LITIGATION AND SETTLEMENT IN THE FEDERAL APPELLATE COURTS: IMPACT OF PANEL SELECTION PROCEDURES ON IDEOLOGICALLY DIVIDED COURTS

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ABSTRACT

This article compares the D.C. Circuit practice of announcing the composition of its panels before the parties have prepared their briefs with that of the remaining federal circuit courts, which announce their panels only after the filing of the briefs. The D.C. Circuit appears to have believed that its practice would reduce the court's adjudicatory burden as a result of the perception by litigants that D.C. Circuit judges vote in an ideological manner. This article shows that the D.C. Circuit practice gives rise to certain litigation-reducing and settlement-inducing incentives, but that it gives rise to countervailing incentives as well. The practice also has the effect of understating the court's ideological divisions. The analysis helps explain the incentives for litigation and settlement generated in other situations in which the identity of the adjudicator is thought to have an effect on the outcome of the case. It also provides an explanation unrelated to the existence of asymmetric information for settlements that are entered into after litigation has commenced.

I. INTRODUCTION

RECENT empirical scholarship concerning the United States Court of Appeals for the District of Columbia Circuit shows that in an important range of regulatory cases, a judge's ideology has a significant impact on judicial decision making. For example, in a recent study I examined the D.C. Circuit's votes on challenges to decisions by the Environmental Protection Agency (EPA),¹ using the views generally held by the party of the appoint-

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ing president as a proxy for ideology.\textsuperscript{2} The study reached three principal conclusions. First, for the period spanning the mid-1980s through the early 1990s, ideology had significant effects on judicial votes: in the case of industry challenges seeking to set aside environmental regulations as too stringent, where the effects were strongest, Republican judges were significantly more likely to vote to reverse EPA decisions than were Democratic judges. Second, the ideological divisions were greatly affected by the nature of the arguments presented to the panel: there were no statistically significant differences in the way in which Democrats and Republicans voted on statutory issues, but in the case of industry challenges the differences were highly significant with respect to procedural issues. Third, panel composition effects were also strong: a Republican judge was significantly more likely to vote to reverse on an industry challenge if she had at least one Republican colleague on the panel, whereas a Democratic judge was significantly less likely to do so if she had at least one Democratic colleague.\textsuperscript{3} Subsequent empirical studies have also found evidence of ideological voting on the D.C. Circuit over particular types of cases.\textsuperscript{4}

At the same time, the D.C. Circuit is unique among the federal circuit courts in announcing the composition of its panels before the parties have prepared and filed their briefs.\textsuperscript{5} The purpose of this study is to compare, in the context of an ideologically divided court, the incentives for litigation and settlement of the D.C. Circuit practice relative to those of the majority practice of announcing the composition of the panel only after the filing of the briefs and shortly before the oral argument.

One of the reasons for the D.C. Circuit's adoption of its practice in 1986 was its belief that, because litigants perceived the court as ideologically divided, the early announcement of the composition of the panel would increase the settlement rate and reduce the adjudicatory burden on the court. This article shows that the effects of the D.C. Circuit practice are far more complex.

On the one hand, the practice has a litigation-promoting effect because

\textsuperscript{2} See 3 Business and Commercial Litigation in Federal Courts § 49.11, n.22 (Robert L. Haig ed. 1998) ("In the District of Columbia Circuit, unlike all other circuits, appellate counsel learns the composition of the panel through a scheduling order issued prior to briefing.").
valuable information is handed out to the appellant earlier in the litigation process, before it has spent as much in litigation costs. When decisions to engage in an activity depend on information and information is cheaper to acquire, the activity becomes more valuable—in this case, more suits are filed. On the other hand, the early announcement of the panel gives rise to the possibility of dropping the suit before the bulk of the litigation costs are expended, reducing the adjudicatory burden on the court.

The D.C. Circuit practice also has complicated effects on settlement. For example, because an appellant is able to drop the litigation after the composition of the panel is announced, the effective costs of litigation are lower. This factor makes settlements less likely. In contrast, to the extent that both parties understand that the appellant will drop certain cases after the panel is announced, the relative level of optimism of the parties is reduced (because they agree on the outcome in one scenario). This lesser level of optimism has settlement-promoting effects.

Also, because in some instances the appellant would drop the case if an unfavorable panel were announced, it matters whether the parties' relative level of optimism varies across panels. If this level if greater with respect to panels under which the appellant is more likely to proceed, there will be fewer settlements. Otherwise, the reverse will be true.

Important corollaries to this analysis illuminate the study of ideological divisions on the courts of appeals. The article shows how the D.C. Circuit practice is likely to reduce the coherence of a circuit's case law by encouraging more extreme arguments to be made to favorably disposed panels. The article also explains why, as a result of case selection effects, the comparison of the voting records of majority-Republican and majority-Democratic panels leads to an understatement of the true extent of the court's ideological division.

The findings of this article have implications for the understanding of judicial review of administrative action. The D.C. Circuit decides a large proportion of cases involving important federal regulatory agencies. Under many statutes, agency decisions are challenged directly before the courts of appeals. Thus, the incentives on settlement and litigation of the D.C. Circuit
practice has implications for the agencies that must defend their decisions before the court. This impact is not limited to the government’s litigation behavior but extends also to the development of the policies that might be the subject of judicial challenge, since these policies are made against the backdrop of possible litigation.

The article proceeds as follows. Section II provides background on the panel selection practices of the federal circuit courts. Section III extends the traditional model of litigation and settlement to deal with situations in which litigants believe that the composition of the panel affects the outcome and where the identity of the panel is announced before all the litigation costs have been expended. Section IV analyzes the relative effects of the D.C. Circuit practice and the majority practice on the incentives for litigation in situations in which settlements are not possible. Section V examines the relative effects of the two practices on settlements. The conclusion discusses some implications for other legal contexts.

II. PANEL SELECTION PRACTICES OF THE UNITED STATES COURTS OF APPEALS

With one exception, the United States Courts of Appeals announce the composition of their panels only shortly before the oral argument, typically after all the briefs have been filed. Panels are announced 1 week before the argument in the First Circuit, on the Thursday before the argument in the Second Circuit, 10 days before the argument in the Third Circuit, on the day of the argument in the Fourth Circuit, 1 week before the argument in the Fifth Circuit, 2 weeks before the argument in the Sixth Circuit, on the day of the argument in the Seventh Circuit, approximately 1 month before the argument in the Eighth Circuit, on the Monday of the week


9 Conversation of Libby Rohlfing with Ed Miller, Calendar Clerk, United States Court of Appeals for the Second Circuit (May 26, 1999).


11 Conversation of Libby Rohlfing with Ellen Belton, Deputy Clerk, United States Court of Appeals for the Fourth Circuit (May 26, 1999).


