

Program in Law and Public Affairs Princeton University



Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation

John M. de Figueiredo
Princeton University, Program in Law and Public Affairs

Princeton Law and Public Affairs
Working Paper Series
Working Paper No. 05-007
Spring Semester

Program in Law and Public Affairs
416A Robertson Hall
Princeton University
Princeton NJ 08544-1013
(609) 258-5626

This paper can be downloaded without charge from the Social Science Research Network electronic library
at: <http://ssrn.com/abstract=747647>

STRATEGIC PLAINTIFFS AND IDEOLOGICAL JUDGES IN TELECOMMUNICATIONS LITIGATION

John M. de Figueiredo^{*}

Princeton University
Woodrow Wilson School
411 Robertson Hall
Princeton, NJ 08544-1013

Revised: 08 November 2004

ABSTRACT

This paper examines the effect of judicial 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 actors are close ideologically. Judges, who are subsequently randomly selected, vote ideologically as the firms' actions predict they will, with Republican judges overturning Democratic agency decisions and vice versa. The effect of judicial ideology on case selection is 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 evidence that regulatory uncertainty may lead to more litigation.

^{*} I would like to thank Severin Borenstein, Chuck Cameron, David Mowery, Bob Powell, Howard Shelanski, Ken Shepsle, Jesper Sorensen, Pablo Spiller, Oliver Williamson and seminar participants at the University of Chicago, Harvard University, Stanford University, MIT, University of Pennsylvania, Northwestern University, Berkeley, Emory University, New York University, and the American Political Science Association for very helpful comments.

STRATEGIC PLAINTIFFS AND IDEOLOGICAL JUDGES IN TELECOMMUNICATIONS LITIGATION

I. INTRODUCTION

There is a large body of literature in judicial politics that demonstrates judges, with preferences over policy outcomes, vote ideologically when rendering their decisions (Segal and Spaeth 1993; 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, party affiliation, ideology, attitudes toward the law, and desire to place their lasting imprint upon policy outcomes.² What this literature generally fails to do is to examine the strategic case selection effect by litigants. That is, if ideology matters, 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.

The literature on law and economics has focused on this question of selection, but has generally foregone an analysis of the judicial politics that affect actual case outcomes. The general methodology followed in these studies is to create theoretical predictions about who will win and lose at trial based on settlement behavior, and to then examine trial outcomes (Priest and

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 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 (Segal 1997).

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 this method does not take into account this new information for better prediction of trial outcomes. That is, the information discovered after the decision to settle or litigate is in the error term.⁴

Thus, while law and economics models (which do consider selection) do not generally consider judge ideology at the time of case outcomes, judicial politics models (which do consider judge ideology) generally do not consider case selection. This fact has been noted by prominent scholars (e.g. Epstein and King 2002; Revesz 2002). Indeed, in a recent survey of the law and economics and political science literatures, Cross (2003) noted, “The intersection of the litigant-driven hypothesis (generally propounded by [law and economics]), and the [judicial ideology] hypothesis (typically advanced by political scientists) has not been extensively explored.”⁵ This paper fills this gap by bringing together these two literatures and focusing on the effect of judicial ideology in both the selection of cases for trial (as in the law and economics literature) and the outcomes of those cases (as in the judicial politics literature). It does this by jointly estimating the litigation and trial equations, correcting for sample selection bias, and controlling for judicial ideology at both stages.

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

⁴ 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). One paper does examine government litigation. Eisenberg and Farber (2003) examine 474,000 personal injury and job discrimination cases filed in federal district court in which the federal government is either the plaintiff or defendant. These cases are quite different that the cases we examine here as they generally cover civil law and not administrative law, they are filed in district courts, and the government can be the plaintiff or defendant..

⁵ In response to a critique by Epstein and King, Revesz (2002) relied upon the Priest and Klein “inference” approach about judicial ideology to explain selection, without addressing directly or estimating the selection process.

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. 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 impact of ideological judges on case selection and case outcomes.

