Adjudication	.0920	.2900	.0845	.2801
FCC Case Experience	.2454	.7378	.8169	2.086
DOJ	.3951	.4904	.4366	.4995

TABLE 4: RESULTS OF BIVARIATE PROBIT MODEL CORRECTING FOR SAMPLE
SELECTION

Litigation Dependent Variable = 1 if Litigation, = 0 if Not Litigate
Trial Dependent Variable   = 1 if firm wins, = 0 otherwise

Variable	Model 1	Model 2	Model 3	Model 4
	DECISION TO LITIGATE ESTIMATION			
Constant - Settlement	.471**	26.506**	-.606**	.12.831**
	(.178)	(8.001)	(.259)	(.4.273)
Republican Agency * Banc Ideology		-47.417**		
		(14.558)		
Democratic Agency * Banc Ideology				22.794**
				(7.855)
Radio	-.203	-.255	.009	-.122
	(.240)	(.263)	(.403)	(.430)
Television	.356	.325	.819**	.946**
	(.252)	(.264)	(.349)	(.391)
Wireless	.082	.012	.830**	1.092**
	(.240)	(.274)	(.399)	(.420)
Pricing	.023	.006	-.165	.030
	(.224)	(.226)	(.347)	(.396)
RBOC	.416	.339	.712*	.824*
	(.296)	(.322)	(.400)	(.430)
Fortune 1000	-1.140**	-1.135**	-.134	-.228
	(.238)	(.255)	(.370)	(.402)
License Case	-.326	-.307	.612*	.666*
	(.217)	(.221)	(.330)	(.344)
Adjudication	-.522**	-.586**	.020	.081
	(.236)	(.255)	(.558)	(.508)
FCC Case Experience	-.056	-.052	-.089	.094
	(.125)	(.125)	(.085)	(.098)
	TRIAL ESTIMATION (WIN v. LOSE)			
Constant - Trial	-1.258	-.527	-.474	-.736
	(.242)	(.385)	(.918)	(.720)
Republican Agency * Panel Ideology		-0.585**		
		(.290)		
Democratic Agency * Panel Ideology				.771*
				(.468)
Pricing	-.323	-.237	.229	.257
	(-.908)	(.359)	(.634)	(.658)
RBOC	.073	-.105	.044	.066
	(.497)	(.490)	(.726)	(.704)
Fortune 1000	.219	1.208**	.601	.486
	(.896)	(.427)	(.664)	(.623)
License Cases	.282	.564**	-.042	-.133
	(.338)	(.275)	(.616)	(.548)
Adjudication	-.266	-.101	-.406	-.468
	(.361)	(.419)	(.665)	(.737)
FCC Case Experience	.160	.116	.165	.127
	(.190)	(.184)	(.120)	(.122)
DOJ	.455	.377	.063	.153
	(.284)	(.302)	(.481)	(.477)

	N Number of Cases Litigated	326 163	326 163	142 71	142 71
	Log Likelihood Function	-295.41	-278.46	-126.37	-118.10

Standard Errors in Parentheses. All significance tests are for two-tailed t-statistics.
* significant at 10% level, ** significant at 5% level