14 Conversation of Libby Rohlfing with Paula Szczepaniak, Deputy Clerk, United States Court of Appeals for the Seventh Circuit (May 27, 1999).

before the argument in the Ninth Circuit,\textsuperscript{16} 1 week before the argument in the Tenth Circuit,\textsuperscript{17} 1 week before the argument in the Eleventh Circuit,\textsuperscript{18} and on the day of the argument in the Federal Circuit.\textsuperscript{19}

In contrast to this majority practice, for an important portion of its docket, the D.C. Circuit announces its panels far earlier in the appellate process. Indeed, the court’s Handbook of Practice and Internal Procedures states: “Ordinarily, the Court discloses merits panels to counsel in the order setting the case for oral argument. In criminal appeals, unlike most civil appeals, the panel will not be disclosed until after the parties have filed briefs.”\textsuperscript{20} The handbook makes clear that “[i]n civil cases, oral argument dates and panels are usually set before the briefs are filed.”\textsuperscript{21}

Despite the early announcement of panels, appellants before the D.C. Circuit must expend some litigation costs before the court announces the composition of the panel that will decide the case. For example, for an appeal of a district court decision, a party must first file a notice of appeal setting forth the court being appealed to, the ruling being appealed, and the parties seeking appeal; in the case of review of an order of an administrative agency, a party must file a petition for review designating the party seeking review and the respondent, as well as information about the party and the decision being appealed.\textsuperscript{22} Subsequently, the appellant must file a docketing statement, which must include a preliminary statement of the issues involved, as well as information about the appellant and the decision being appealed.\textsuperscript{23} While the handbook states that the preliminary statement is nonbinding,\textsuperscript{24} adverse consequences can flow from failing to prepare it with care.\textsuperscript{25}

The D.C. Circuit practice dates back to 1986.\textsuperscript{26}

\textsuperscript{19} Conversation of Libby Rohlfing with Karen Hendricks, Senior Deputy Clerk, United States Court of Appeals for the Federal Circuit (May 27, 1999).
\textsuperscript{21} Id. § IV.A.3, at 117.
\textsuperscript{22} Id. §§ III.B.1, III.E.1., at 109, 112.
\textsuperscript{23} Id. § IV.A.3, at 117.
\textsuperscript{24} See id.
\textsuperscript{25} See, for example, Southwestern Bell Tel. Co. v. FCC, 180 F.3d 307, 313 (D.C. Cir. 1999); City of Benton v. NRC, 136 F.3d 824, 825 (D.C. Cir. 1998).
\textsuperscript{26} See Patricia M. Wald, “. . . Doctor, Lawyer, Merchant, Chief,” 60 Geo. Wash. L. Rev. 1127, at 1138 (1992) (“We took a chance on disclosing the identities of merits panels, as well as the dates of oral argument, within sixty days of filing.”).
circuits, it announced the composition of panels only shortly before oral argument. The judges on the court appeared to have believed that adopting the current practice would encourage settlements. For example, in a speech delivered in 1991, Chief Judge Harry Edwards took issue with the perception, now supported by empirical evidence, that the D.C. Circuit decides cases in an ideological manner, but noted a positive by-product of this perception:

To some extent, the false reality to which I refer may encourage litigants and lawyers with weak cases on the merits to withdraw before argument. Indeed, in the D.C. Circuit, the names of the judges who are assigned to hear an appeal are announced well in advance to encourage such settlements. By blaming their withdrawal on the composition of judicial panels, rather than on the merits of their cases, lawyers are able to save face while simultaneously freeing the court system of unnecessary burdens. If this provides a palatable excuse and thus increases settlements, then the false image of a politicized judiciary may have some salutary effect.

The central purpose of this article is to test the validity of the view that the D.C. Circuit practice encourages settlements and reduces the court's adjudicatory burden.

III. THE MODEL

In the standard model of settlement and litigation, a risk-neutral plaintiff brings suit if and only if

\[ p_p D - C_p > 0, \]

where \( p_p \) is the plaintiff's estimate of its probability of success at trial, \( C_p \) are the plaintiff's litigation costs, and \( D \) are the damages that the plaintiff would recover if it prevails. In turn, if the defendant is also risk neutral, the suit will be settled if and only if

\[ p_p D - C_p \leq p_d D + C_d, \]

where \( p_d \) is the defendant's estimate of its probability of success at trial and \( C_d \) are the defendant's litigation costs. (This formulation assumes that the

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27 See text around notes 1–4 supra.
29 See id. at 854 (emphasis added).
TABLE 1

PROBABILITY OF MAJORITY-REPUBLICAN PANELS

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<th>Number of Republican Judges on the Court ($n_R$)</th>
<th>Probability of Majority-Republican Panels ($q_R$)</th>
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plaintiff will not bring suit unless its expected recovery is strictly positive and that the parties will settle if they are indifferent between settling and litigating.)

To study the impact of panel selection procedures in an ideologically divided federal appellate court, this standard model is extended as follows. Let $q_R$ be the probability that at least two of the three judges on a panel will be Republican. Obviously, $q_R$ increases monotonically as the proportion of Republican judges increases. Then $(1 - q_R)$ is the probability that a majority of the judges is Democratic.\[^{31}\] Because in the courts of appeals typically judges are randomly assigned to panels, there is no reason why the parties would have asymmetric beliefs about panel composition. Table 1 quantifies, for a 12-judge court, the effect of $n_R$, the number of Republican judges, on $q_R$.\[^{32}\]

In an ideologically divided court, the probabilities of success of the two parties will depend on the composition of the panel; thus, further notation is necessary. Let $P_{pR}$ be the appellant's estimate of its probability of success in the appeal if the majority of the panel is Republican, and let $P_{p_{R^c}}$ be the

\[^{31}\] This formulation ignores the possibility that a case will be decided by only two judges. See 28 U.S.C. § 46(d) (1994); United States v. Desimone, 140 F.3d 457 (2d Cir. 1998).

\[^{32}\] The D.C. Circuit has 12 authorized judgeships. 28 U.S.C. § 44 (1994). Let $n_R$ be the number of Republican judges. If all the judgeships are filled and if the panels are formed exclusively out of this group of judges, $q_R = n_R(n_R - 1)(17 - n_R)/660$. These probabilities are affected by the fact that judges on senior status can also sit on panels. 28 U.S.C. § 294(b) (1994). Moreover, judges from other courts can be invited to sit as well. 28 U.S.C. §§ 291(a), 292(a), (d) (1994). The chief judge of a circuit has considerable discretion with respect to such invitations.
corresponding probability if the majority of the panel is Democratic. In turn, \( p_{dr} \) and \( p_{d-r} \) are the appellee’s estimates of the appellant’s probabilities of success under majority-Republican and majority-Democratic panels, respectively. Note that

\[
p_p = q_R p_{pR} + (1 - q_R) p_{p-R},
\]

\[
p_d = q_R p_{dR} + (1 - q_R) p_{d-R}.
\]

Without any loss of generality, the discussion that follows assumes that the appellant is an industry group challenging an environmental regulation as too stringent. Then, given ideological voting,

\[
p_{pR} > p_{p-R},
\]

\[
p_{dR} > p_{d-R}.
\]

While the appellant and the appellee have different estimates of the appellant’s probability of success, in light of the existing empirical evidence they agree that this probability is higher under a majority-Republican panel. The respective relationships would be reversed if the plaintiff were an environmental group challenging the regulation as too lax.