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. Third, 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. Finally, regulatory cases, unlike auto accidents or civil law cases, are attractive to analyze because the government is always the defendant at the circuit level; thus one litigant is constant throughout the sample. 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.

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 and shifts in the make-up of the Court provide two additional sources 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.

In integrating the plaintiff case selection literature with the judicial ideological voting literature, the paper has a number of results. The paper finds, not surprisingly, that judges vote in ideologically predictable ways in regulatory cases. What is more striking is the effect ideology has on the selection of cases for litigation. Firms, anticipating judges' ideological votes, select regulatory cases for litigation strategically, and that this selection effect is larger than the effect on litigated case outcomes. In this sense, the impact of judicial ideology is underestimated in previous papers. Moreover, although the Democratic and Republican-appointed judges behave almost the same in the degree to which they favor like-minded agencies, the selection effect is somewhat stronger for during Republican administrations than Democratic administrations. 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 provides initial evidence 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. Overall, this paper addressing a recurring critique of the literature that the judicial politics and law and economics literatures are not integrating their theories and empirical techniques.

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 1996.⁶ Thus, the remainder of this paper examines events through 1995. The procedures that govern the rulemaking and internal appeals process for the FCC are outlined in the Administrative Procedures Act of 1946 (APA) 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.⁷ 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

⁶ 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.

⁷ For an extensive description of the FCC rule-making process, see de Figueiredo (1997) or Fagan (1995), for a summary. For a description of lobbying at the FCC, see de Figueiredo and Kim (2004).

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.⁸ 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.⁹ The second category of disputes, non-license 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).¹⁰ Only after a case is filed in the court, a three-judge panel, selected randomly from the banc of 12

⁸ For an overview of judicial review of FCC rules, see Botein (1995).

⁹ 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 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)

¹⁰ 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.

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.¹¹ 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 the FCC for further consideration. A decision that receives a majority of judges votes is binding, unless appealed.¹²

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.

¹¹ 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.

¹² 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.

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.

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).¹³ 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. Thus half of the cases will succeed and half of the cases will be lost. 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.

¹³ 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.

Here strong and weak are meant to mean relative to the judicial ideology of the bench.¹⁴ All that is needed is judicial ideology that is known ex ante, and strategic litigants to generate a nonrandom draw of cases.¹⁵

In contrast, the judicial politics literature has largely foregone an analysis of selection and has argued that judges not only vote ideologically, but that this ideological voting will be observed in voting behavior. Indeed, most studies in this literature have found this ideological voting effect, without controlling for selection. Thus the law and economics literature argues selection should eliminate (or largely mitigate) the observed ideological voting effect, while the judicial politics literature, which generally does not control for selection, finds empirically strong effects in judicial voting.

In this paper, we allow the possibility that judges are ideological. 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

¹⁴ 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).

¹⁵ 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.

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. The fact that the presiding judges are not known at the time of case filing allows separate measurement of the ideological effect from selection and voting.

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.¹⁶ 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, and therefore in violation of the APA. Indeed, interviews at the FCC suggest that the litigation division of the FCC rarely discusses opportunities for settlement with the Bureaus. (We discuss the possibility that the agency may be tempering its initial 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.¹⁷ If cases have large precedential 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

¹⁶ See *Greater Boston TV Corp v. FCC* (1971), 463 F.2d 268, as it relates specifically to FCC rulemaking.

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 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

¹⁷ 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.

are opposed to agency ideology are more likely to overturn the agency than to uphold the agency, as the firms expect. That is, we should observe both that judges are ideologically motivated, and that firms react rationally to this in the cases selected for trial.

IV. EMPIRICAL TEST

A. BACKGROUND

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.¹⁸ All cases where the appellant is an individual and all cases which are solely emergency petitions are omitted as well as four cases that were filed in 1985 and 1986, resulting in 234 litigated cases for analysis

The second part of the data set includes cases that are not litigated. Two-hundred forty-six, firm-specific, FCC rulings from 1990 to 1995 that did not reach the litigation stage have been randomly sampled.¹⁹ 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,

¹⁸ 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.

¹⁹ 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.

requests for comments), for a result of 240 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 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.

