

University at Buffalo School of Law

Digital Commons @ University at Buffalo School of Law

Journal Articles

Faculty Scholarship

1-1-2016

Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Disputes through the Clinton and Bush II Years

Amy Semet

University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/journal_articles



Part of the [Labor and Employment Law Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Disputes through the Clinton and Bush II Years*, 37 Berkeley J. Emp. & Lab. L. 223 (2016).

Available at: https://digitalcommons.law.buffalo.edu/journal_articles/993



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton and Bush II Years

Amy Semet[†]

Does partisan ideology influence the voting of members of multi-member adjudicatory bodies at “independent agencies”? In studying the federal circuit courts of appeals, scholars have found that results of cases vary depending upon the partisan composition of the particular panel hearing a case. Few scholars to date, however, have systematically studied whether partisan panel effects occur in administrative adjudication. In this Article, I explore the impact that partisan ideology and panel composition have on the vote choices of an administrative agency rumored to be one of the most partisan: the National Labor Relations Board (“NLRB”). Employing an original dataset of close to 3,000 NLRB decisions from the William Jefferson Clinton and the George W. Bush (“Bush II”) administrations (1993-2007), this Article presents one of the few recent studies of voting patterns at the NLRB on unfair labor practice disputes. I find that the propensity of a panel to reach a decision favoring labor

DOI: <http://dx.doi.org/10.15779/Z38ZP08>

[†]. Postdoctoral Research Associate, Center for the Study of Democratic Politics, Woodrow Wilson School of Public and International Affairs, Princeton University; A.B., Dartmouth College (1997), J.D., Harvard Law School (2000), Ph.D. Political Science, Columbia University (2015).

I would like to thank all those who offered helpful comments on this piece, especially my dissertation committee at Columbia University (dissertation chair Michael Ting, sponsor Ira Katznelson, Robert Shapiro, Gregory Wawro, and Gillian Metzger). Earlier drafts of this work were presented at the 2016 Quantlaw Conference at the University of Arizona Law School, the 2014 American Law and Economics Association Annual Meeting, the 2013 and 2014 Midwest Political Science Association Annual Conferences, the 2014 Junior Scholars Colloquium held by the Federalist Society, the Dartmouth College Government Department Faculty Workshop, and the Columbia University Political Science American Politics Workshop. I would like to thank the participants and discussants in those workshops for their helpful comments. I received funding to attend the out-of-state conferences. I am also grateful for access to data provided by the James Gross NLRB archives located at Cornell University, the National Labor Relations Board, the National Archives, and Cole Taratoot.

increases monotonically with each additional Democrat added to the panel. I also find that the partisanship effect is generally asymmetric, meaning that compared to homogenous panels, the addition of a single Democrat to an otherwise Republican panel influences the magnitude of the pro-labor vote choice more so than the addition of a Republican to an otherwise Democratic panel. Homogenous Republican panels behave in especially partisan ways. I further find that political actors—such as Congress, the President, and the appellate courts—fail to have a direct impact on NLRB unfair labor practice decisions; rather, the decision of the lower court Administrative Law Judge (“ALJ”) and the partisan ideology of the Board have the most impact in influencing whether the NLRB rules for or against labor. These findings have significant implications for a number of controversies, including debates about agency independence as well as questions concerning political diversity on agencies that have multi-member adjudicatory bodies who do all or primarily all of their work through adjudication as opposed to rulemaking.

INTRODUCTION.....	225
I. THE NLRB: A POLITICIZED AGENCY MOTIVATED BY PARTISAN IDEOLOGY?	228
A. Anecdotal Evidence of Partisanship and Flip-Flops at the NLRB.....	228
B. Scholarly Studies of Partisanship at the NLRB	233
C. Limitations of Scholarly Studies.....	236
II. DOES PARTISANSHIP DRIVE NLRB VOTING?	239
A. What Can We Learn from Studies Regarding Panel Effects in the Appellate Courts?.....	240
B. Design of the Empirical Study	244
1. Data	244
2. Dependent Variable.....	251
C. General Findings.....	253
D. Multivariate Statistical Analysis	260
1. Key Independent Variables of Interest: Ideology and Panel Composition	261
2. Political Variables	264
3. Economic Variables	267
4. Case-Specific Variables	268
E. Statistical Results	273
III. CONCLUSIONS, POLICY PRESCRIPTIONS, AND FUTURE RESEARCH	283
A. Conclusions.....	283
B. Policy Prescriptions	286
1. Mandating Panel Diversity.....	287

2. Rulemaking on Major Issues.....	287
3. Changing the Appointment Process.....	289
C. Future Research and Conclusions.....	291

INTRODUCTION

In December 2012, the Republican-led House of Representatives Oversight and Government Reforms Committee issued a report, entitled *President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional Union Advocate*, lambasting the National Labor Relations Board (“NLRB”) for the supposed “pro-union” bias of its decisions.¹ The House committee expressed particular indignation with the Board’s decision blocking the airplane manufacturer Boeing’s plan to move a plant to South Carolina, a state with laws unfriendly to labor unions.² The House report came on the heels of increased partisan tension over the work of the Board.³ Republicans decried President Barack Obama’s attempts to make recess appointments to the Board, resulting in the Board operating with just two members for well over a year and causing a constitutional showdown at the Supreme Court in 2010.⁴ The NLRB is not the only independent agency accused of political bias but it is often cited as the poster child for partisanship in agency decision-making.⁵

This episode between President Obama and Congress over the NLRB harkens back to similar disputes in the past.⁶ As President Obama noted in his response when he distanced himself from the tension of the Boeing case, the NLRB is, after all, an “independent agency,” and should have some political autonomy separate from the whims of executive and legislative

1. STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., PRESIDENT OBAMA'S PRO-UNION BOARD: THE NLRB'S METAMORPHOSIS FROM INDEPENDENT REGULATOR TO DYSFUNCTIONAL UNION ADVOCATE 4 (Dec. 13, 2012), <http://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf>.

2. *See id.*; Boeing Int'l Assoc. of Machinists, N.L.R.B., No. 19-CA-32431, 2011 WL 2597601 (June 20, 2011). In the case, the ALJ granted a motion to dismiss. *See id.*

3. STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, PRESIDENT OBAMA'S PRO-UNION BOARD: THE NLRB'S METAMORPHOSIS FROM INDEPENDENT REGULATOR TO DYSFUNCTIONAL UNION ADVOCATE.

4. *See* *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010) (holding, in a five-Justice majority decision, that two members hearing an NLRB case were insufficient for a quorum).

5. *See, e.g.*, Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. TIMES, Aug. 8, 2013, at B1. Other recent examples abound. For instance, the regional branch of the IRS has been accused of politicization in its granting of tax exemptions. *See* Alan Farnham, *IRS Has Long History of Political Dirty Tricks*, ABC NEWS, May 15, 2013, <http://abcnews.go.com/Business/irs-irs-long-history-dirty-tricks/story?id=19177178>; John A. Andrew III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON (2002).

6. For a historical account of NLRB history, see James A. Gross, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* (2010) [hereinafter Gross, *BROKEN PROMISE*].

preferences. President Obama's words echo then-Senator John F. Kennedy's statement in 1954 that the NLRB "is not a policymaking branch of the administration which should be filled by one whose philosophy of labor is in keeping with the views of the political party in power."⁷ Yet, despite what politicians may say about the NLRB's purpose, scholars, politicians, and Board members themselves have chastised the Board for being such a "political animal."⁸ Former Board member Guy Farmer contended that while the White House did not necessarily dictate Board outcomes, he, as a Board member, felt pressure to implement "the philosophy that he thought his administration wanted him to project on the Board."⁹ So, the questions remain: how much does partisan ideology impact the decisions of the Board in its unfair labor disputes? Is it fair for the Board's critics to accuse it of political bias? Can presidents indirectly control the Board through strategic use of appointments? Indeed, what is the exact nature of political control over so-called independent agencies?

This Article addresses these questions by examining the unfair labor disputes of the NLRB during the presidencies of William Jefferson Clinton and George W. Bush ("Bush II"). Specifically, it looks at the impact that partisan ideology and panel composition have in whether the NLRB issues a decision for or against labor.¹⁰ Using multivariate statistical analysis, I find

7. 100 CONG. REC. 2004 (1954). Senator Kennedy continued: "It is not a tripartite body, to which representatives of labor and management should be appointed. Its members do not serve at the pleasure of the President, nor for a term of years concurrent with the Presidential tenure . . . [It] is instead a quasi-judicial agency, whose primary function is to interpret and apply the basic labor relations law of the land . . . Board members are, in effect judges." *Id.*

8. See Gross, *BROKEN PROMISE*, *supra* note 6, at 97 (quoting NLRB member Guy Farmer), 275 (noting that a "presidential administration can make or change labor policy without legislative action through appointments to the NLRB" and that "national labor policy is in a shambles in part because its meaning seems to depend primarily on which political party won the last election"); Cole D. Taratoot, *Review of Administrative Law Judge Decisions by the Political Appointees of the NLRB, 1991-2006*, 23 J. OF PUB. ADMIN. RES. & THEORY 551, 565-67 (2013) [hereinafter Taratoot, *Review of Administrative Law Judge Decisions*]; Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 711 (2006); William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 241-42, 255 (1995); Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1102 (1985); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982); Myron Roomkin, *A Quantitative Study of Unfair Labor Practice Cases*, 34 INDUS. & LAB. REL. REV. 245, 251 (1981); Charles D. Delorme, Jr. et al., *The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases: 1955-1975*, 37 PUB. CHOICE 207, 216-17 (1981); Charles D. Delorme, Jr. & Norman J. Wood, *Presidential Labor Relations Philosophy and the NLRB*, 12 AKRON BUS. & ECON. REV. 31, 31 (1981); Samuel Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328, 328 (1962).

9. JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLICY, AND THE LAW* (1974) [hereinafter GROSS, *MAKING*]; JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947* (1981) [hereinafter GROSS, *RESHAPING*].

10. Consistent with the way it is used by others, I define ideology to mean voting with respect to either the Board member's partisan affiliation or to the professional background of said member (i.e., members hailing from labor backgrounds would be more liberal while members from management would

that panel composition matters, with Democratic appointees being significantly more likely than Republican appointees to vote in favor of labor. The impact varies depending upon the time frame, with partisanship playing a greater role since the start of Clinton's second term. Moreover, a Democratic appointee sitting with other Democrats is much more likely to find in favor of the pro-labor litigant than a Democratic appointee sitting with two Republican appointees. I also find that the partisanship effect is generally asymmetric, meaning that compared to homogenous panels, the effect of adding a single Democrat to an otherwise Republican panel influences the magnitude of the pro-labor vote choice more so than the addition of a Republican to an otherwise Democratic panel. The partisan ideology of the Board—as well as the ideological tone of the decision by the lower court Administrative Law Judge (“ALJ”)—are the most important factors motivating the Board's decisions. Contrary to other studies, I also find that the President, Congress, and the reviewing appellate courts appear to have little direct bearing on how the NLRB rules, indicating that the effect these other political actors may have on the Board is, at most, indirect.

This Article contributes to a greater understanding of the adjudicatory functions of administrative agencies. Administrative agencies may be labeled “independent” because they have design features intended to ensure that they will not be beholden to the whims of political actors. Federal administrative agencies handle a host of litigation disputes ranging from deciding Social Security benefits, to adjudicating representation elections in labor disputes, to deciding how much wounded veterans should receive in disability benefits. These agencies are charged with making important decisions that impact countless Americans every day. Indeed, many, if not most Americans, will have some encounter with administrative adjudication, either at the federal or state level. Yet despite the importance of administrative adjudication, scholars have paid scant attention to it.¹¹

be more conservative). See Turner, *supra* note 8, at 711. Admittedly, ideology is a nebulous concept and there are different ways that it can be measured. See, e.g., Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1138-53 (2006) for a discussion [hereinafter *Judged by the Company You Keep*]. Yung, for instance, proposes a Partisanship and Independence Score that he says predicts when court of appeals justices will dissent, concur or reverse. See Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505, 531 (2012).