Finally, the parties’ litigation costs have two components. Let \( C_{pl} \) and \( C_{dl} \) be the costs expended by the appellant and appellee, respectively, before the composition of the panel is announced. Then \((C_p - C_{pl})\) and \((C_d - C_{dl})\) are the respective costs expended subsequently. Under the D.C. Circuit practice, \( C_{pl} \) is small relative to \( C_p \). Moreover, \( C_{dl} \) is likely to be an even smaller proportion of \( C_d \) because the appellee does not need to make any filing before the composition of the panel is announced. In contrast, under the majority practice, \( C_{pl} \) is close to \( C_p \) and \( C_{dl} \) is close to \( C_d \).

Note that \( C_{pl} \) can be thought of as the price of an option that the appellant purchases, giving it the right but not the obligation to proceed to judgment. After the composition of the panel is announced, the appellant decides whether to continue pursuing the litigation (and thereby invest an additional \( C_p - C_{pl} \)) or to drop it.

The stage in the litigation at which the composition of the panel is an-

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33 In these cases, regulations promulgated by the EPA are challenged directly in the courts of appeals. The model is equally germane to appeals from district courts. In the case of agency regulations that are challenged directly before the courts of appeals, the parties are designated as petitioner and respondent, though throughout the article they will be referred to as appellant and appellee, respectively.

34 See text around notes 1–4 supra.

35 It may be necessary, however, for the appellee to have retained a lawyer.

nounced affects the relationship between \( C_{pl} \) and \( C_p \), and between \( C_{dl} \) and \( C_d \). Thus, one purpose of this article is to determine the effects of these relationships on the incentives for litigation and settlement.

IV. INCENTIVES FOR APPEALS IF SETTLEMENTS ARE NOT POSSIBLE

This section examines the appellant's litigation strategy when, as a result of the ground rules of the litigation game, settlements are not possible. There are two reasons for proceeding in this manner. First, this analysis lays the groundwork for Section V, which considers the role of settlements. Second, there are significant roadblocks to settling certain types of public law controversies. For example, an agency typically cannot decide to change its challenged regulations without having to reopen the notice-and-comment rule-making process.

Under the model described in Section III, the appellant makes two decisions, in sequential order. First, the appellant determines whether to expend \( C_{pl} \) in litigation costs to learn the composition of the panel. Then, once the appellant obtains this information, it needs to determine whether to expend the remaining \((C_p - C_{pl})\) in litigation costs to pursue the case to a judgment. Depending on the relationship among the various parameters, there are three possible outcomes. In the first scenario, the appellant does not pursue an appeal at all. In the second, the appellant expends \( C_{pl} \) in the first stage, but pursues the appeal further only if the panel is favorable (for the purposes of this discussion, if the panel is majority Republican). Third, in some cases the appellant pursues the appeal to a judgment regardless of the composition of the panel.

The appellant's strategy is considered first. The effects on the volume of litigation of announcing the composition of the panel early in the appellate process are analyzed next. Some comparative statics are then studied. Finally, the effects of endogenizing the appellant's probabilities of success are examined.

A. Appellant's Strategy

The game unfolds in two stages, which are referred to as stage 1 and stage 2. In stage 1, the appellant must decide whether to expend \( C_{pl} \) in litigation costs to learn the composition of the panel. If the appellant does not make this expenditure, the game is over. Otherwise, in stage 2, the appellant must decide whether to expend \((C_p - C_{pl})\) in litigation costs to pursue the appeal to a judgment.

\[37\] See text around notes 1–4 supra.
An appeal will be filed in stage 1 if and only if

\[ q_R \min\{p_{pR}D - (C_p - C_{pl}), 0\} + (1 - q_R) \min\{p_{p-R}D - (C_p - C_{pl}), 0\} - C_{pl} > 0. \tag{7} \]

The first two terms represent the expected returns to the appellant in stage 2 from litigating before majority-Republican and majority-Democratic panels, respectively. These terms are each bounded from below by zero because the appellant need not proceed in stage 2 even if it has filed an appeal in stage 1. The third term represents the costs that the appellant incurs in stage 1 (when there are no corresponding benefits).

As indicated above, the appellant’s game can result in three possible outcomes. First, the appeal will not be filed in stage 1 if the left-hand side of equation (7) is not strictly positive. It may be that, because \( p_{p-R}D - (C_p - C_{pl}) > 0 \), pursuing the appeal in stage 2 has positive net expected value under both majority-Republican and majority-Democratic panels but that this amount is insufficient to justify the expenditure of \( C_{pl} \) in litigation costs in stage 1. Alternatively, it may be that, because \( p_{p-R}D - (C_p - C_{pl}) \leq 0 \), pursuing the appeal in stage 2 has positive net expected value only under a majority-Republican panel and that this amount is insufficient to justify the expenditure of \( C_{pl} \) in litigation costs in stage 1. Finally, it may be that, because \( p_{p-R}D - (C_p - C_{pl}) = 0 \), the appeal would not be worth pursuing in stage 2 even with a majority-Republican panel. It follows, of course, that in this situation the appeal would not be filed in stage 1: it is never in the appellant’s interest to file in stage 1 if it would not pursue the appeal in stage 2 regardless of the composition of the panel.\(^{38}\)

Second, the appeal will be filed in stage 1 but pursued in stage 2 only in the presence of a majority-Republican panel if and only if the relationship in equation (7) holds, and additionally if and only if

\[ p_{p-R}D - (C_p - C_{pl}) \leq 0. \tag{8} \]

The latter condition ensures that the appeal is not pursued in stage 2 in the face of a majority-Democratic panel. Equation (7) can then be rewritten in simplified form as

\[ q_R(p_{pR}D - C_p) - (1 - q_R)C_{pl} > 0. \tag{9} \]

\(^{38}\) Recall that, as result of ideological voting, \( p_{pR} > p_{p-R} \). It follows that a necessary, though not sufficient, condition for the appeal to be filed is that the expected recovery in the event of a panel favorable to the appellant—in this case, a Republican panel—be greater than zero. That is, \( p_{pRD} - (C_p - C_{pl}) > 0 \).
If both equations (8) and (9) hold, the appeal will be filed in stage 1 but pursued in stage 2 only under a majority-Republican panel.\(^3\)

Third, the appeal will be filed in stage 1 and pursued to a judgment in stage 2 regardless of the composition of the panel if and only if the relationship in equation (7) holds, and additionally if and only if

\[ p_{p-R}D - (C_p - C_{p_1}) > 0. \]  

(10)

The latter condition ensures that the appeal is pursued in stage 2 even in the face of a majority-Democratic panel. As a result, equation (7) can be rewritten in simplified form as

\[ [q_{RP}p_{R} + (1 - q_{R})p_{p-R}]D - C_p > 0. \]  

(11)

If equations (10) and (11) both hold, the appeal is filed in stage 1 and pursued in stage 2 regardless of the composition of the panel.