B. 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:

$$I_i^* = Z_i\gamma + \varepsilon_i \quad \text{Eq. (1)}$$

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:

$$Y_j^* = X_j\beta + u_j \quad \text{Eq. (2)}$$

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

We define, I_i^* as the latent variable that measures 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.²⁰ 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:

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

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. Identification of the second stage econometrics comes from the functional form of the bivariate probit equations (similar to the standard Heckman selection model).

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

²⁰ See Van den Ven (1981) for a more complete discussion.

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.²¹ 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 independent variable is BANC IDEOLOGICAL DISTANCE and is designed to pick up the information about the ideological distance between the agency and the judges sitting on the bench. To obtain the ideological distance, we look at the make-up of the agency and the court. If the Chairman of the FCC is a Democrat, it is coded as a 0; a Republican is coded as one. (During this time, the Chairman is always in the political majority on the Commission.) To measure the 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. Circuit. The ideology score is equal to 1 if the judge is appointed by a Republican president, and 0 if appointed by a Democratic president.²² We list the judges and their appointing Presidents in Table 1. With these individual scores, we can create a measure of the probability that the plaintiff draws a Republican (Democratic) majority panel from the banc of judges sitting on the bench. To create a measure of ideological distance, we measure the ideological distance from the agency to the probability that the plaintiff draws a panel of the same ideology. For example, if the probability of drawing a Democratic majority panel is 0.36, then the ideological distance from a Democratic

²¹ If the case is remanded to the agency or overturned in part, it is considered a win for the firm.

²² In earlier versions of this paper, we show that the results are robust to a judge ideology score which is a weighted average of the party of the president and the majority party in the Senate. Results are available upon request.

agency to the banc is measure as $|0.36 - 0| = 0.36$. If however, the agency is run by a Republican chairman, then the ideological distance between the agency and the same court is $|0.36 - 1| = 0.64$. 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. Because politics may determine outcomes of cases, this measure allows us to examine if plaintiffs believe 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—and thus adjust their filing behavior accordingly.

*** INSERT TABLE 1 HERE ****

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 BANC IDEOLOGICAL DISTANCE to have a positive coefficient. As the ideological distance between the agency and the banc of judges increases, there should be a higher likelihood of litigation.

The second through fifth reported independent variables in the selection equation control for the nature of the cases and industries. RADIO, BROADCAST, 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 than 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.²³ ADJUDICATION controls for cases which challenge the implementation of rules and their

²³ 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 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. One could interpret low forum-shopping as evidence that litigants don't care about politics. Most law firms that are expert in telecommunications are based in Washington, D.C., and paying for them to litigate in another circuit is more expensive than pursuing the case in the D.C. Circuit. If forum-shopping were successfully in non-licensing cases, firms should win more often in nonlicensing cases. That is the coefficients in Table 3 on License should be consistently negative, but we do not find this result. Although there is much forum shopping today, in the Pre-Telecommunications Act of 1996 environment, there was not the regulatory uncertainty that existed after the passage of the Act, thus, perhaps, limited the benefit to forum shopping. However, despite all of

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. PANEL IDEOLOGICAL DISTANCE is designed to account for the political affiliation of the panel. This variable is constructed in a very similar way as BANC IDEOLOGICAL DISTANCE, except it includes the ideology score of the opinion writer (or the median justice, if no opinion is written).²⁴ In all other respects, the variable is created the same way as the previous ideology variable, and the coefficient should be signed positive. 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 variable DOJ is introduced. These are cases where the Department of Justice assists the FCC and becomes a party to the case. The DOJ will become a party to the case if the Department believes the issues in the case relate to a broader set of legal issues outside the sole purview of the FCC. At the time of filing, the firms do not know whether the DOJ will be a party to the case or not. This variable, along with PRICING variable, is designed to pick up

this evidence, we cannot reject the hypothesis that forum shopping mitigates the ideology effects during this time period.

²⁴ 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

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.