11. There have been, however, some excellent studies of the determining factors of administrative adjudication. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (analyzing asylum decisions); see also Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8 (analyzing NLRB decisions); Cole D. Taratoot, *The Politics of Administrative Law Judge Decision Making at the Environmental Protection Agency in Civil Penalty Cases*, 42 AMER. POL. RES. 114 (2014) (analyzing ALJ decision-making in environmental cases) [hereinafter Taratoot, *The Politics of Administrative Law Judge Decision Making*]; Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, 39 AM. POL. RES. 832 (2011) (analyzing NLRB ALJ decisions).

In Part I, I analyze past stories and studies of NLRB decision-making. I first discuss in Part I.A the impact of partisan ideology on NLRB decisions, as reflected in anecdotal evidence and in Part I.B, I dissect the few scholarly studies that have examined the phenomenon. I move in Part I.C to analyzing the limitations of the current literature. In Part II, I turn to the study at hand. I first orient the study within the broader scholarship regarding panel effects in the appellate courts in Part II.A. Then, in Part II.B, I set forth my empirical strategy to assess how partisan ideology impacts vote choice on the NLRB during the Clinton and Bush II presidencies. In Part II.C, I present and analyze the data in a general fashion to assess how far the Board has strayed from its initial mission of being a dispassionate expert. I then present the multivariate statistical analysis. In Part II.D, I describe the variables and in Part II.E, I analyze the statistical results detailing how panel effects operate at the Board. Finally, I devote Part III.A to discussing the analysis's conclusions, before making policy recommendations and proposals for future research in Parts III.B and III.C, respectively.

I.

THE NLRB: A POLITICIZED AGENCY MOTIVATED BY PARTISAN IDEOLOGY?

Much ink has been spilled lambasting the NLRB for its supposedly partisan decision-making.¹² In this Part, I discuss both the anecdotal and scholarly literature on the NLRB's politicization. In Part I.A, I present a retelling of some of the anecdotal evidence of the importance that partisanship has played at the NLRB. I then turn in Part I.B to a discussion of the scholarly studies concerning empirical analysis of the NLRB's decision-making. Finally, in Part I.C, I discuss the limitations of the present research for understanding NLRB decision-making.

A. *Anecdotal Evidence of Partisanship and Flip-Flops at the NLRB*

Unlike life-tenured federal judges, NLRB appointees are known as “in-and-outers”¹³ who are nominated by the president for their particular ideological views and who return to their prior labor or management

12. See, e.g., Gross, *BROKEN PROMISE*, *supra* note 6, at 97 (noting that the Board is a “political animal” and has been “since its inception”); Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 179 (2002) (“The Board pretends to act like a court solemnly arriving at the correct interpretation of a legislative command, but in fact acts like politicians carrying out their electoral mandate to favor labor or to favor management.”).

13. See generally Linda L. Fisher, *Fifty Years of Presidential Appointments*, in *THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON* (G. Calvin Mackenzie ed., 1987) (analysis of 1985 study by the National Academy of Public Administration).

employment upon completion of Board service.¹⁴ In his authoritative history of the Board, labor historian James Gross contends that Board decision-making shifts depending upon who occupies the White House.¹⁵ Ronald Turner echoes this view, noting that while it may be the case that about 90% of NLRB outcomes are unanimous, ideology nonetheless is a “persistent and, in many cases, a vote-predictive factor when the Board decides certain legal issues.”¹⁶ In his article, Turner details thirteen substantive legal issues in which ideology appeared to motivate Board outcomes.¹⁷

Scholars argue that politicization is rampant in the work of the Board with Democratic members behaving differently than Republican members. For instance, Catherine Fisk and Deborah Malamud contend that “[a]cross a range of doctrinal arenas, it is apparent that Bush II labor policy made a decisive shift in favor of protecting managerial prerogatives and augmenting the ability of employers and employees to oppose unionization.”¹⁸ For instance, they cite data on the General Counsel’s propensity to seek injunctive relief under section 10(j) of the National Labor Relations Act (“NLRA” or “the Act,” also known as the “Wagner Act”).¹⁹ During the Bush II presidency, the General Counsel made between fifteen and twenty-eight requests yearly, while during the Clinton presidency, the number of requests

14. As Joan Flynn notes, service on the Board, especially for management lawyers, is often merely a short “hiatus” from an otherwise long career representing management. Joan Flynn, *A Quiet Revolution on the Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1399, 1401 (2000).

15. See, e.g., Gross, *BROKEN PROMISE*, *supra* note 6, at 275 (noting that “a presidential administration can make or change labor policy without legislative action through appointments to the NLRB” and that “national labor policy is in shambles in part because its meaning seems to depend primarily on which political party won the last election”).

16. Turner, *supra* note 8, at 711.

17. See *id.* at 716-51. In 2014, he updated his analysis, particularly focusing on bargaining over employer relocation decisions. Ronald Turner, *Ideological Voting on the National Labor Relations Board Revisited*, 14 HOUS. BUS. & TAX J. 24 (2014). Julia Tomassetti also analyzes a subset of labor opinions to find partisan differences in the standards applied. Julia Tomassetti, *Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment*, 37 LAW & SOC. INQUIRY 815 (2012).

18. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2020 (2009). According to Fisk and Malamud, these doctrinal areas include: limiting the availability of the voluntary recognition of unions, the scope of section 7 protections for mutual aid protections, and the use of interim injunctions under section 10(j) for violation of unfair labor practice laws. *Id.* Fisk and Malamud compare the style of reasoning between the Bush and Clinton Boards on two issues: voluntary decisions about recognition or withdrawal of recognition of unions and how the Board describes how it adopts older rules to new and changed circumstances. *Id.* at 2059-77.

19. *Id.* at 2028-31. The NLRA, otherwise known as the Wagner Act, is the NLRB’s governing statute enacted during its founding in 1935. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)). It has received major amendments only two times: the Labor -Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-44), and the Labor-Management Reporting & Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-531).

ballooned to between forty-three and 104.²⁰ Fisk and Malamud also take the Bush II Board to task for imposing higher legal standards on litigants pleading in favor of labor.²¹ At least on the surface, it appears there is a pattern of Board members voting in accord with their ideology.

Like scholars, Board members themselves argue that partisanship motivates NLRB decision-making. In his memoir, former Board Chairman William Gould recounts tales of the tensions between himself, Board members, House Republicans, and the NLRB General Counsel.²² He criticizes his fellow Board members, noting that some, such as Republican Charles Cohen, were obstructionist,²³ while others, such as fellow Democrat John Truesdale, “carefully [kept] a finger in the wind.”²⁴

The prevalent partisanship at the Board has resulted in frequent flip-flops over some of the most important legal issues coming before the Board.²⁵ The Board’s determination of what constitutes a “bargaining unit” has been a source, for instance, of frequent changes in policy.²⁶ In the 1970s, the Board approved bargaining units for acute care hospitals based on a “community of interest” standard.²⁷ By the 1980s, the Board shifted to using a “disparity of interest” standard for determining the appropriateness of bargaining units.²⁸ Moreover, the Board has continually flip-flopped over who should be considered an “employee” or a “supervisor” under the Act.²⁹

These stories fly in the face of what the NLRB’s founders envisioned for the Agency. The NLRB’s founders wanted it to be a “strictly

20. Fisk & Malamud, *supra* note 18, at 2029.

21. For instance, in *Raley’s Supermarkets & Drug Centers*, 349 N.L.R.B. 26 (2007), the Board imposed a higher pleading requirement that the General Counsel had to meet in order to prove that the employer violated the labor laws. *See* Fisk & Malamud, *supra* note 18, at 2031 n.76.

22. *See* WILLIAM B. GOULD, IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR* (2000).

23. Gould says that Cohen was labeled “Doctor No” by Board members due to his obstructionist behavior. *Id.* at 55.

24. Though Gould said that Truesdale was a “consummate senior bureaucrat,” he nevertheless opined that he owed his continued power on the Board to the fact that he was “carefully keeping a finger in the wind.” *Id.* at 55-56.

25. *See* Zev J. Eigen & Sandro Garofalo, *Less is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1887-93 (2014).

26. *Id.* at 1890-92.

27. *Id.*; *see, e.g.*, *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409 (1980) (applying community interest standard); *Allegheny General Hosp.*, 239 N.L.R.B. 872 (1978) (same).

28. Eigen & Garofalo, *supra* note 25, at 1891-92 (discussing revised test).

29. *See* Daniel P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMPLE L. REV. 177, 221-35 (2008) (detailing the differing ways the Board interprets “employee” and “supervisor”).

nonpartisan³⁰ body that would cater to the public interest.³¹ This was a deliberate shift from the Board's predecessor, the National Labor Board, which was an arbitral body made up of two members each from labor and industry and chaired by a third representative of the public interest.³² The decision to make the new NLRB an adjudicatory rather than arbitral body, however, resulted in a change in the structure of the body, with "a consensus" that "only the public should be represented."³³ The legislative history of the Board's governing act, the NLRA, confirms this interpretation: the Senate committee reporting the final version of the Act noted that "labor and management agree . . . that a small impartial board is better than a board with [members] representing respectively workers and employers."³⁴ Appointments in the first half-century of the Board reflected this spirit, with appointees hailing largely from the halls of academia or government service.³⁵ As scholar James Brudney notes, the legislative record of the Taft-Hartley Act underscores that "there was no suggestion that the expanded Board should be anything other than nonpartisan and impartial," and no indication that the Board would be anything other than neutral.³⁶

While there have been some breaks in this pattern, notably during the Eisenhower³⁷ and Nixon³⁸ years, the Reagan Revolution cemented the trend

30. STAFF OF S. COMM. ON EDUC. AND LABOR, 74TH CONG. COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) Section 3, 4 (Comm. Print 1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1320 (1949).

31. *See, e.g., To Create a National Labor Board: Hearings on S. 2926 Before the S. Comm. on Educ. and Labor*, 73d Cong. 329, 889 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 359, 927 (statement of Nathan L. Miller, General Counsel, United States Steel Corporation) ("[T]he individuals composing [the Board] should be selected to represent one interest and one alone, and that is the public interest.").

32. *See* GROSS, MAKING, *supra* note 9, at 15, 25.

33. *A Bill to Promote Equality of Bargaining Power Between Employers and Employees, to Diminish the Causes of Labor Disputes, to Create a National Labor Board, and for Other Purposes: Hearings on S. 1958 Before the S. Comm. on Educ. and Labor*, 74th Cong. 237, 291 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1617, 1677 (statement of Sen. Robert F. Wagner).

34. COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.), *supra* note 30, at 1320.

35. For instance, the first and second chairs of the Board, Warren Madden and Harry Millis, came from academia. *See* GROSS, MAKING, *supra* note 9, at 150; GROSS, RESHAPING, *supra* note 9, at 226.

36. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 244 & n.110 (2005).

37. Eisenhower nominated Guy Farmer, a management lawyer, to the Board in 1953. Flynn, *supra* note 14, at 1368-69. He also nominated, Albert Beeson, an industrial relations director, to the Board. *Id.* at 1369-74. While the Farmer nomination sailed through the Senate without incident, labor mobilized in opposition to the Beeson nomination, though Beeson was still confirmed. *Id.* at 1369-71; *see* Charles J. Morris, *How the National Labor Relations Board Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. OF EMP. & LAB. L. 1, 47-60 (2012).