Equations (8) through (11) show that, if the other parameters are held constant, the appellant's strategy will be determined by the level of damages, \(D\). In particular, for sufficiently high levels of \(D\), the appeal is filed in stage 1 and pursued in stage 2 regardless of the identity of the panel. Equations (10) and (11) establish that such a litigation strategy will be pursued if and only if

\[ D > \max\{ (C_p - C_{p_1})/p_{p-R}, C_p/p_p \}. \]  

(12)

If \(D\) is in an intermediate range, the appeal is filed in stage 1 but pursued in stage 2 only under a majority-Republican panel. From equations (8) and (9), the relevant conditions are

\[ D \leq (C_p - C_{p_1})/p_{p-R}, \]  

(13)

\[ D > [q_{R}C_p + (1 - q_{R})C_{p_1}]/(q_{RP}p_{R}). \]  

(14)

These two conditions can hold simultaneously if the right-hand side of equation (13) is greater than the right-hand side of equation (14), which will be the case if and only if

\[ C_{p_1}/C_p < q_R(p_{pR} - p_{p-R})/p_p. \]  

(15)

Thus, as long as equation (15) holds there will be a range of \(D\) for which the appellant would file an appeal in stage 1 but pursue in stage 2 only under a majority-Republican panel. If equation (15) does not hold, the appellant has only a dichotomous choice: depending on the level of \(D\) it either files an appeal and pursues it to a judgment or does not file the appeal at all.

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\(^{3}\) The discussion below derives the conditions under which equations (8) and (9) can hold simultaneously. If they do not hold simultaneously, there would never be a situation in which an appeal was filed in stage 1 but abandoned in stage 2.
B. Effects of Different Panel Selection Procedures

The purpose of this section is to determine the impact on the volume of litigation of announcing the composition of the panel early in the process, as under the D.C. Circuit practice, so that $C_{pi} < C_p$. The properties of this practice will be compared with those of the majority practice, where for practical purposes $C_{pi} = C_p$.\(^{40}\)

For $C_{pi} = C_p$, every filed case is pursued to a judgment since all the litigation costs are expended before the announcement of the panel’s composition. It follows from equation (1) that the plaintiff will file an appeal and pursue it to judgment if and only if

$$D > C_p/p_p. \quad (16)$$

In contrast, when equation (15) holds—that is, when the ratio of $C_{pi}/C_p$ is sufficiently low—there will be a range of $D$ for which the appeal will be filed in stage 1 but pursued in stage 2 only under a majority-Republican panel. Tables 2 and 3 show the appellant’s strategies for $C_{pi}/C_p < 1$ and

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\(^{40}\) Of course, even if the panel were announced the morning of the oral argument, as is the case in the Seventh Circuit and the Federal Circuit, the appellant could save some money by not appearing for the oral argument. Compared to the amounts expended, the resulting savings, however, would be negligible; moreover, there might be adverse reputational consequences.
$C_{pl}/C_p = 1$, respectively. Filing an appeal in stage 1 and pursuing it in stage 2 regardless of the composition of the panel is denoted as a "Full Appeal," filing the appeal in stage 1 but pursuing it in stage 2 only under a majority-Republican panel is denoted as a "Partial Appeal," and failing to file the appeal in stage 1 is denoted as "No Appeal."

Table 2 shows that when $C_{pl}/C_p$ is sufficiently high, announcing the panel before all the litigation costs have been expended is equivalent to announcing it after all such costs have been expended. In both cases, the appellant files the appeal in stage 1 and pursues it to a judgment in stage 2 when $D$ is sufficiently large but does not file the appeal for lower $D$.

Table 3 compares the strategies when the ratio of $C_{pl}/C_p$ is lower. Here, there are four relevant ranges, which are determined by equations (12)–(16). For sufficiently high $D$, announcing the panel early in the litigation process has the same effect as doing so after all the litigation costs have been expended: under both practices the appeal is pursued to a judgment. Similarly, when $D$ is sufficiently small, both practices also yield the same result: no appeal is filed. In an intermediate range, however, the timing of the announcement of the panel composition has important implications.

For $C_p/p_p < D \leq (C_p - C_{pl})/p_{p-R}$, the same number of cases is filed under both panel selection practices. However, when the panel is announced sufficiently early in the litigation process, these cases are pursued to a judgment only in $q_R$ of the cases—those with majority-Republican panels.

The situation is different for lower levels of $D$, such that $[q_R C_p + (1-q_R) C_{pl}]/(q_R p_{pR}) < D \leq C_p/p_p$. No cases where $D$ is in this range are filed under the majority practice. In contrast, all cases with $D$ in this range are filed in stage 1 if the panel is announced sufficiently early; then $q_R$ of these cases (those for which there is a majority-Republican panel) are pursued to a judgment in stage 2. In this range of $D$, it is not worth expending the full litigation costs in order to get a judgment, but it is worthwhile for the appellant to file the appeal in stage 1 and pursue in stage 2 under a majority-Republican panel.

In summary, announcing the composition of the panel early in the litigation process increases the number of cases filed: it leads the appellant to file in the third damage range in Table 3. The corresponding effect on the number of cases adjudicated by the court, however, is ambiguous. In the second damage range in Table 3, the early announcement of the panel’s composition decreases (from 1 to $q_R$) the proportion of cases adjudicated by the court. In contrast, in the third damage range, this practice increases (from 0 to $q_R$) the proportion of cases adjudicated. Thus, whether the total number of adjudicated cases is higher or lower when the composition of the panel is announced early in the litigation process depends on the distribution of $D$. If it is such that a sufficiently large proportion of the cases falls
in the second damage range of Table 3, the D.C. Circuit’s practice decreases the burden on the court. If, in contrast, a sufficiently large proportion of the cases falls in the third range of Table 3, this practice increases the burden on the court.

As a result, the claim adduced by proponents of the D.C. Circuit’s rule is misplaced. In asserting that this rule would reduce the number of litigated cases, they appear to have focused only on the fact that certain cases would be abandoned if the composition of the panel was unfavorable. But there is another category of cases for which the D.C. Circuit’s rule induces litigation. By making it possible to shed cases in stage 2 if the composition of the panel is unfavorable, the D.C. Circuit’s rule turns cases that would otherwise have a negative net expected return for the appellant into ones that have a positive net expected return.