In order to determine if Republicans and Democrats behave differently, we break the time series into two subsamples—one subsample when Republicans are in charge of the FCC (1990 to 1992) and a second subsample when Democrats run the FCC (1993-1995). Table 2 offers descriptive statistics for the variables. It is interesting to note that the raw probability of firms winning cases has risen from 31% to 38% over this time period.

INSERT TABLE 2 HERE

E. RESULTS

1. THE ESTIMATES

The maximum likelihood coefficients are reported in Table 3, 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

closely reflect their ideology, especially in multiple dimension ideology space. See, for example, Maltzman and

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 3 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*.

We examine separate models for Republican and Democratic agencies to determine if there are different behaviors during each of the administrations. Models 1 and 3 contain only the control variables for the Republican (1990-1992) and Democratic (1993-1995) periods, respectively; Models 2 and 4 add the political variables to these models.

INSERT TABLE 3 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 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 56% and 64% of the cases, while Models 2 and 4 correctly predict 78% and 77% of the cases, respectively. The control variables with the variables of theoretical interest increase the

predictive power of our model by 40% in the first subsample, and by 20% in the second subsample.

The correlation coefficient, RHO, is estimated to be -.25 in Model 2 and -.52 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.

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, has 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, the FORTUNE 1000 and ADJUDICATION coefficients are statistically significant in the litigation estimation at the 95% level of confidence. Both the FORTUNE 1000 and ADJUDICATION variables 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 period. The coefficients on BROADCAST, WIRELESS, RBOC and LICENSE CASE are now positive and statistically significant. 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 interesting to note the relative magnitude of the industry effects; they correspond to the age of the industry, except for wireless in Model 2.²⁵ 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 some litigants firms. Large firms are less likely to bring cases in the early period than 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 litigiousness on the part of the RBOCs is weakly true. 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 largely insignificant results in Models 2 and 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 their decision about whether or not to litigate, thus leaving little systematic

²⁵ The FCC held a number of wireless auctions in the 1993-1995 time-period, which may contribute to the

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. BANC IDEOLOGICAL DISTANCE has a positive and significant coefficient as predicted in both models. The coefficient suggests that companies are more likely to bring cases to the court when the political make up of the D.C. Circuit is far from the ideology of the FCC Commissioners. That is, when there is a majority Republican commissioners on the FCC, and the court is highly Democratic (and vice versa), there is a higher probability of the firm bringing cases than when both the FCC and the bench are of the same political affiliation.

The lower half of Table 3 also shows that judges vote in a partially ideological way, as firms predict. PANEL IDEOLOGICAL DISTANCE has a positive coefficient that is statistically significant at the 95% and 90% level of confidence in Models 2 and 4, respectively. During this time period, Republican panels tend to overturn Democratic agency decisions with higher frequency than they do Republican agency decisions, and Democratic panels tend to overturn Republican agency decisions with higher frequency than they do Democratic agency decisions.

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,²⁶ firms would be 27% less likely to bring cases to court. Likewise, for additional judge appointed by Clinton in his first term as President, replacing a Republican

significance of the results in Model 4.

retiree, the firms are 22% less likely to litigate. 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 19% 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.

These results suggest that judges do vote ideologically, and that Democratic and Republican judges show a roughly equal tendency to support an FCC that makes like-minded decisions. The results also show that plaintiffs adjust their behavior in response to the expectation of getting these types of judges.

F. ROBUSTNESS and ALTERNATIVE EXPLANATIONS

Here we address three concerns that might arise in the previous specifications. The first 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

²⁶ If the bench has 6 Democratic and 6 Republican judges, and one Republican was replaced with a Democrat, this would result in a shift from a 50% chance of getting Republican-majority panel to a 36% chance of getting a Republican-majority panel.

the extent that legal help can be obtained in a market, firms will not have differential abilities in the court.²⁷

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 second 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. The paper suggests that firms are strategic. We do not formally test nor reject the hypothesis that the FCC is strategic as well. However, a number of facts lead us to believe that the extent of FCC strategic behavior is limited. First, the results from Table 3 point to non-strategic behavior of the FCC in the cases examined. If there was strategic behavior on the part of the FCC, we should see statistically insignificant coefficients on the ideological variables with values close to zero, as the ideological effects would be cleansed by the FCC's strategic decision-making. Second, we replicate Model 2 for non-litigated cases and only those litigated