38. Presidents Kennedy and Johnson stuck to the normal pattern of not nominating union or management representatives to the Board. Flynn, *supra* note 14, at 1378. In 1970, in a move opposed by the AFL, President Nixon broke with this pattern by appointing a management lawyer, Edward Miller, to

that continues to this day of presidents making ideologically motivated appointments to the Board.³⁹ As American Federation of Labor (“AFL”) President Lane Kirkland said during the Reagan administration, “appointments to the NLRB have been of a character that represents the perversion of that board into an instrument of anti-union employers.”⁴⁰ By the dawn of the first Bush presidency, the trend toward making ideological appointments to the Board had become so pronounced that the AFL no longer even bothered to oppose the nominations.⁴¹ Presidents Bush I, Clinton, and Bush II continued to make ideological appointments to the Board, but each of them followed an unofficial norm of replacing departing union or management representatives with another like-minded union or management representatives.⁴² Indeed, according to some studies, President Clinton appointed not only the three most pro-union advocates to the Board, but the three most pro-management ones as well.⁴³

The increasingly partisan appointees to the Board reflected the underlying transformation of the appointments process itself after the Reagan years.⁴⁴ Until the late 1970s, the NLRB appointment process was almost seen as a “repeat game,” with each side (Democrats and Republicans) not wanting to rock the boat too much for fear that later, their favored candidates would not be confirmed by the opposing side.⁴⁵ Accordingly, the Senate exercised restraint and followed a norm of deference for the President’s nominees, who usually were fairly moderate or at least no more in favor of management or labor than their nominating presidents.⁴⁶ But the Reagan Revolution signaled changes in the larger political landscape that played itself out as well with respect to the NLRB appointment process. Overall, President Reagan’s appointees to federal agencies were more ideological than the appointees of

the Board. *Id.* at 1378-83. Most of Nixon’s and subsequently Ford’s appointees came from management, while Carter did not appoint either union or management representatives to the Board. *Id.* at 1383.

39. See *id.* at 1383-92 (describing the history of President Reagan’s appointees to the Board). As Flynn notes, President Reagan went “outside the mainstream labor relations community” to make ideological appointments to the Board. *Id.* at 1384. For instance, one of his appointees, John Van de Water, specialized in organizing campaigns to defeat unions. *Id.*; see also *Reagan’s NLRB Tips Toward Management*, BUS. WK., July 6, 1981, at 27-28 (noting that Van de Water “advises companies that want to resist union organizing campaigns”).

40. House Subcommittee Plans Oversight Hearing on Change at Enforcement Division of NLRB, 1983 DAILY LAB. REP. (BNA) NO. 110, at A-10 (June 7, 1983).

41. Flynn, *supra* note 14, at 1392-93. President Bush, however, did make an attempt to appoint a union representative to the Board. *Id.* at 1393-94.

42. See *id.* at 1393-95. For instance, President Bush attempted to appoint a union representative to the Board. *Id.* at 1393. President Clinton became the first Democratic president to appoint management to the Board, filling every Republican seat with a management lawyer: Charles Cohen, Peter Hurtgen, and J. Robert Brame. *Id.* at 1394-95 & n.148.

43. *Id.* at 1412.

44. *Id.* at 1416.

45. *Id.* at 1417.

46. *Id.* at 1417-18.

his predecessors.⁴⁷ More importantly, however, the previous norm of deference broke down, with both sides now willing to wage campaigns to preclude the confirmation of any candidate deemed too extreme to the opposing side.⁴⁸ The process became even more contentious by the Clinton years, with the Senate either refusing to take up nominations or else informally vetoing such nominations before they were even officially announced.⁴⁹ Moreover, “package” nominations increasingly became the norm as polarization between the political parties increased.⁵⁰ As some scholars have argued, packaging of nominees contributes to nominees being more partisan.⁵¹ This shift—from a presidentially directed process with deference being the norm to one during which both Congress and the President compete over nominations—exacerbated the partisan turn of the nominations, especially at the NLRB.⁵² Rather than agreeing on moderate nominations (or at least not directly opposing them), each side picks “slots” to fill with their chosen partisans.⁵³

B. *Scholarly Studies of Partisanship at the NLRB*

While there has been much anecdotal evidence of the NLRB’s politicization, there have only been a few scholarly studies of the NLRB’s adjudicatory decisions, with scholars generally finding that the party of the appointing President influences the NLRB’s output.

Scholars studying the topic observed broad patterns of Board member voting being very closely aligned with the party of the appointing President, with the most pro-industry voters being Republican and the most pro-labor

47. *Id.* at 1384-85 & n.100.

48. *Id.* at 1420-26. Flynn also notes that labor was angered by the failure to pass labor law reform during the Carter administration. *Id.* at 1421-22 & n.224. This prompted labor to insist that Carter violate appointment norms to appoint a more ideological General Counsel. *Id.* at 1421-22.

49. *Id.* at 1427-28 & n. 253.

50. *Id.* at 1429-30. President Clinton made two package nominations to the Board: the first in 1993-1994, at the onset of his presidency, *Senate Confirms Gould Nomination to NLRB; Feinstein, Cohen and Browning Also Approved*, DAILY LAB. REP. (BNA) NO. 41, at AA-1 (Mar. 3, 1994), and the second in 1997. *Senate Confirms Four Clinton Nominees Giving Labor Board Five-Member Complement*, DAILY LAB. REP. (BNA) NO. 218, at AA-1 (Nov. 12, 1997). This trend toward package appointments to the Board has also occurred for appointments to other federal agencies, such as the Equal Employment Opportunity Commission and the Federal Communications Commission. Flynn, *supra* note 14, at 1435-36.

51. Flynn, *supra* note 14, at 1437. The Senate’s committee system contributes to this tendency. *Id.* A few select senators representing certain distinct groups have a great deal of power over who gets nominated, *id.* at 1438-39, and unlike the President, they have no incentive to necessarily nominate a moderate to the Board. *Id.* at 1437-38. Rather, they are more likely to want to nominate a partisan who appeals to whatever interest group wields power in that senator’s respective state. *Id.* at 1438.

52. *Id.* at 1445. Flynn describes this as the “you pick two, we pick two” mentality. *Id.*

53. *Id.* at 1446.

voters being Democratic, with one exception.⁵⁴ In their study spanning the Board's unfair labor practice decisions involving "novel questions" or cases that set "important precedents" from 1955 to 1975,⁵⁵ Charles Delorme and Norman Wood found that about three quarters of those with the most pro-industry voting records came from management backgrounds and that Board members continued voting in partisan ways even when their appointing President had left office.⁵⁶ In a follow-up study, Delorme et al. looked at the data through a multivariate statistical analysis and found that reappointments, the sitting President's party, the Board member's party, the unemployment rate and whether the Board member formerly worked at the NLRB to be significant factors impacting voting.⁵⁷ Another study covering the later period between 1985 and 2000 looked at Board votes on so-called "disputed" cases where at least one Board member filed a dissent.⁵⁸ That study found that the six Board members hailing from industry had the most pro-industry records while the three Board members who previously represented labor had the most pro-union voting records.⁵⁹ These patterns persisted even when controlling for political party with the voting patterns clearly being one-sided.⁶⁰ For instance, Republican Board members Peter Hurtgen and J. Robert Brame voted in favor of the employer 97% and 90% of the time, respectively; likewise, Democratic Board member Margaret Browning voted in favor of labor 98% of the time while fellow Democratic members Williams Liebman and Sarah Fox voted 92% and 91% in favor of labor, respectively.⁶¹ Further, voting patterns of some members appeared to grow more partisan over time, according to the study. For instance, Democrat Fox voted 173–0 in favor of labor in cases from 1999 and 2000.⁶² In another study, William Cooke and Frederick Gautschi expanded the Delorme et al. analysis by looking at the role that Board member characteristics (i.e., age, employment by management prior to appointment, urban/rural) and political characteristics (i.e., percentage of Democrats in the Senate) played in decision-making.⁶³ The study found that none of these factors affected NLRB votes; rather, the only factors that impacted NLRB decisions were the nature of the

54. *See id.* at 1407, 1413; *see also* Moe, *supra* note 8, at 1104 (noting that Fanning's appointment "may have been a colossal mistake of Earl Warren proportions by a president who failed to recognize a liberal-in-the-making").

55. In its annual reports, the NLRB sets forth a list of such decisions. *See* NLRB ANN. REP., <https://www.nlr.gov/reports-guidance/reports/annual-reports> (last visited Aug. 15, 2016).

56. Delorme & Wood, *supra* note 8, at 31.

57. Delorme et al., *supra* note 8, at 211-13.

58. Flynn, *supra* note 14, at 1407. Flynn cites a report, the "Employment Law Alert," compiled by a law firm, Nixon, Hargrave, Devans & Doyle. *Id.* at 1404-12.

59. *See id.*

60. *Id.* at 1411.

61. *Id.* at 1410.

62. *Id.* at 1412.

63. Cooke & Gautschi, *supra* note 8, at 543.

appointment (party affiliation of the appointing President and of the Board member) and the status of the litigant as a plaintiff or defendant.⁶⁴ In a later analysis updating Delorme et al. and Cooke and Gautschi, Cooke et al. distinguished “important, complex” decisions from “less important, simpler” decisions,⁶⁵ and found that the political inclinations of the appointing President and Board member mattered for more “important” cases only with members being influenced by lower-level agency actors such as the ALJ for less important cases.⁶⁶ Cooke et al. also found that higher unemployment rates led to more pro-employer votes, and the ideological composition of Congress impacted how Board members voted.⁶⁷

Terry Moe found similar results.⁶⁸ Unlike Cooke et al., he expanded prior models to account for case mix and he also tested the impact that courts have in the process.⁶⁹ Moe used as his dependent variable the proportion of pro-labor decisions made by the Board each quarter between 1948 and 1979.⁷⁰ He found the Board’s voting to be responsive to macroeconomic pressure, such as changes in unemployment and inflation as well as to changes in presidential and congressional influence.⁷¹ With respect to courts, he found support for his hypothesis that “[t]he greater the tendency of the courts to overturn the NLRB in favor of labor rather than business, the more pro-labor the NLRB’s subsequent decisions.”⁷²

Several recent studies have built on the work of these scholars by incorporating more variables into their analyses. Cole Taratoot discovered that once one accounts for the ALJ decision, the impact of factors previously found to be significant—such as political factors like the ideological composition of Congress—largely disappears.⁷³ He found that the ALJ decision played the most important predictive role in determining NLRB case outcomes; he also found that the Board’s ideology impacted results, with a “moderate” Board generating a pro-industry decision 2.9% of the time, a split decision 44.3% of the time, and a pro-labor decision 52.8% of the time.⁷⁴ Taratoot further found that appellate court ideology impacted NLRB

64. *Id.* at 546-48.

65. Cooke et al., *supra* note 8, at 243.

66. *Id.* at 250-51.

67. *Id.* at 252.

68. See Moe, *supra* note 8, at 1108 tbl.2.

69. See *id.* at 1101, 1107.

70. *Id.* at 1103, 1107.

71. *Id.* at 1108-09.

72. *Id.* at 1102, 1109.

73. Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 565-67. In another articles, Taratoot also explored the factors that impact how the ALJ—as opposed to the Board—will rule. Taratoot, *The Politics of Administrative Law Judge Decision Making*, *supra* note 11; Taratoot & Howard, *supra* note 11.

74. Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 566.

decision-making, hypothesizing that the Board is forward-thinking in making decisions that conform with what the appellate court might rule.⁷⁵ Unlike previous studies, however, Taratoot contended that neither the President nor Congress influence outcomes.⁷⁶

However, not all scholars studying NLRB decisions have found that partisanship or ideology impacts decision-making. In a qualitative analysis of NLRB cases concerning a specific type of conduct, Paul Secunda concluded that institutional collegiality permeated Board decision-making, at least with respect to decisions concerning one specific topic.⁷⁷ In his study of 140 cases from 1967 to 2004, he found that Board appointees of one political party were no more or less likely to find a violation than appointees of the opposing party.⁷⁸ Secunda, however, found that Democratic-majority Boards were more likely to find a section 8(a)(3) violation than Republican-majority Boards: Democratic Boards found violations in 85% of cases while Republican Boards found violations in just 54% of cases.⁷⁹ Nonetheless, he concluded that, at least with respect to the limited doctrinal area studied, the NLRB decides cases “solely on their legal merits and with the sole goal of getting the law right.”⁸⁰

C. Limitations of Scholarly Studies

Many of the studies that have examined the administrative state, especially those studying the NLRB, have been limited in focus and time. Rather than focusing on how the Board rules, many of them focus on the propensity of labor to prevail or they construct an index containing a ratio with labor wins compared as a proportion of how cases are filed.⁸¹ Further, only a handful of the studies are recent, with most studying the NLRB prior to the ideological turn of the Reagan years.⁸² Prior studies also fail to account for the important legal differences between cases. While some scholars separate out cases emanating from labor and those coming from industry, no

75. *Id.* at 567.

76. *Id.*

77. Paul M. Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 103, 104 (2004) (“[I]nstitutional concerns better explain why the Board is able to achieve decisional consistency in an area of labor law ripe for political factionalism.”). Secunda does a doctrinal analysis of 140 cases he found where the issue of inherently destructive conduct came before the Board from June 1967 to February 2004. *Id.* at 79-80.

78. *Id.* at 87-88. Rather, he found that appointees from each party contributed almost equally. *Id.*

79. *Id.* at 98.

80. *Id.* at 105.

81. *See, e.g.,* Moe, *supra* note 8, at 1107.

82. For instance, Delorme & Wood and Delorme et al. only consider data prior to 1980 and 1975, respectively. Delorme & Wood, *supra* note 8, at 31; Delorme et al., *supra* note 8, at 207.

analysis on NLRB decision-making makes any attempt to separate out cases according to case type or legal issue.⁸³

Previous studies do not adequately capture the politicization of the Board because they lump together cases regarding different NLRA violations, even though these violations allow the Board different amounts of discretion when reaching its decisions. Most of the analysis concerns unfair labor practice disputes, which arise under the NLRA.⁸⁴ For instance, employers can violate section 8(a)(1) by making threats to dissuade employees from joining a union.⁸⁵ Section 8(a)(1) cases are largely decided on whether the employer conduct impermissibly interfered with, coerced, or restrained employees when they exercised their rights under section 7 of the Act.⁸⁶ In these cases, the Board generally will weigh employer's economic interests with the interests of the complaining party, such as with respect to their right to organize.⁸⁷ Discriminatory intent is irrelevant to finding a violation.⁸⁸ The underlying legal determination largely rests on questions of fact, and the Board has virtually no discretion to upset the credibility or factual judgments of the ALJ.⁸⁹ In contrast, discriminatory intent is key to finding a violation of section 8(a)(3).⁹⁰ In section 8(a)(3) cases, the NLRB must judge whether the employer's actions are motivated by an anti-union intent that has the foreseeable effect of discouraging employees from joining a union.⁹¹ Section 8(a)(5) claims, in particular, may be different in nature

83. Scholars separate out cases based on whether the case was filed against industry or against labor, but few scholars studying NLRB decision-making separate out cases based on the statutory section challenged. James J. Brudney et al. analyze cases separately depending on the statutory section challenged in their analysis of appellate court review of NLRB decisions. James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1707, 1715-16 tbl. II (1999). They found that appellate court judges were less likely to favor pro-labor litigants when challenges were raised under sections 8(a)(5), 8(b), and 10(c) than under either section 8(a)(1) or section 8(a)(3). *Id.* at 1714. In another study, Brudney also found a difference in reversal rates in the appellate courts with respect to sections 8(a)(5) and 9 as compared to sections 8(a)(1) and 8(a)(3). James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 981-82 (1996).

84. See 29 U.S.C. § 160 (2012).

85. See *id.* § 158(a)(1).

86. See *id.*

87. See Brudney et al., *supra* note 83, at 1707.

88. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) (“A violation of 8(a)(1) alone . . . presupposes an act which is unlawful even absent a discriminatory motive.”).

89. In many of its opinions, the NLRB has standard language where it states that the Board's “established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.” *Auto Nation, Inc.*, 360 N.L.R.B. 141, 1 n.1 (2014); *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544, 545 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951) (noting credibility analysis).

90. See *Turner*, *supra* note 8, at 77 (discussing discriminatory intent in 8(a)(3) cases).

91. See *Radio Officers' Union of Commercial Telegraphers Union v. N.L.R.B.*, 347 U.S. 17, 43 (1954) (“The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor.”). Such anti-union bias can be shown in two ways: specific evidence of unlawful intent or inferring intent from the conduct. See *id.* at 44-45 (“[S]pecific

from claims arising under other parts of the statute.⁹² Section 8(a)(5), which makes it illegal for an employer to refuse to bargain in good faith,⁹³ may give an employer more legal wiggle room to mount a defense.⁹⁴ What constitutes “good faith” can often be a subjective decision, and the weighing accorded with such an analysis may give the Board more discretion to interject personal feelings. In summary, previous studies may fail to discern the true motivator of politicization because they do not distinguish between different types of claims under the Act, even though the Board’s discretion varies depending on the type of claim. This limitation calls into question the results of such studies, given the omission of such a potentially important variable.

Another important distinction is that virtually all preexisting studies ignore split decisions, which are probably the cases that are the hardest to decide given that they often involve so many different legal issues.⁹⁵ Many researchers just cut out split decisions from their analysis,⁹⁶ while some more recent scholars include split decisions, but do so in only a limited way by not differentiating pro-labor from pro-industry split decisions.⁹⁷

Moreover, nearly all analyses completely ignore the role of other important Board actors. With the exception of Taratoot and Moe,⁹⁸ no analysis accounts for the deference afforded to ALJ determinations, such that in 80% of cases the Board merely affirms the ALJ decision.⁹⁹ Moreover, much of the quantitative analysis of the NLRB fails to account for the ALJ

evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3). . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement.”).

92. See Brudney et al., *supra* note 83, at 1714-15 (concluding that appellate court judges acted differently deciding section 8(a)(5) claims than claims arising under some other sections of the statute).

93. *Id.* at 1707.

94. Brudney et al. notes that section 8(a)(5) claims “differ substantially” from claims arising under other sections of the NLRA. *Id.* at 1726. Such claims focus more on the conduct of employers as opposed to individuals. *Id.* As Brudney et al. argue, “[J]udges must be comfortable both with the protected nature of group action and with the complex dynamics generated by a clash between two collective entities, the union and the employer.” *Id.*

95. See Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 559-60 (“Although initially researchers ignored split decisions (DeLorme and Wood 1978; DeLorme, Hill, and Wood 1981; Moe 1985), the introduction of split decisions was eventually incorporated into models of board member decision making (Cooke and Gautschi 1982).”).

96. See Delorme et al., *supra* note 8, at 208 (omitting “decisions finding both union and management at fault”); Moe, *supra* note 8, at 1113.

97. See Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 559-60; Cooke & Gautschi, *supra* note 8, at 541-42 (“For the sake of simplicity and because of the intractability of computing a measure of the degree of support in each case, we treat any vote that finds the defendant guilty of an [unfair labor practice] as a vote for the union (employer) if the plaintiff is the union (employer). Thus, if a member decides that the defendant committed an [unfair labor practice], the member is considered to have cast his vote for the plaintiff even though the member may disagree with the plaintiff in part.”).

98. See Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 558; Moe, *supra* note 8, at 1103 (using, as one of three variables, staff filtering decisions).

99. See, e.g., Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 559.

decision at all.¹⁰⁰ Further, with respect to the political variables included in the analysis, many scholars do not account for how appellate court review could impact NLRB decisions.¹⁰¹

II.

DOES PARTISANSHIP DRIVE NLRB VOTING?

Despite anecdotal claims of the NLRB's supposed politicization, the empirical question remains to be answered: what impact do these ideological appointments have in affecting the actual decision of the Agency? That is, are the decisions of independent agencies motivated by the sort of dispassionate expertise that is supposed to differentiate them from other forums? Or do the decisions of independent agencies shift according to short-term political whims, with political ideology animating decision-making? In other words, all else constant, would the same case be decided differently if there were a Democrat on the panel instead of a Republican? If that indeed is the case, such a pattern of decision-making could call into question the very expertise and stability of so-called independent agencies,¹⁰² and could raise the specter of whether agencies are "captured" by short-term partisan interests.¹⁰³

The study is designed to test the impact that partisan ideology has on case outcomes at the NLRB and to determine whether different partisan configurations of the panel impact the tendency of the NLRB to vote for or against labor. It also seeks to test the impact that other political actors such as Congress, the President and the appellate courts have on Board decision-making. To orient the reader, I begin by discussing the literature concerning how scholars have analyzed partisanship on multi-member panels so as to provide a background to apply to the study of the NLRB. In Part II.B, I set forth the empirical strategy and discuss the nature of the study and analyze the impact that partisan ideology and panel composition have on NLRB unfair labor practice decisions. I present general findings in Part II.C, showing graphs of how different partisan panel combinations vote on unfair labor practice disputes. In Part II.D, I move on to present the statistical analysis undertaken. Finally, in Part II.E, I discuss the results along with graphs showing how partisan panel effects operate on the Board as well as an analysis of what factors motivate Board decision-making.

100. *See id.* at 565-67.

101. *But see* Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 562-63; Moe, *supra* note 8, at 1101-02.

102. *See, e.g.*, Turner, *supra* note 8, at 753 (noting that if the Board "favors labor over management or vice versa, the agency's output is not the output of principled adjudication as measured by the rule of law theory. . .").

103. *See, e.g.*, Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010).

A. *What Can We Learn from Studies Regarding Panel Effects in the Appellate Courts?*

Supreme Court scholars often study how judicial ideology impacts the justices' votes on particular issues.¹⁰⁴ More recently, some scholars have expanded this line of inquiry to study decision-making at lower federal courts, with many finding that ideology pervades judicial decision-making on certain issues.¹⁰⁵ These scholars theorize that Democrats tend to favor a liberal outcome while Republicans tend to favor a conservative outcome.¹⁰⁶ Some scholars and judges have raised concerns about ascribing so much importance to ideology, arguing instead that formalist interpretations of law or institutional goals, such as career advancement or general feelings of collegiality, motivate decisions more than ideology.¹⁰⁷ Whatever the case, the number of empirical studies of how judicial ideology impacts judicial decision-making has skyrocketed over the last decade.¹⁰⁸

104. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) ("The [attitudinal] model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.").

105. See Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304-05 (2004) [hereinafter Sunstein et al., *Ideological Voting on Federal Courts of Appeals*]; Yung, *Judged by the Company You Keep*, *supra* note 10, at 1178-80 (finding that liberal ideology scores are associated with an increased tendency to favor the plaintiff in civil rights cases); Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1533-36 (2008) (finding panel effects on the basis of ideology and race in voting rights cases); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 784-89 (2008) (finding panel effects in Supreme Court and circuit courts deciding arbitrariness review of EPA and NLRB decisions); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 854-59 (2006) (finding panel effects when circuit courts apply *Chevron*) [hereinafter Miles & Sunstein, *Do Judges Make Regulatory Policy?*]; Christopher Smith, *Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology, and Circuit Court Voting in Race and Gender Cases*, 22 HASTINGS WOMEN'S L.J. 157, 174-79 (2011) (finding panel effects in race and gender cases).