C. Some Comparative Statics

The analysis of the comparative statics of the model developed above has two components. The first component concerns the effects of changes in the relevant variables on the proportion of cases for which the D.C. Circuit practice affects the appellant’s strategy because \( \frac{C_{pl}}{C_p} \) is sufficiently small, so that the relevant effects are those of Table 3 rather than those of Table 2. For this purpose, let

\[ X(p_{pR}, p_{p-R}, q_R) \]

be the limiting value of \( \frac{C_{pl}}{C_p} \) so that, as a result of equation (15), partial appeals would be pursued only when \( \frac{C_{pl}}{C_p} < X(p_{pR}, p_{p-R}, q_R) \). Then the larger \( X \) is, the greater the range of \( \frac{C_{pl}}{C_p} \) for which the D.C. Circuit practice would have an impact different from that of the majority practice on the appellant’s litigation strategy.

The analysis set forth below examines the impact of changes in the relevant variables on the magnitude of \( X \). First, differentiating the right-hand side of equation (15) yields

\[
\frac{\delta X}{\delta p_{pR}} = \frac{q_Rp_{p-R}/p_p^2}{p_{pR}} > 0.
\] (17)

Thus, increases in \( p_{pR} \) have the effect of increasing the range over which the D.C. Circuit practice has an impact on the appellant’s litigation strategy. When other variables are kept constant, increasing \( p_{pR} \) increases the overall attractiveness of litigating as well as the relative attractiveness of doing so under a majority-Republican rather than under a majority-Democratic panel. Some cases that would be brought under the majority practice as a result of the increase in \( p_{pR} \) (because of the overall net returns to the appellant become positive) under the D.C. Circuit practice would be brought in stage 1 and pursued in stage 2 only under a majority-Republican panel (be-

\[ \text{ Recall from equation (3) that } p_p \text{ is a function of } p_{pR}, p_{p-R}, \text{ and } q_R. \]
cause the net return of doing so in stage 2 under a majority-Democratic panel is negative). This situation is reflected in the second damage range of Table 3.

Moreover, there are some cases for which the increase in \( p_{pR} \) would not be sufficient to induce litigation under the majority rule (because the overall net returns to the appellant would continue to be nonpositive), but which would be brought in stage 1 under the D.C. Circuit’s rule and pursued in stage 2 under a majority-Republican panel because shedding the case in the face of a majority-Democratic panel saves a sufficient amount in litigation costs to make otherwise unpromising litigation worthwhile. This situation is reflected in the third damage range of Table 3.

Second,

\[
\frac{\delta X}{\delta p_{p-R}} = -q_R p_{pR}/p^2_R < 0. \tag{18}
\]

Here, increasing \( p_{p-R} \) has the effect of decreasing the range in which it is worthwhile for the appellant to pursue the appeal only under a majority-Republican panel. By reducing the range between \( p_{pR} \) and \( p_{p-R} \), which reflects the degree of ideological division on the court, the increase in \( p_{p-R} \) increases the proportion of cases that under the D.C. Circuit practice are pursued in stage 2 regardless of the composition of the panel.

Third,

\[
\frac{\delta X}{\delta q_R} = (p_{pR} - p_{p-R})p_{p-R}/p^2_R > 0. \tag{19}
\]

Increases in \( q_R \) have the effect of increasing the range over which the D.C. Circuit practice has an impact on the appellant’s litigation strategy. When other variables are kept constant, increasing \( q_R \) increases the overall attractiveness of litigating and leads to the filing of appeals in cases in which the appellant faces negative net returns from proceeding in stage 2 under a majority-Democratic panel. Thus, under the D.C. Circuit practice, increases in \( q_R \) induce the appellant to file more appeals in stage 1 that it intends to pursue in stage 2 only under a majority-Republican panel.

The second component of a comparative statics analysis concerns the effects of changes in the relevant variables on the proportion of cases that fall within the second and third damage ranges in Table 3, so that under the D.C. Circuit practice, the appellant pursues partial appeals as opposed to full appeals or no appeals, respectively. As indicated above, however, the effect of changes on the relevant variables on the number of cases filed and adjudicated under the respective practices depends on how damages are distributed across the relevant ranges. Thus, no general propositions can be derived with respect to this component of the comparative statics.
D. Endogenizing the Appellant's Probabilities of Success

Up to this point, the discussion has assumed that the four relevant probabilities of success, $P_{DR}$, $P_{D-R}$, $P_{DR}$, and $P_{d-R}$, are independent of when the composition of the panel is announced. In fact, knowing the composition of the panel early will affect the manner in which arguments are presented to the court.

To some extent, both the appellant and the appellee can benefit from knowing the identity of their judges before they file their briefs. But it seems likely that by being able to choose the grounds on which to bring a challenge, the appellant benefits more. Take, for example, the recent case of American Trucking Ass'n v. EPA. In this case, litigated before a majority-Republican panel, the petitioners prevailed on the argument that EPA construed key provisions of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power.

It is questionable whether this argument would have been raised to a majority-Democratic panel for fear of prejudicing any other arguments by coupling them with one that probably would have seemed frivolous to certain judges. Indeed, the Supreme Court has rejected all nondelegation arguments since 1935, and the argument advanced by the petitioners could result in striking down the bulk of federal environmental and health-and-safety regulation, which has been an important part of the regulatory landscape since the 1970s.

More generally, the ideological voting on the D.C. Circuit appears limited to certain types of arguments. For example, as indicated above, my recent study found no evidence of ideological voting with respect to cases involving statutory interpretation. In contrast, with respect to procedural challenges to notice-and-comment rule making, such as whether EPA properly responded to comments, my empirical study found staggering differences across panels: the reversal rate for panels with two Democrats and one Republican ranged between 2 and 13 percent, whereas for panels with two Republicans and one Democrat the reversal rate ranged from 54 to 89

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43 See id. at 1033–40.
44 The last cases were A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
45 The judges appear to have recognized as much: “EPA cites prior decisions of this Court holding that when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the ‘policy judgment’ to set the standards at one point within the relevant range rather than another. . . . We agree. But none of those panels addressed the claim of undue delegation that we face here.” American Trucking, 175 F.3d at 1037 (emphasis added).
46 See Revesz, Environmental Regulation, supra note 1, at 1747–49.
percent. Given the page limitations of briefs, it is rational for the composition of the panel to affect the decision whether to allocate space to such an argument when there are other plausible arguments that could be raised (and over which there may be less ideological division).