²⁷ 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 cases or clients.

cases where a lengthy opinion was written by the bench.²⁸ These might be considered more “important” cases where one would expect FCC strategic action to be most pronounced. We find that the estimates presented in Table 3 largely hold for this sample. If there was strategic behavior on the part of the FCC, we would expect on this subsample statistically insignificant coefficients. Third, the FCC makes over 1,200 rulings every year. Many of these are mundane, and it is likely 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 litigation; what might be mundane to the Commission could be quite important to the firm. Fourth 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. Finally, like any other bureaucratic organization, the FCC adheres to its policy and procedures, and operates by standard operating procedures.

While we argue that these facts combine to suggest the FCC is not behaving strategically in this sample of cases, we cannot statistically reject the hypothesis that it does behave strategically in decision-making. In a handful of very important cases, it may behave just as Spiller and Gely (1992) and McNollgast (1989) predict. In order to test such a hypothesis,

²⁸ There are too few observations in the second sub-sample to make reliable statistical inference.

though, one would need a larger dataset, a concrete and unassailable method of determining the important decisions that are likely to engender strategic action by the FCC, and a different estimation procedure than that which is used here. We leave this to future work.

Finally, throughout the paper, we have referred to the tendency for the judge to vote with his party as “ideology.” It could also be “party loyalty.” That is, judges of the same party as the FCC Chairman may just follow the lead of the Chairman. Sometimes a Republican Chairman will select a liberal decision and other times a conservative decision. The judge, loyal to the party, just conforms to the choice of the party. To the extent that party affiliation and ideology are highly correlated, as has been suggested in other literatures in political science, it would be difficult to differentiate between these hypotheses. Our measure of ideology does not allow us to separate these two possibilities. If we were able to credibly call each case and decision “liberal” or “conservative”, then headway might be made. However, doing this would be difficult and be subjected to numerous critiques of coder bias. Hence, we alert the reader to this issue, and in this paper, conform to the more standard measures of ideology used in the literature.

V. CONCLUSION

This paper has integrated the law and economics literature on selection with the judicial politics literature on ideological judges. Consistent with the law and economics literature, the paper demonstrates that litigants are indeed strategic in the cases they bring to court. Consistent with the judicial politics literature, the paper shows that judges vote ideologically or in a consistent political manner. In integrating the literatures, the paper shows that the expectation of an ideological effect of judicial voting affects the selection of cases for trial by the plaintiff. In particular, when the ideological division between the agency and the court is large, firms are more

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

This ideological selection effect is measured and shown to 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 because much of the unmeasured effect is in selection. Plaintiffs against the government do 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. This paper has, more broadly, integrated the law and economics approach with the literature in judicial politics to fill a gap in the literature by linking and measuring the judicial ideology effect in selection and outcomes separately.

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 (2003). "Decisionmaking in the U.S. Circuit Courts of Appeal," California Law Review 91: 1457-1515.
- 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 James J. Kim (2004). "When Do Firms Hire Lobbyists? The Organization of Lobbying at the Federal Communications Commission," Industrial and Corporate Change 13(6): 387-404.
- 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.
- Eisenberg, Theodore, and Henry S. Farber (1997). "The Litigious Plaintiff Hypothesis: Case Selection and Resolution," Rand Journal of Economics, 0:S92-S112.
- Eisenberg, Theodore, and Henry S. Farber. 2003. "The Government as Litigant: Further Tests of the Case Selection Model," *5 American Law and Economics Review* 94-133.
- Epstein, Lee (1995). Contemplating Courts. Washington, D.C.: CQ Press.
- Epstein, Lee, and Gary King (2002). "The Rules of Inference," The University of Chicago Law Review 69: 1-133.
- 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.

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.

Revesz, Richard (2002). "A Defense of Empirical Legal Scholarship," University of Chicago Law Review 69: 169-189.