106. See e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* 19 (2007) ("[R]esearchers have presumed that judges appointed by Democrats are ideologically liberal whereas those appointed by Republicans are ideologically conservative."); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1728 (1997) (setting forth hypotheses about the role of ideology in impacting judicial votes in environmental cases).

107. See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336-39 (1998); see also RICHARD J. POSNER, *HOW JUDGES THINK* 29 (2008); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1904-06 (2009); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003) [hereinafter Edwards, *The Effects of Collegiality*]; Harry T. Edwards, *Public Misconceptions Concerning the "Politics" of Judging: Dispelling Some Myths about the D.C. Circuit*, 56 U. COLO. L. REV. 619, 625 (1985).

108. A special symposium of the Duke Law Journal addressed this blossoming literature. See, e.g., Jeffrey M. Chemerinsky & Jonathan L. Williams, *Measuring Judges and Justice*, 58 DUKE L.J. 1173 (2009); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009); Jack Knight, *Are Empiricists Asking the Right Questions about Judicial Decisionmaking*, 58 DUKE L.J. 1531 (2009); see also Joshua B. Fischman & David S. Law, *What is Judicial Ideology and How Should We Measure It?*, 29 WASH. U. J. L. & POL'Y 133 (2009); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology:*

Scholars theorize that panel composition impacts judicial outcomes, with many finding that the partisan affiliation of one's colleagues impacts vote choice and may mitigate (or enhance) the impact of a judge's own ideology.¹⁰⁹ In two seminal works, Richard Revesz (studying the D.C. Circuit)¹¹⁰ and Cass Sunstein et al. (studying federal circuit courts on a host of issues),¹¹¹ found that the propensity of a member of a three-judge panel to cast a liberal vote increases with every Democratic appointee on the bench, and likewise decreases with every Republican appointee.¹¹² Indeed, Revesz notes that "while individual voting and panel composition both have important effects on a judge's vote, the ideology of one's colleagues is a better predictor of one's vote than one's own ideology."¹¹³ The differences can be striking: Sunstein et al. found that in some areas of law, such as affirmative action, an all-Democratic panel issued a liberal ruling 82% of the time while an all-Republican panel did so only 37% of the time.¹¹⁴ Other scholars have found similar results in diverse areas of law, including asylum cases,¹¹⁵ criminal, immigration, and civil rights cases,¹¹⁶ and Establishment Clause cases in the federal courts of appeals.¹¹⁷ These so-called "panel effects" apply not just to partisanship but to gender, race and religion as well, with judges deciding a case differently depending on the gender and race of

Empirically Measuring Supreme Court Cases, 98 GEO. L.J. 1 (2009); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873 (2008).

109. See Revesz, *supra* note 106, at 1732; see also CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (Brookings Inst. 2006) (analyzing panel effects in the federal judiciary); Cox & Miles, *supra* note 105, at 1533-36 (finding panel effects on the basis of ideology and race in voting rights cases); Thomas J. Miles, *The Law's Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. OF LEGAL ANALYSIS 301, 310 (2012) (analyzing panel effects).

110. Revesz, *supra* note 106.

111. SUNSTEIN ET AL., *supra* note 109.

112. Sunstein et al. note that this occurs because "[d]eliberating groups of like-minded people tend to go to extremes." *Id.* at 71.

113. Revesz, *supra* note 106, at 1764.

114. Sunstein et al., *Ideological Voting on Federal Courts of Appeals*, *supra* note 105, at 319.

115. See Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J. LAW & ECON. 781, 792 (2011). Fischman finds that Democratic appointees grant relief 35% of the time to plaintiffs in asylum cases when his co-panelists are Democrats compared to just 15% when he shares the bench with two Republicans. *Id.* at 793. Likewise, Republican appointees favor the asylum plaintiff 20% of the time when sitting with two Democrats but just 6% of the time when sitting with co-partisans. *Id.*

116. See Carlos Berdejó, *It's the Journey, Not the Destination: Judicial Preferences and the Decision-Making Process*, 51 U. LOUISVILLE L. REV. 271, 275 (2013) (finding that plaintiffs in criminal and immigration cases prevail less when Democrats are on the panel, but that the chance of success in civil rights and prisoner petition cases increases when more Democrats are on the panel).

117. See Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1216 (2012) (finding that Democratic-appointed judges uphold Establishment Clause challenges 57% of the time, while Republican-appointed judges do so only 25% of the time, resulting in a 2.25 times greater chance of prevailing before a Democratic-appointed judge).

his or her co-panelists.¹¹⁸ Adam Cox and Thomas Miles, for instance, found that African-American judges were twice as likely as white judges to find a violation of section 2 of the Voting Rights Act.¹¹⁹ However, other studies have found no evidence of judges voting ideologically in other areas of law. For instance, Jonathan Remy Nash and Rafael Pardo found that only non-ideological factors motivated decision-making in bankruptcy cases at the court of appeals.¹²⁰

Sunstein et al. set forth theories of ideological dampening and ideological amplification.¹²¹ Ideological dampening occurs when the propensity for a judge to favor his own ideology is “dampened” if his co-panelists come from the opposing party.¹²² This may be because judges are persuaded by opposing viewpoints, or it could be a byproduct of collegiality.¹²³ Judges may suppress doubts in order to go along with other members of the panel,¹²⁴ or alternatively, the views of co-panelists may play a role in moderating the tone of the majority’s legal reasoning. In another variant of the model, the lone minority judge on a three-judge panel acts as a whistleblower.¹²⁵ Where the majority may deviate from precedent, the lone minority judge can threaten to “blow the whistle” by writing a dissent so as to make the appellate court cognizant of the panel’s break with precedent.¹²⁶

118. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390, 402-06 (2010) (finding gender panel effects in cases implicating sex discrimination); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 320 (2004) (finding that a woman being on the panel results in the men on the panel voting more “liberally”); Jonathan P. Kestel, *Racial Diversity and Judicial Influence on Appellate Courts*, AM. J. POL. SCI. 167, 178 (2012) (finding that the presence of a nonwhite panelist increases the propensity of the panel voting in favor of affirmative action policies); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1787 (2005) (finding gender differences in judging in sexual discrimination cases); DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 87-91 (2003) (reporting religious effects in gay rights cases).

119. Cox & Miles, *supra* note 105, at 1535-36. Similarly, they found that Democratic appointees were more likely than Republican appointees to find a violation. *Id.* at 1531-35.

120. Jonathan Remy Nash and Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 923-24 (2012).

121. See Sunstein et al., *Ideological Voting on Federal Courts of Appeals*, *supra* note 105, at 304-05.

122. *Id.* at 304-05. Indeed, in some areas of law, Sunstein et al. found such extreme cases of ideological dampening (which they called “leveling effects”) such that Democratic judges, sitting with two Republican judges, are as likely to vote in a conservative direction as Republican judges sitting with two Democratic colleagues. *Id.* at 305.

123. *Id.* at 307.

124. *Id.* Sunstein et al. refers to this phenomenon as the “collegial concurrence” where a judge would rather just agree with the majority opinion rather than waste the time to dissent. *Id.*

125. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998); Jonathan P. Kestel, *Panel Composition and Judicial Compliance on the US Court of Appeals*, 23 J.L. ECON. & ORG. 421, 421-41 (2007).

126. See Cross & Tiller, *supra* note 125, at 2159.

This threat results in the majority issuing a more moderate opinion than it would have otherwise because it does not want to be reversed by the higher court.¹²⁷ Judges may also not want to spend the time to write a dissent.¹²⁸ “Dissent aversion” may also be at work, with one judge having a particularly strong opinion, and at least one of the other two judges goes along with the first judge to “avoid creating ill will.”¹²⁹ They may also engage in logrolling by trading a vote on one issue in exchange for a favorable vote on another.¹³⁰

Likewise, a judge’s ideological tendency may be “amplified” if he sits with co-partisans.¹³¹ Sunstein et al. notes that this occurs because “[d]eliberating groups of like-minded people tend to go to extremes.”¹³² The pool of arguments employed by a homogenous group will likely be very different than those employed by a mixed group.¹³³ For instance, in an all-Democratic panel, panelists will offer arguments in favor of the liberal outcomes, whereas, on a mixed panel, members from the other party may raise contrasting arguments that favor a more conservative outcome.¹³⁴ Judges, for instance, may be exposed to and respond to the most extreme argument of the group.¹³⁵ Judges sitting with their co-partisans may also have greater confidence that their viewpoints are correct.¹³⁶

While there has been a robust literature on the study of panel effects on federal courts of appeals, there has been virtually no empirical study of how panel voting works in administrative agencies.¹³⁷ Analyzing panel effects at administrative agencies is important for understanding how the agencies function and exercise delegated power—particularly given how commonly administrative agencies decide cases using a panel format. We now turn to this task using the NLRB as a case study. Using the backdrop of the panel

127. *See id.*

128. *See id.* at 2174. Cross and Tiller argue that the presence of a minority viewpoint could alter the content of the opinion even if there is not a formal dissent. *Id.* at 2159.

129. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. OF LEGAL ANALYSIS 101, 108 (2011).

130. *See* Peresie, *supra* note 118, at 1785. However, although judges may care more about some cases than others, “explicit vote trading” is not permitted. Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2380 (1999) (“One apparent ‘rule of the game’ of collegial judges is that, while certain forms of output-focused strategic behavior are accepted (even encouraged) and others are quietly tolerated, explicit vote is disallowed.”).

131. Ideological amplification in many areas of law is so strong such that Democrats sitting with two other Democrats are about twice as likely to vote in a liberal direction as are Republicans sitting with Republican judges. *See* SUNSTEIN ET AL., *supra* note 109, at 10.

132. *Id.* at 71.

133. *See id.* at 76.

134. *See id.*

135. *See id.*

136. *See id.* at 75.

137. *But see* Christopher L. Griffin, *Identifying Panel Effects in Quasi-Judicial Decision Making* (May 15, 2015) (unpublished paper presented to the 25th Annual American Law and Economics Association Annual Meeting, Columbia Law School) (on file with author).

effects literature, we look to see how panel effects apply in administrative adjudication.

B. Design of the Empirical Study

Applied to the NLRB, I test the following four hypotheses:

1. Democratic panels are more likely to rule in favor of labor when there are more Democrats on the panel (DDD>DD>D);
2. Democratic panels are less likely to rule in favor of industry when there are more Democrats on the panel (DDD<DD<D);
3. Republican panels are more likely to rule in favor of industry when there are more Republicans on the panel (RRR>RR>R);
4. Republican panels are less likely to rule in favor of labor when there are more Republicans on the panel (RRR<RR<R).

I. Data

To analyze the NLRB of the Clinton and Bush II presidencies and to see whether it acts consistently with its principal founding purpose of being an impartial “labor court,” I looked at 2,675 NLRB cases from 1993 to 2007, spanning the Clinton and second Bush administrations.¹³⁸ This sample contains a large variety of data over two presidential administrations, yet does not span such long a period that omitted variables concerning time trends cloud the analysis. The status of labor remained largely unchanged during this period; Congress has passed no major labor laws since the 1950s¹³⁹ and it appears unlikely to do so anytime in the future.¹⁴⁰ President Clinton had the unique opportunity to be able to transition the Board to Democratic control and appoint a General Counsel in his first year in office.¹⁴¹ President Bush

138. I deliberately excluded cases from 2008 because during parts of that year the Board operated with only two members, raising legal issues concerning the constitutionality of two-member panels and whether such panels constituted a quorum. The circuit courts were divided on whether to accept the NLRB’s two-member rulings as valid. *See, e.g.,* John Sanchez, *The National Labor Relations Board at 75: Two is Company but it is a Quorum?*, 51 FLA. INT’L L. REV. 715, 717 (2010). The Court ultimately resolved these issues. *See supra* text accompanying note 4; *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010).