To the extent that the early announcement of the composition of the panel increases the appellant’s probability of prevailing, the result will be to increase the number of cases that are litigated. Indeed, by increasing the appellant’s net return from litigation, this feature will turn some negative expected value cases into positive expected value cases. As a result of the endogeneity of the appellant’s probabilities of success, there will be cases in the second damage range in Table 2 and the fourth damage range in Table 3 for which the appellant’s net return will in fact be positive.

Finally, the endogeneity in the appellant’s probabilities of success that result from the early announcement of the composition of the panel is likely to undermine the coherence of a circuit’s case law. Consider, once again, the American Trucking case. As explained above, if the composition of the panel had not been known before the briefs were written, it is likely that the appellant would not have raised the nondelegation argument. Instead, it probably would have attacked the regulations on far more commonplace grounds, arguing under the Administrative Procedure Act that the EPA did not sufficiently explain its reasons for the standard that it chose. The appellant may still have won under a majority-Republican panel, but the grounds for decision would have been less far-reaching. Thus, the early announcement of the panel apparently led to a decision that is a relative outlier. Similar incentives for outlier precedents of the opposite kind exist when environmental groups bring challenges to environmental regulations before majority-Democratic panels.

V. ROLE OF SETTLEMENTS

It follows from equation (2) that under the majority practice settlements take place for

\[ (P_p - P_d) \leq \frac{(C_p + C_d)}{D}. \]  

Moreover, all such settlements take place at the time the case is filed. No settlements are entered into subsequent to filing because the passage of time reduces the litigation costs that remain to be expended, thereby making settlements comparatively less attractive, without producing any changes (such

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47 See Revesz, Ideology, supra note 1, at 1763.
48 Of course, the magnitude of this effect is potentially reduced by the possibility of review by the en banc court or by the Supreme Court.
as changes in $p_p$ and $p_d$) that would make settlement comparatively more attractive.

The analysis of the settlement-inducing properties of the D.C. Circuit practice relative to those of the majority practice must be conducted with respect to four categories:

1. cases that are filed and litigated to a judgment under both practices (the first damage ranges in Tables 2 and 3);
2. cases that are filed under both practices and that are litigated to a judgment regardless of the composition of the panel under the majority practice, but that under the D.C. Circuit practice are litigated to a judgment only under majority-Republican panels (the second damage range in Table 3);
3. cases that are not filed under the majority practice but that under the D.C. Circuit practice are filed and litigated to a judgment under majority-Republican panels (the third damage range in Table 3); and
4. cases that, in a model without settlements, are not filed under either rule but that when settlements are possible are filed only under the D.C. Circuit practice (a portion of the second damage range in Table 2 and of the fourth damage range in Table 3).

For each of these categories, the analysis begins by assuming that the parties’ relative level of optimism ($p_p - p_d$, where $p_p > p_d$) is independent of the composition of the panel.\(^49\) Then

$$p_{pR} - p_{dR} = p_{p-R} - p_{d-R} = p_p - p_d.$$  \hspace{1cm} (21)

The implications of departing from this assumption are considered subsequently.

A. Cases in Which There Is a Full Appeal under Both Practices

At the beginning of stage 1, assuming that there could be no settlement at a later stage in the appellate process,\(^50\) the condition for settlements under the D.C. Circuit practice is identical to equation (20)—the same condition as under the majority rule. The condition for a settlement at the beginning of stage 2 assuming no earlier settlement is given, for majority-Republican and majority-Democratic panels, respectively, by

\(^{49}\) Of course, if the parties are pessimistic, so that $p_p < p_d$, settlements will take place regardless of the levels of litigation costs.

\(^{50}\) If a subsequent settlement were possible, it would change the payoffs that the parties face at the beginning of stage 1. This situation is presented below in equation (25).
(P_{pR} - P_{dR}) \leq [(C_p - C_{pI}) + (C_d - C_{dI})]/D, \quad (22)

(P_{p-R} - P_{d-R}) \leq [(C_p - C_{pI}) + (C_d - C_{dI})]/D. \quad (23)

If, as reflected in equation (21), the relative level of optimism of the parties is independent of the composition of the panel, there will never be a settlement at the beginning of stage 2. The left-hand sides of equations (22) and (23) are equal to the left-hand side of equation (20), but the right-hand side is smaller because a smaller level of litigation costs remains to be expended. As a result, settlements are relatively less attractive at the beginning of stage 2 than at the beginning of stage 1. Moreover, no settlements subsequent to the beginning of stage 2 are possible because, as indicated above, the passage of time reduces the litigation costs that remain to be expended but produces no corresponding pro-settlement change. Therefore, all settlements take place at the beginning of stage 1. Thus, for cases in this category, the D.C. Circuit practice and the majority practice have identical settlement-inducing properties if the relative level of optimism of the parties is independent of the composition of the panel.

In contrast, let the parties' overall relative level of optimism \((P_p - P_d)\) remain unchanged, but let \(P_{pR} - P_{dR} < P_p - P_d < P_{p-R} - P_{d-R}\), so that the relative level of optimism is smaller for majority-Republican panels than for majority-Democratic panels. \(^{51}\) Then, for certain levels of the relevant parameters, equation (22) will hold even though equation (20) does not. Thus, under the D.C. Circuit practice, there would be a settlement at the beginning of stage 2 (assuming no settlement took place earlier), even though under the majority practice there would be no settlement at all.

But working by backward induction, if equation (22) holds, there might be a settlement at the beginning of stage 1 even though equation (23) does not hold (that is, there would be no settlement at the beginning of stage 2 under a majority-Democratic panel). Let \(S_{R2}\) be the amount at which a case would settle at the beginning of stage 2 (assuming no earlier settlement) in the event of a majority-Republican panel. Then there will be a settlement at the beginning of stage 1 if and only if

\[
g_R S_{R2} + (1 - q_R) [p_{p-R} D - (C_p - C_{pI})] - C_{pI} \leq q_R S_{R2} + (1 - q_R) [p_{d-R} D + (C_d - C_{dI})] + C_{dI}. \quad (24)
\]

This expression simplifies to

\[
(P_{p-R} - P_{d-R}) \leq \{(C_p + C_d) + [q_R/(1 - q_R)](C_{pI} + C_{dI})\}/D. \quad (25)
\]

\(^{51}\) The same analysis, with opposite conclusions, applies if \(P_{pR} - P_{dR} > P_p - P_d > P_{p-R} - P_{d-R}\).
The right-hand side of equation (25) is greater than the right-hand side of equation (20). Thus, even though \( P_{p-R} - P_{d-R} > P_p - P_d \), there will be instances in which equation (25) is satisfied even though equation (20) is not. For such cases, the D.C. Circuit practice would induce the settlement, at the beginning of stage 1, of a range of cases that would not have settled under the majority practice.