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). "Ideological Values and Votes of U.S. Supreme Court Justices Revisited," Journal of Politics 57: 812-23.

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

Spiller, Pablo (1992). "Agency Discretion Under Judicial Review," Mathematical and Computer Modelling 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," Rand Journal of Economics 23(4): 463-492.

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

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

Tiller, Emerson H. (1998). "Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making," Journal of Law, Economics & Organization 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," Journal of Econometrics, 17: 229-252.

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

Wittman, Donald (1985). "Is the Selection of Cases for Trial Biased?" Journal of Legal Studies, 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," Journal of Legal Studies 17: 313-352.

Figure 1: Litigation

$$I_i^* = Z_i \gamma + \varepsilon_i$$

$$I_i = 1 \text{ if } I_i^* > 0$$

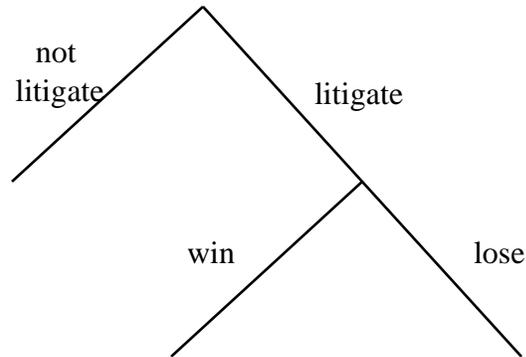
$$I_i = 0 \text{ otherwise}$$

$$Y_j^* = X_j \beta + u_j$$

$$Y_j = 1 \text{ if } Y_j^* > 0$$

$$Y_j = 0 \text{ otherwise}$$

$$j \in i$$



Author: John M. de Figueiredo
Paper: Strategic Plaintiffs and Ideological Judges in
Telecommunications Litigation

TABLE 1: JUDGES OF THE D.C. CIRCUIT, 1984-1995

| <u>Judge</u> | <u>Year Appointed</u> | <u>President</u> |
|-------------------------|-----------------------|------------------|
| Buckley, James L. | 1985 | Reagan |
| Edwards, Harry T | 1980 | Carter |
| Ginsburg, Douglas H. | 1986 | Reagan |
| Henderson, Karen L. | 1990 | Bush |
| Randolph, A. Raymond | 1990 | Bush |
| Rogers, Judith | 1994 | Clinton |
| Sentelle, David B. | 1987 | Reagan |
| Silberman, Laurence H. | 1985 | Reagan |
| Wald, Patricia M | 1979 | Carter |
| Williams, Stephen | 1986 | Reagan |
| Bazelon, David L. | 1949 | Truman |
| Bork, Robert H. | 1982 | Reagan |
| Ginsburg, Ruth B. | 1980 | Carter |
| Mackinnon, George | 1969 | Nixon |
| McGowan, Carl | 1963 | Kennedy |
| Mikva, Abner | 1979 | Carter |
| Robinson, Spottswood W. | 1966 | Johnson |
| Scalia, Antonin | 1982 | Reagan |
| Starr, Kenneth W. | 1983 | Reagan |
| Tamm, Edward A. | 1965 | Johnson |
| Thomas, Clarence | 1990 | Bush |
| Wilkey, Malcolm R. | 1970 | Nixon |
| Wright, J. Skelly | 1962 | Kennedy |

TABLE 2: DESCRIPTIVE STATISTICS

| <u>Variable</u> | <u>Period 1 (1990-1992)</u> | | <u>Period 2 (1993-1995)</u> | |
|---------------------------|-----------------------------|-----------|-----------------------------|-----------|
| | <u>Republican Agency</u> | <u>SD</u> | <u>Democratic Agency</u> | <u>SD</u> |
| Win | 0.31 | 0.46 | 0.38 | 0.49 |
| Banc Ideological Distance | 0.27 | 0.05 | 0.70 | 0.04 |
| Radio | 0.25 | 0.43 | 0.15 | 0.36 |
| Broadcast | 0.15 | 0.36 | 0.15 | 0.36 |
| Wireless | 0.13 | 0.33 | 0.19 | 0.39 |
| RBOC | 0.12 | 0.33 | 0.14 | 0.35 |
| Pricing | 0.20 | 0.40 | 0.20 | 0.40 |
| Case Experience | 0.33 | 0.80 | 0.83 | 1.75 |
| Fortune 1000 | 0.26 | 0.44 | 0.36 | 0.48 |
| Adjudication | 0.14 | 0.34 | 0.07 | 0.25 |
| License Case | 0.50 | 0.50 | 0.39 | 0.49 |