139. *See* Landrum-Griffin Act, *supra* note 19; Brudney, *supra* note 36, at 228. Congress last passed a labor law in 1959 making some changes, among others, such as revising some of the provisions directed against union abuses. *See id.* Congress also added amendments in 1974 directed toward the healthcare industry. Pub. L. No. 93-360, 88 Stat. 395 (1974). Subsequent attempts to pass labor law reform have failed. *See* Labor Law Reform Act of 1977, H.R. 8410, 95th Cong. (1977); S. 1883, 95th Cong. (1977); Teamwork for Employees and Managers Act, S. 295, 104th Cong. (1994).

140. As Cynthia Estlund notes, “[A] longstanding political impasse at the national level has blocked any major congressional revision of the basic text since at least 1959.” Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

141. *See* Ellen J. Dannin, *We Can’t Overcome?: A Case Study of Freedom of Contract and Labor Law Reform*, 16 BERKELEY J. EMP. & LAB. L. 1, 3 n.10. Furthermore, because the General Counsel serves a four-year term, the President often does not have the opportunity to appoint a new General Counsel until

faced more obstacles in his effort to transition the Board to Republican control. Indeed, it was not until early 2002 that a majority of the Board's members were Republican.¹⁴²

I collected the cases in a few different ways. The NLRB hears two types of cases: unfair labor dispute cases and election representation cases.¹⁴³ I limited the analysis to unfair labor disputes because assessing whether the Board member favors labor or not is easier to decipher.¹⁴⁴ First, I looked up all the NLRB's cases on the LexisNexis database by year for the period. I read each case and coded the cases in several different ways. I first coded the cases for case outcomes, generating a "1" if the case was decided in favor of labor and a "0" otherwise. For any case brought against an employer (a "CA" case), I counted the case as "pro-labor" if the Board decided any part of the case on the merits in labor's favor. For any case brought against a union (a "CB," "CC," or "CD" case) I counted the case as "pro-labor" if the Board decided for the union.¹⁴⁵ For any case brought by an employee, I coded the case as "pro-industry" if the Board decided the case for the employer. Finally, for any case brought by an employee against a union, I coded the case as "pro-industry" if the Board decided against the union.

In just 8% of the cases in my database, employees or others brought complaints against unions ("CB" cases); the vast majority of cases were brought by employees or unions against employers ("CA" cases).¹⁴⁶ Figure 1

the second year of his presidency—unless the General Counsel retires early (as happened during President Clinton's presidency).

142. Turner, *supra* note 8, at 74 (setting forth in Appendix a list of all Board members, their parties and employment background).

143. The Board hears unfair labor cases pursuant to 29 U.S.C. § 160. It also hears representation election cases under 29 U.S.C. § 159 (c)(1)(A)(i)-(ii) (2012), which involve a determination of the particular union that an employee groups wants to represent them (certification proceeding) or a determination of whether a union that the Board previously certified still represents them (decertification proceeding).

144. Moreover, much of the empirical literature on the NLRB concerns unfair labor practice dispute cases. See sources cited *supra* note 8.

145. CA cases are based on violations of sections 8(a)(1)-8(a)(5) of the NLRA; CB cases allege violations of sections 8(b)(1)(A) through 8(b)(6); CC cases allege violations of sections 8(b)(4)(ii) through subparts (A) and (C); and CD cases allege violations under section 8(b)(4)(i). I eliminated cases concerning violations under CP for violation of sections 8(b)(7)(A) through 8(b)(7)(C) because there were only a few cases. I also eliminated CE cases under section 8(e) because in these "Hot Embargo" cases, both the employer and union are defendants. For brevity, I call CB, CC and CD cases "CB" cases.

146. The figure is from my own analysis of my database. I excluded settlements from the analysis. Excluding settlements from the analysis could potentially raise concerns of selection bias. As Theodore Eisenberg and Charlotte Lanvers found, however, there appears to be no evidence of a material change in aggregate settlement rates over time. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 111 (2009). For instance, if I sought to test the propensity of labor to prevail before the Board, excluding settlements from the dataset could bring about misleading results. However, I seek to test the impact that ideology and panel configuration have on how the panel or individual judges will vote. Other scholars doing similar analyses have likewise excluded settlements from the dataset. See, e.g., Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8. In many cases, information on settlements is not readily available. Moreover, as Daniel

below details the case process. Those who feel aggrieved by an employer or union can file charges with the regional office of the NLRB; the NLRB General Counsel, acting through the regional offices,¹⁴⁷ decides whether to press claims as it is his responsibility to both issue and prosecute unfair labor practice disputes.¹⁴⁸ If a complaint is issued,¹⁴⁹ and assuming the case does not settle, an ALJ may hear the case.¹⁵⁰ The losing litigant can challenge the ALJ decision by filing within a specified time frame what is known as an “exception” to the ALJ’s order, which will then be heard by the Board.¹⁵¹ The Board sits in panels of three members, except when it chooses to take cases to be heard by the full five-member Board.¹⁵² Each Board member is appointed by the President, with the advice and consent of the Senate, for five-year terms for which the member can be reappointed.¹⁵³ A Board

Klerman and Yoon-Ho Alex Lee argue, one can still make valid inferences while excluding settlement data. See Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 209 (2014).

147. Description of NLRB Organization, § 203, 1 LAB. L. REP. (CCH) ¶ 1105.030, at 2965 (1985). All told, the Agency currently operates through twenty-six regional offices scattered throughout the United States. See NATIONAL LABOR RELATIONS BOARD, REGIONAL OFFICES, www.nlr.gov/who-we-are/regional-offices (last visited Aug. 10, 2016).

148. 62 NLRB ANN. REP. 3 (1997). The General Counsel’s discretion to follow through on a complaint is unreviewable. *N.L.R.B. v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 114 (1987). The NLRB is unique among federal administrative agencies, as it is one of the only agencies where the prosecutorial body is separate from the adjudicatory body. The General Counsel, who is appointed by the President, has the authority to issue complaints independent of the political inclinations of the Board. Christy Concannon, Comment, *The EAJA and the NLRB: Chilling the General Counsel’s Prerogative to Issue Unfair Labor Practice Complaints?*, 36 CATH. U. L. REV. 175, 177 (1986). This change was made by Congress in 1947 because there had been the perception that the Board leaned too pro-labor in its rulings. *E.g.*, Scher, *supra* note 8, at 332-33; John E. Higgins, Jr., *Keeping Women in the Kitchen: The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 960 (1998).

149. The General Counsel’s decision whether or not to issue a complaint is subject to a reasonableness standard. That is, the legislative history of the governing statute instructs the General Counsel to issue a complaint if there is reasonable cause to believe that an unfair labor practice is true. See H.R. REP. NO. 80-245, at 40 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 331 (1948); Concannon, *supra* note 148, at 180.

150. As a technical matter, the regional officer first determines whether the Agency has jurisdiction by assessing whether the claim affects interstate commerce. 29 C.F.R. § 102.63(b)(1)(i) (2016). The regional officer assigns a field agent to investigate the claim and to decide whether the General Counsel should issue a complaint. See 29 C.F.R. § 102.15 (2016). If a complaint is issued, the ALJ schedules a formal hearing. 29 C.F.R. § 102.34 (2016).

151. 29 U.S.C. § 160(c). The General Counsel can also file exceptions to a case. If the General Counsel declines to issue a complaint, the complaining party can appeal. 29 C.F.R. § 102.19 (2016).

152. In order to hear more cases, the Board typically sits in panels of three or five members. S. REP. NO. 105, on S. 1126, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 1947, at 414 (1948); 29 U.S.C. § 153(b) (“The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise.”); see also John E. Higgins, Jr., *THE DEVELOPING LABOR LAW* 42 (2012) (noting that the Taft-Hartley Act changed the Board from a three-member Board to a five-member Board).

153. 29 U.S.C. §§ 153(a), 154(a).

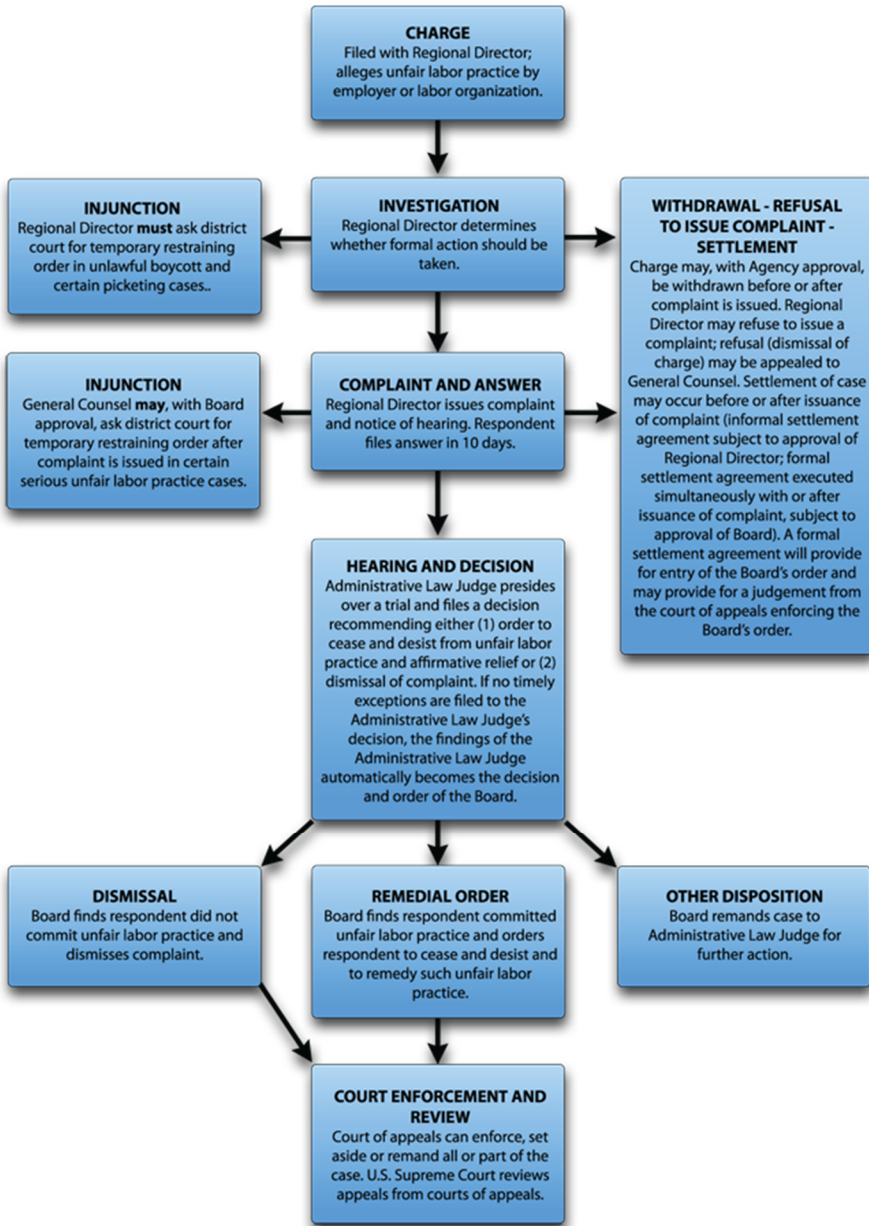
decision can be appealed to the appellate courts.¹⁵⁴ A Board decision is largely “vested with a large amount of discretion [by the appellate courts], and it will not be disturbed unless . . . the Board’s determination was lacking in evidentiary support, arbitrary, capricious or an abuse of discretion.”¹⁵⁵ As one scholar noted, the NLRB is probably one of the most protected agencies with respect to whether the appellate court will disturb its rulings on appeal.¹⁵⁶

154. 29 U.S.C. § 160(f).