In contrast, if equation (25) does not hold, the settlements induced by the D.C. Circuit practice would occur at the beginning of stage 2. Thus, making the relative level of optimism of the parties dependent on the composition of the panel creates the possibility of partial settlements, which occur after some of the litigation costs have been expended.

The intuition underlying this result is relatively straightforward. In the situation analyzed above, the lesser degree of optimism in the face of majority-Republican panels leads to settlements at the beginning of stage 2, on the assumption that no earlier settlement was reached. The certainty of this settlement, moreover, decreases the degree of optimism in stage 1. Now the parties are optimistic only with respect to \((1 - q_R)\) of the cases (those for which the panel is majority Democratic). This decrease in the relative level of optimism is sometimes, though not always, sufficient to induce a settlement at the beginning of stage 1.

In summary, for cases in which, in the absence of the possibility of settlement, there would be full appeals under both practices, the D.C. Circuit promotes settlements relative to the majority practice. Both practices have the same settlement-inducing properties when the relative level of optimism of the parties is independent of the composition of the panel. In contrast, where this level of optimism is affected by whether the panel is majority Republican or majority Democratic, the D.C. Circuit practice promotes settlements—full settlements in some cases and partial settlements in others. This latter effect manifests itself regardless of which type of panel produces the higher level of optimism.

B. Cases in Which There Is a Partial Appeal under the D.C. Circuit Practice but a Full Appeal under the Majority Practice

For cases in this category (the second damage range in Table 3), the preceding discussion illustrates one settlement-inducing effect of the D.C. Circuit practice. This effect results because the appellant proceeds in stage 2 only under a majority-Republican panel; thus, the optimism of the parties manifests itself only with respect to a fraction, \( q_R \), of the cases. For the remaining cases, the parties agree that the appellant would not proceed.

This pro-settlement feature would be counteracted if litigation costs were expended in only \( q_R \) of the cases. But, instead, while the full litigation costs
are, in fact, expended only in $q_R$ of the cases, partial costs ($C_{pi}$ for the plaintiff and $C_{di}$ for the defendant) are expended in the remaining cases. Thus, the pro-settlement effect of the decrease in optimism outweighs the antisettlement effect of the reduction in expected litigation costs.

The analysis is different if the relative level of optimism of the parties depends on the composition of the panel. If the parties are less optimistic under majority-Republican panels, so that $p_{pR} - p_{dR} < p_p - p_d < p_{p-R} - p_{d-R}$, the D.C. Circuit practice has an additional settlement-inducing effect. In this scenario, the decreased optimism of the parties under majority-Republican panels is not counteracted by the corresponding increase under majority-Democratic panels because the parties understand at the outset that the appellant would not pursue the case under such panels. In contrast, under the same logic if the parties are more optimistic under majority-Republican panels, there is a countervailing antisettlement effect, which could be greater than the pro-settlement effects discussed above.

In summary, in the second damage range of Table 3, the D.C. Circuit practice has a pro-settlement effect unless the parties have greater optimism under majority-Republican panels. Otherwise, the practice can have either pro- or antisettlement effects, depending on the values of the relevant parameters. Moreover, in this damage range, as shown in Section IV, the D.C. Circuit practice leads to fewer cases being pursued to a judgment. Thus, two independent effects ease the adjudicatory burden on the court but one effect may increase it.

C. Cases in Which There Is a Partial Appeal under the D.C. Circuit Practice but No Appeal under the Majority Practice

In the third damage range of Table 3, the proportion of cases that settle is the same as in the second range, since the analysis of the effects of the D.C. Circuit practice is identical in both instances. But because not all cases settle, the D.C. Circuit practice results in the adjudication of cases that would not have brought under the majority practice. Thus, in this damage range, the D.C. Circuit practice increases the court's adjudicatory burden.

D. Cases That Are Not Filed under Either Rule in a Model without Settlements

Finally, in the second damage range of Table 2 and the fourth damage range of Table 3, as a result of the possibility of settlement, the D.C. Circuit's practice leads to the filing of cases that otherwise would not be brought. Lucian Bebchuk has shown that the divisibility of litigation costs into stages can lead to the filing of negative expected value cases that would not have been brought in situations in which litigation costs are expended
in a single stage. The reason for this phenomenon is that at a late stage, after part of the litigation costs have been expended, the expected value to the plaintiff (or in this case to the appellant) of proceeding may be positive. As a result, the appellant would have a credible threat to proceed at this stage and on this basis would be able to extract a positive settlement. This positive settlement, in turn, could justify the expenditures needed to litigate at earlier stages. Following the logic, there are conditions under which negative expected value suits are settled at the outset, before any litigation costs have been expended.\(^5\)

As indicated above, the D.C. Circuit practice has the effect of separating the litigation into two stages: stage 1, in which the appellant expends \(C_{p1}\) in litigation costs, and stage 2, in which it expends \((C_p - C_{p1})\) in litigation costs. The appellant would derive positive expected returns in stage 2 regardless of the composition of the panel if equation (10) holds. A settlement would then occur at the beginning of stage 2, again regardless of the composition of the panel, if equations (22) and (23) hold as well.

If the two parties have equal bargaining power, so that settlements take place at the midpoint of the settlement range, the amounts, \(S_{R2}\) and \(S_{-R2}\), at which a case would settle at the beginning of stage 2 (assuming no earlier settlement), for majority-Republican and majority-Democratic panels, respectively, is given by

\[
S_{R2} = \frac{[(p_{pR} + p_{dR})D + (C_d - C_{d1}) - (C_p - C_{p1})]}/2, \tag{26}
\]

\[
S_{-R2} = \frac{[(p_{p-R} + p_{d-R})D + (C_d - C_{d1}) - (C_p - C_{p1})]}/2. \tag{27}
\]

When \(S_{R2}\) and \(S_{-R2}\) are sufficiently large relative to \(C_{p1}\)—the costs that the appellant must sink in stage 1—the D.C. Circuit’s practice will have the effect of turning negative expected value cases into positive expected value cases, thereby inducing litigation.

Not all of those cases, however, will settle at the outset. Indeed, the D.C. Circuit practice induces the filing of negative expected value appeals that do not settle until stage 2, and then only if the panel is majority Republican. Consider, for example, the situation in which \(p_{pR} - p_{dR} < p_{p-R} - p_{d-R}\), so that the relative optimism of the parties is smaller for majority-Republican panels.\(^5\) Then there will be instances in which equation (22) holds, so that a settlement would be reached at the beginning of stage 2 under majority-Republican panels if it had not been reached earlier, but equation (23) does


\(^5\) If \(p_{pR} - p_{dR} > p_{p-R} - p_{d-R}\), there will be instances in which the settlement does not occur until the beginning of stage 2, and then only if the panel is majority Democratic.
not hold, so that no settlement would be reached at the beginning of stage 2 under majority-Democratic panels. As shown in equation (25), in some cases under this scenario a settlement is induced at the beginning of stage 1, but other times no such settlement takes place. Thus, if no settlement takes place at the beginning of stage 1 and the panel turns out to be majority-Democratic, the case would end up being litigated.