TABLE 3: RESULTS OF BIVARATE PROBIT MODEL
CORRECTING FOR SAMPLE SELECTION BIAS
Selection: Litigation Dependent Variable =1 if Litigation, = 0 if No Litigation
Outcome: Trial Dependent Variable = 1 if Win, = 0 Otherwise

| | Selection Equation | | | |
|----------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| | <u>Republican Agency</u> | <u>Republican Agency</u> | <u>Democratic Agency</u> | <u>Democratic Agency</u> |
| | <u>Model 1</u> | <u>Model 2</u> | <u>Model 3</u> | <u>Model 4</u> |
| Banc Ideological Distance | | 14.02*** (2.51) | | 12.81*** (3.55) |
| Radio | -0.23 (0.23) | -0.23 (0.27) | 0.02 (0.39) | -0.13 (0.40) |
| Broadcast | 0.30 (0.25) | 0.34 (0.29) | 0.83*** (0.35) | 0.95*** (0.36) |
| Wireless | 0.05 (0.24) | 0.10 (0.29) | 0.85** (0.38) | 1.14*** (0.41) |
| RBOC | 0.38 (0.29) | 0.18 (0.32) | 0.58* (0.33) | 0.77* (0.40) |
| Pricing | 0.05 (0.21) | 0.04 (0.23) | -0.11 (0.31) | -0.01 (0.33) |
| Case Experience | -0.06 (0.07) | -0.06 (0.13) | 0.08 (0.07) | 0.09 (0.08) |
| Fortune 1000 | -1.17*** (0.24) | -1.06*** (0.25) | -0.15 (0.35) | -0.26 (0.36) |
| Adjudication | -0.50** (0.23) | -0.53** (0.25) | 0.02 (0.47) | 0.09 (0.46) |
| License | -0.31 (0.21) | -0.33 (0.24) | 0.62 (0.33) | 0.66* (0.34) |
| Constant | 0.48*** (0.17) | -7.22** (1.67) | -0.62*** (0.25) | -3.13** (2.54) |
| Outcome Equation | | | | |
| Panel Ideological Distance | | 0.50** (0.23) | | 0.58** (0.29) |
| Case Experience | 0.12 (0.08) | 0.18 (0.16) | 0.18 (0.10) | 0.16 (0.10) |
| Fortune 1000 | 0.17 (0.29) | 1.27*** (0.45) | 0.02 (0.59) | -0.06 (0.59) |
| License | 0.34 (0.24) | 0.69*** (0.29) | -0.30 (0.60) | -0.29 (0.54) |
| RBOC | 0.20 (0.35) | 0.05 (0.51) | 0.30 (0.64) | 0.32 (0.64) |
| Pricing | -0.23 (0.26) | -0.26 (0.35) | 0.61 (0.56) | 0.66 (0.58) |
| Adjudication | -0.41 (0.29) | -0.20 (0.40) | -0.33 (0.66) | -0.41 (0.68) |
| DOJ | 0.31 (0.20) | 0.28 (0.28) | -0.22 (0.45) | -0.14 (0.44) |
| Constant | -1.30*** (0.22) | -0.71** (0.34) | -0.29 (0.85) | -0.62 (0.74) |
| Total Cases | 329 | 329 | 145 | 145 |
| Total Cases Litigated | 163 | 163 | 71 | 71 |
| Log Likelihood | -295.40 | -267.08 | -128.13 | -119.80 |

* 90%, ** 95%, *** 99% level of statistical significance