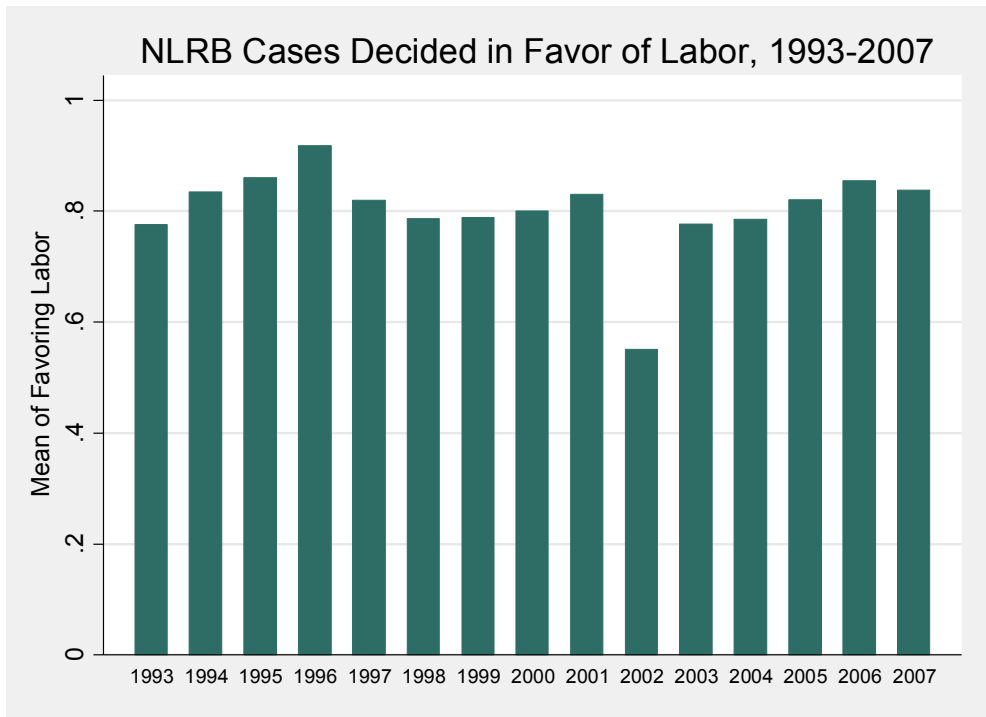
155. See, e.g., *N.L.R.B. v. Episcopal Community of St. Petersburg*, 726 F.2d 1537, 1541 (11th Cir. 1984) (citing *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497 (1979)); *Automobile Salesman’s Union Local 1095 v. N.L.R.B.*, 711 F.2d 383, 385-86 (D.C. Cir. 1983).

156. See Robert Douglas Brownstone, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 *BROOK. L. REV.* 229, 246 (1986).

Figure 1: The NLRB Review Process



Source: NLRB, www.NLRB.gov.

Figure 2

The figures above present graphs showing the percentage of cases decided in favor of labor by year. On average, as shown in Figure 2, the NLRB decides about 75% of the cases it hears in favor of labor each year. This number stayed fairly constant through the period under study. However, there were some notable exceptions. For instance, during the first full year of the Bush II presidency, in 2002, the Board decided only between 53% and 57% of cases in favor of labor, depending on how one codes the variable. This lower rate in 2002 is not altogether surprising. It generally takes about two years for the NLRB to hear the appeal of an ALJ decision.¹⁵⁷ As a result, decisions heard by the ALJ in 2000 before the presidential election may just be coming up before the Board in 2002, so the case mix for that particular year may have been different. More importantly for this study, panels composed exclusively of Republicans heard almost 10% of the cases in 2002—the highest yearly total for the entire period under study.¹⁵⁸ In

157. See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FLA. INT'L U. L. REV. 361, 372 (2010).

158. Indeed, less than 1% of the cases were heard by panels exclusively composed of Republicans in my database. A quarter of those cases were in 2002.

addition, about 91% of cases had a pro-labor bent in 1996. Like the anomaly of 2002, this exception to the general trend is most likely attributable to the change in presidential administration. By 1996, President Clinton finally had the opportunity to mold the NLRB more in his favor. Given that there is some lag time between the ALJ decision and that of the Board, it is unsurprising that perhaps it took a few years for the more liberal spirit of the Clinton administration to pervade the NLRB as well.

To help narrow down the cases (and to also check my coding to ensure inter-coder reliability), I also consulted with two databases I received from the NLRB that were not readily accessible until recently.¹⁵⁹ Between 1984 and 2000, the NLRB hosted its cases in the Case Handling Information Processing System (“CHIPS”), and from 1999 to 2010, it collected cases in the Case Activity Tracking System (“CATS”).¹⁶⁰ Each database, particularly the CATS database, has a treasure trove of information for scholars to study agency adjudication.¹⁶¹ I used the database to give me further information on the identity of the parties and to confirm my coding of information.¹⁶²

In addition, I omitted certain types of Board decisions that could have distorted my analysis. First of all, I excluded Board decisions that merely

159. The CHIPS database is available at www.data.gov and the CATS database is available at www.archives.gov. See U.S. GENERAL SERVICES ADMINISTRATION, OFFICE OF CITIZEN SERVICES AND INNOVATIVE TECHNOLOGIES, www.data.gov (last visited Sept. 15, 2015); THE NATIONAL ARCHIVES, www.archives.gov (last visited Sept. 15, 2015).

160. Consistent with the methodology of other scholars, I rely in this analysis on published decisions available on LexisNexis. However, my analysis was complicated because the CHIPS and CATS databases track case outcomes by actual case numbers. For instance, a few challengers may contest employer action and the cases may all be combined at some point for the Board to hear the cases jointly.

161. The CATS database alone contains over 600 fields and more than 50 Excel spreadsheets of information on everything the Agency does in its adjudication, ranging from how many cases are withdrawn to a regional breakdown of cases. See *supra* note 159.

162. I did two things to ensure some measure of reliability with respect to the cases I collected from LexisNexis. The NLRB’s CHIPS and CATS databases state the final outcome of the case at both the Board and ALJ level. See *supra* note 159. By looking at the type of case (e.g., CA or CB) as well as the direction of the lower court decision, I could characterize a case as pro- or anti-labor. Thus, I had an entirely separate database to ensure that my coding agreed with the Agency’s databases. I found that the Agency did not always correctly transcribe the final outcome of the case; in those instances, I relied on my own reading of the case. Moreover, I also obtained access to a database constructed by Cole Taratoot where, as part of a National Science Foundation Grant, he characterizes cases as for or against labor. However, his database does not include all cases or all years. I added several hundred additional cases from LexisNexis that were not in his database. For the cases that his database included, I compared my codings to see if they coincided, and where they did not, I read the case again to confirm my decision. Sometimes, I departed from his codings because, when I assessed whether or not to code a case as “pro-labor” or “pro-industry,” I looked at who challenged the ALJ action. For instance, if only an employer filed exceptions to the NLRB case and the employer won, I coded the case as anti-labor, whereas Taratoot often characterized such cases as split. I considered such cases wholly in favor of labor because the Board was not asked to rule for the labor party; only the employers challenged the action, so if the Board ruled against the employer, I considered that a case decided wholly in favor of labor. Nonetheless, I looked at the cases both ways and came to consistent statistical results no matter how they were coded. Furthermore, I also excluded some cases that Taratoot included. For instance, I excluded cases dealing with procedural or jurisdictional matters that did not really raise unfair labor dispute issues.

bless settlement agreements. Because Board decisions are not self-enforcing, a Board order is necessary to compel a settling party to follow through with the terms of any settlement.¹⁶³ The Board also hears a fair share of supplemental decisions after the Board remands a case back to the ALJ to decide a factual issue.¹⁶⁴ Since such decisions may reflect ex-post judicial influence, they could bias the results.¹⁶⁵ Upon hearing the case a second time, the ALJ may have the opportunity to correct deficiencies in his or her reasoning.¹⁶⁶ Thus, I only included such cases if the Board actually ruled on the merits for the first time. I also excluded motions for summary judgment. Motions for summary judgment require the fact-finder to decide whether or not there is any genuine issue of material fact, so the legal issue involved is quite different from whether or not there is a violation of the NLRA.¹⁶⁷ Further, for ease of analysis, I also eliminated cases decided by the five-member NLRB during the study's time period. Although three-member panels normally hear NLRB cases, the full five-member Board often chooses to hear those cases posing particularly important legal issues, much like an *en banc* court of appeals.¹⁶⁸ I also excluded cases that are both CA (against employers) and CB (against unions), as it is impossible to discern one single pro-labor or pro-industry tendency as these cases involve both issues. Finally, I excluded some cases in which the Board does not rule on the underlying unfair labor practice disputes. On some occasions, the Board decides a case on technical or constitutional grounds, such as whether or not the complaint is time-barred or whether or not First Amendment rights are at issue or whether the Board appropriately should exercise jurisdiction in a given case.¹⁶⁹ I was then left with about 2,675 cases to analyze on the merits.

2. *Dependent Variable*

The key independent variable of interest is the Board outcome. I coded the Board's decision in a number of alternative ways. In one coding style

163. Specifically, the General Counsel must seek enforcement in the courts of appeals under section 10(e) or by filing a cross-petition for enforcement when the losing litigant appeals to the circuit court on the merits of the case under section 10(f). 29 U.S.C. § 160(e)-(f) (2012).

164. Many of the supplemental decisions concerns disputes about the remedy. *See, e.g.*, Grosvenor Orlando Associates, Ltd., et al., 350 N.L.R.B. 86 (2007) (ruling on backpay remedy).

165. *See* Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 557.

166. *See id.*

167. The Board will only grant motions for summary judgment if there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." *Conoco Chemicals Co.*, 275 N.L.R.B. 39, 40 (1985).

168. *See* 29 U.S.C. § 153(b) ("The Board is authorized to delegate to any group of three or more members any or all of the powers it may exercise itself"). According to my data, the Board hears less than a dozen cases a year in the full five-member Board.

169. *See, e.g.*, *San Manuel Indian Bingo and Casino et al.*, 341 N.L.R.B. 138 (2004) (deciding whether the NLRA's jurisdiction extends to Native American reservations); *Media General Operations, Inc., et al.*, 346 N.L.R.B. 11 (2005) (ruling on whether the complaint is time-barred under the NLRA).

(“Coding Style 1”), I read and analyzed each Board decision and coded the case as “1” if the NLRB decided the case in whole or in part in favor of labor. In an alternative coding (“Coding Style 2”), I looked at what party challenged the ALJ’s ruling in order to weigh whether the decision should be coded a “1” or a “0.” For instance, suppose in a case the ALJ decides in part in favor of labor. The losing pro-labor litigant, disappointed that the ALJ did not decide wholly in his favor, files exceptions to the ALJ’s decision. The Board finds those exceptions to be without merit. Under the first coding style, the decision would be coded as pro-labor because by affirming the ALJ decision in part, the case upheld the pro-labor claims in part. Under Coding Style 2, however, a case such as this would be coded as pro-industry because the pro-labor litigant who filed exceptions before the Board lost. In other words, the Board found against the pro-labor litigant, and in turn, the tone of its ruling had a pro-industry beat because it was *against labor*. The Board was asked to rule on the pro-labor litigants’ claim and it rejected them, making the employer/industry party the “winner” of the case.