This phenomenon gives rise to an interesting extension of the current theory of negative expected value suits. Whereas the existing models show that the separation of a case into stages can lead to the filing and settlement of negative expected value suits, the analysis of the D.C. Circuit practice reveals that it can lead to the filing and litigation of such suits.

E. The D.C. Circuit Practice and the Priest-Klein Hypothesis

A simple extension of the model used in this article reveals an important insight for the analysis of ideological divisions on the courts of appeals. So far, the discussion has assumed that the appellant’s probabilities of success are fixed for the different types of panels and that the effect of more favorable panels is that they induce the litigation of cases in which the appellant’s damages are lower. Consider, instead, a model in which the parties agree about the size of the judgment but disagree about the likely outcome of the trial. In their important article, George Priest and Benjamin Klein showed, given certain assumptions, that plaintiff win rates under these circumstances approach 50 percent. A subsequent literature has shown that under a variety of other conditions, including asymmetric information, the plaintiff’s win rate can depart from 50 percent.

In a situation in which the identity of the panel is revealed before any costs have been expended (\(C_{pl} = C_{dl} = 0\)), the Priest-Klein hypothesis would predict that the appellant would prevail 50 percent under majority-Republican panels and, similarly, would prevail 50 percent of the time under majority-Democratic panels. The ideological division of the court would thus not affect the relative success rates of industry appellants across the two types of panels but would instead affect the average quality of the cases brought under each type of panel: certain low-quality cases would be brought only under majority-Republican panels. Then, the lower average

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quality of the cases would counteract the more favorable predisposition of the majority-Republican panels.

The situation is different when the identity of the panel is revealed after all the litigation costs have been expended (where \( C_{pl} = C_p \) and \( C_{di} = C_d \)—essentially the situation under the majority practice. Then, cases of the same average quality are brought to each type of panel—because an irrevocable commitment to pursue litigation has been made before the panel is announced. But, as a result, to the extent that the court is ideologically divided, one would expect to observe a higher success rate for industry appellants under majority-Republican panels than under majority-Democratic panels.

Under the D.C. Circuit practice, where \( C_{pl} \) and \( C_{di} \) are positive but small, the results are between the two polar cases. Some weaker quality cases are litigated by industry challengers before majority-Republican panels, but not as many as when the panel is announced before any litigation costs have been expended. In turn, the appellant’s success rate will differ between majority-Republican and majority-Democratic panels, but not as much as if the panel was announced after all litigation costs had been expended. Thus, relative to the majority practice, the D.C. Circuit practice has the effect of understating the degree of ideological division on the court. This result would hold even under the extensions of the Priest-Klein study in which the plaintiff’s success rate is not 50 percent. It is therefore important to correct for this factor if one makes comparisons of the degree of ideological division across the courts of appeals.\(^5\)

VI. Conclusion

This article has shown that there is no theoretical support for the D.C. Circuit’s belief that its practice would encourage settlements and reduce the court’s adjudicatory burden. To be sure, the D.C. Circuit practice gives rise to certain incentives in these directions, but it gives rise to countervailing incentives as well. Thus, no categorical claim can be made about whether departing from the majority practice has the desired effect.

In situations in which settlements are not possible, the D.C. Circuit practice has one effect that reduces the adjudicatory burden on the court. In certain instances in which an appeal is pursued to a judgment regardless of the panel under the majority practice, it is pursued to a judgment only if the panel is favorable to the appellant under the D.C. Circuit practice. This phe-

\(^5\) Thus, the literature in this area has understated the degree of ideological division on the D.C. Circuit relative to the other courts of appeals. See Pierce, supra note 4 (finding that the D.C. Circuit had the greatest ideological division in cases involving the standing of environmental groups).
nomenon will occur in instances in which the appellant faces a negative net return from proceeding under an unfavorable panel even though the overall net return is positive.

In contrast, there are instances in which the D.C. Circuit practice induces the litigation of cases that would not be pursued at all under the majority practice. In these cases, the overall net returns to the appellant are negative, but the net returns under a favorable panel are positive.

With respect to settlement-inducing properties, the effects of the D.C. Circuit practice are similarly mixed. On the one hand, in cases that absent settlements would be litigated to a judgment under both practices, the D.C. Circuit practice encourages settlements if the relative level of optimism of the parties is dependent upon the composition of the panel. The rate of settlement is also higher under the D.C. Circuit practice in cases in which this practice leads to the abandonment of cases if the panel turns out to be unfavorable to the appellant, as this feature reduces the parties' relative level of optimism.

On the other hand, there are also instances in which the D.C. Circuit practice can have an antisettlement effect when the relative level of optimism of the parties is dependent upon the composition of the panel. Moreover, the D.C. Circuit practice can lead to the filing of negative expected value cases that otherwise would not be litigated at all: while some of these cases settle, others are pursued to a judgment.

The effects of the D.C. Circuit practice are not limited to impacts on the court's adjudicatory burden. The practice is likely to reduce the coherence of a circuit's case law and, unless an appropriate correction is made, leads to an understatement of the true extent of the court's ideological division.

The analysis in this article is relevant to other adjudicatory situations in which the identity of the adjudicator is thought to have an effect on the outcome of the case. For example, panels of the D.C. Circuit sometimes retain jurisdiction of a case following a remand—a practice generally explained by reference to the benefits of judicial economy. As this article shows, such a decision has an impact on the rates of settlement and litigation.

Similarly, this article illuminates the analysis of the choice between a bench trial and a jury trial. In the event of the former, the identity of the decision maker is typically known after the plaintiff has expended only a

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57 See, for example, American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1057 (D.C. Cir. 1999); West Virginia Ass'n of Community Health Centers v. Heckler, 734 F.2d 1570 (D.C. Cir. 1984); Sierra Club v. Gorsuch, 715 F.2d 653, 661 (D.C. Cir. 1983).

58 In an ideologically divided court, such a decision may also have important effects on how an agency responds on remand and on the outcome of any subsequent litigation.
portion of its litigation costs—those necessary to file a complaint. In the case of jury trials, in contrast, the identity of the jury becomes known only on the eve of trial, after all the motions have been adjudicated and all discovery has been completed.

The findings of the article also help explain a phenomenon that is observed more often in practice than in the theoretical literature: settlements that are entered into after litigation has already commenced. In the law and economics literature to date, such settlements occur only under conditions of informational asymmetries. This article shows instances in which they can also occur when all the relevant information is known by both parties.

Finally, the discussion in the article about how the appellants’ probabilities of success are endogenous has implications that go well beyond the core concerns of this article.

59 See Bebchuk, supra note 52, at 14.