Most cases in the dataset are clear cut; the ALJ decided a case wholly in favor of labor and the Board upheld, often issuing merely a summary opinion stating that it does not have the power to review credibility determinations of the ALJ. However, there are a handful of cases that present the situation posed above, so I analyze the cases in two ways: one using the first coding style that favors labor, and the other using a second coding style that looks more carefully at the Board decision to see (i) who exactly files exceptions to the ALJ’s ruling and (ii) whether the Board denies or grants the relief asked for by the exceptions in whole or in part.

As another alternative dependent variable (which I explore later with an alternative statistical analysis), I also look at the cases broken down more fine-tuned as to whether they lean labor or industry. Many cases in the dataset are split. For instance, in a hypothetical case the charging party could potentially bring charges under various sections of the NLRA. Typically, pro-labor litigants allege joint violations of section 8(a)(1) and section 8(a)(3), or section 8(a)(1) and section 8(a)(5), for instance. The ALJ could find in favor of the pro-labor litigant on the section 8(a)(1) claim but for the industry litigant on the section 8(a)(5) charge. Likewise, the Board may find the opposite: that there are no section 8(a)(1) violations, but there is a section 8(a)(5) violation. There are countless possibilities. In particular, many cases allege specific violations against many different individual employees, each of which could constitute a violation of some part of the statute.¹⁷⁰ The Board could find violations for some individuals, but not for others.

170. See, e.g., *Michael’s Painting, Inc., et al.*, 337 N.L.R.B. 140 (2002) (alleging multiple violations concerning terminations of five people).

Given so much potential variation in the cases, I use an alternative dependent variable to try to allocate each case as much as possible to one of four possible categories: pro-industry, lean industry, lean labor, and pro-labor. I allocate cases to each category using the two distinct coding schemes of Coding Style 1 and Coding Style 2 through which I look at which parties file exceptions to the ALJ action. Coding of the cases is necessarily complicated and requires delicate judgment calls to properly categorize the case. Nonetheless, nearly all of the prior empirical work on the NLRB blindly allocates NLRB cases to the pro-labor pile regardless of what party challenges the case or whether the case is split.¹⁷¹ With rare exceptions, no one has even really looked at the differences between split and non-split cases, partly because the coding of so many cases is so laborious.¹⁷² Moreover, scholars disagree on how exactly to code for legal doctrine. As Derek Linkous and Emerson Tiller note, “Doctrine . . . is hard to code for, and undoubtedly, there may be issues with trying to transform a legal principle, standard, or rule into a codable variable.”¹⁷³ This study is at least a modest attempt to try to incorporate these differences into the analysis.

C. General Findings

At first glance, looking at the overall data, additional Democrats on a panel increases the chance the NLRB will rule in favor of labor. Quite clearly, at least on a superficial level before additional “controls” are added in, the partisan composition of a panel is strongly correlated with case outcomes. While the incremental difference is relatively small, there is a stark difference when one compares all-Democratic panels with all-Republican panels. Using Coding Style 1 and as shown in Figure 3, Board members sitting on all-Democratic panels vote 91% in favor of labor, while Republican members entirely sitting with other Republicans vote in favor of labor only 51% of the time. The propensity for the Board to rule in favor of labor decreases as more Republicans are added to the panel; when one Republican replaces a Democrat, the Board rules in favor of labor 84% of the time—an 7% decline. Likewise, if two Republicans sit on a panel, the rate goes down even lower to 76%. The trends were similar when I switched to Coding Style 2, where I allocated more decisions to the pro-industry side after reading the case specifics. Most notable is the difference with respect to all-Republican panels. Whereas DDR panels voted in favor of labor 80% of the time, RRD panels voted in favor of labor 66% of the time. Likewise, whereas all-Republican panels voted in favor of labor in whole or in part 50% of the time

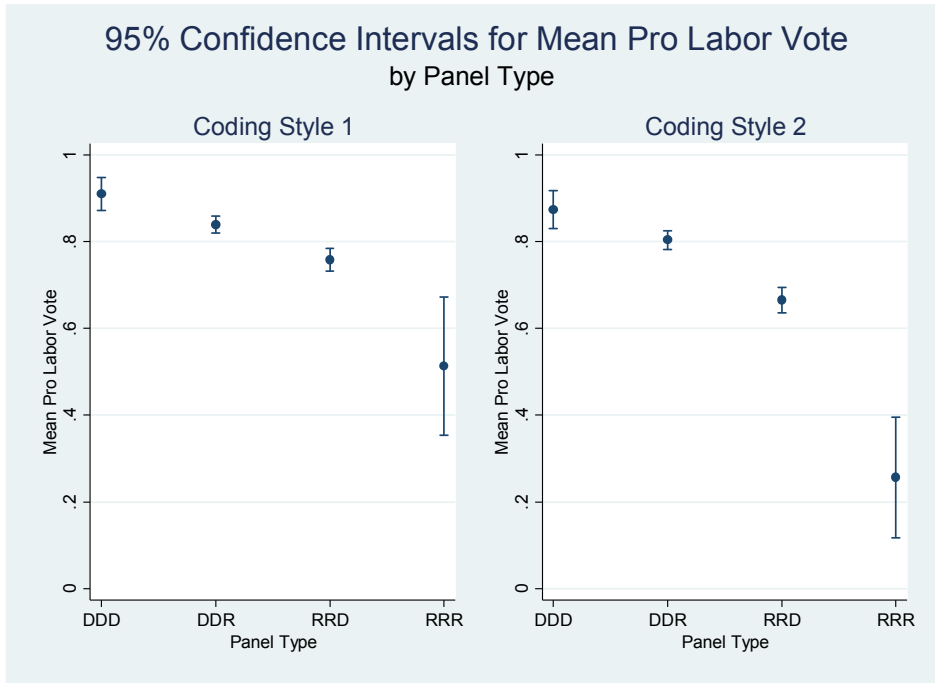
171. See, e.g., Delorme et al., *supra* note 8, at 208; Moe, *supra* note 8, at 1113.

172. But see Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 559-60; Cooke & Gautschi, *supra* note 8, at 541-42.

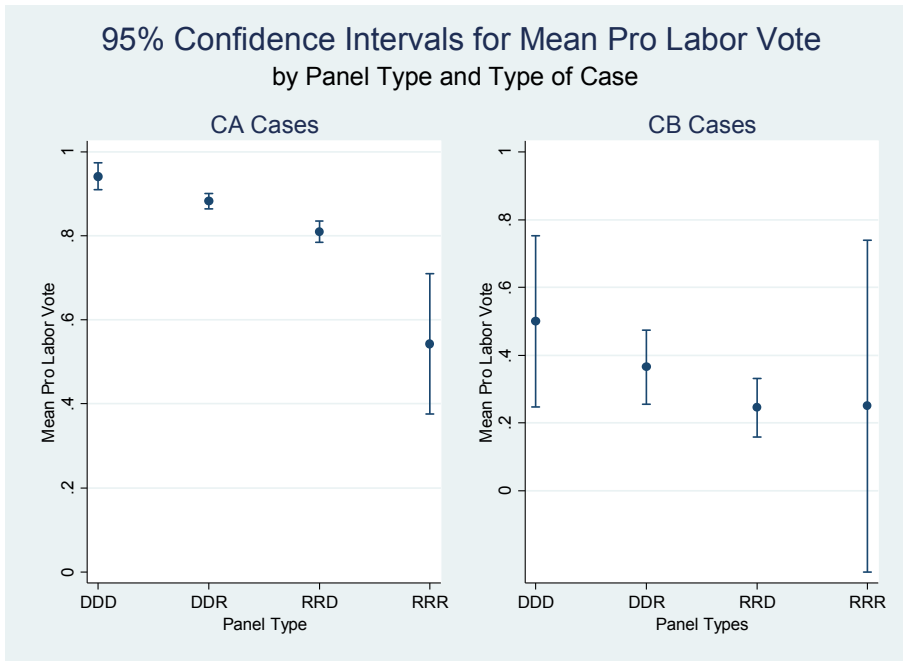
173. Derek J. Linkous & Emerson H. Tiller, Response, *Panel Effects, Whistleblowing Theory, and the Role of Legal Doctrine*, 158 U. PA. L. REV. 83, 90-91 (2009).

using Coding Style 1, they voted in a pro-labor direction only 26% of the time using Coding Style 2. These results underscore how important legal considerations are in understanding how the Board makes decisions.

Figure 3



We see a similar pattern when we restrict the analysis to only cases filed by labor or cases that allege only certain violations of the NLRA. As shown in Figure 4 using Coding Style 2, looking only at cases filed against employers (CA cases), all-Democratic panels rule in favor of labor 91% of the time, while majority Democratic-mixed panels rule in favor of labor 84%. The presence of two Republicans rather than one changes the figure to 76%. The big jump, however, occurs when three Republicans occupy the panel, although the situation is quite rare during the time frame under study (which is why the error bars are so large). All-Republican panels voted in favor of labor only about 51% in cases alleging employer violations. The results are similar looking at cases against unions (CB et al. cases), though because of the sample size, the results are not statistically significant.

Figure 4

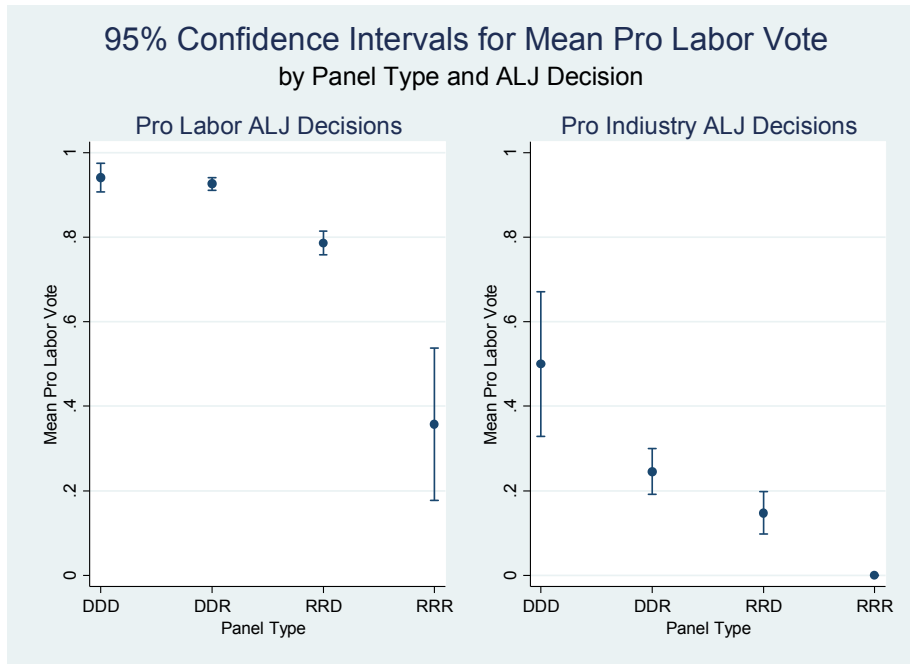
These results echo what others have found concerning partisan effects on panels.¹⁷⁴ Here, across a range of issues, the same pattern emerges: an increased tendency to vote in favor of labor when there are more Democrats on the panel. Yet the effect of adding one Democrat to the panel is not merely the inverse of adding one Republican. While the presence of a lone Republican on a majority Democrat panel results in a decreased tendency to favor labor, the absolute difference is less than in cases when there is a lone Democrat added to a Republican panel. This suggests that the presence of a lone Democrat on an otherwise majority Republican panel may have a somewhat greater impact in mediating the results toward labor than the opposite effect of adding a Republican. Although the differences between a DDD panel and a DDR panel are statistically significant in most cases, the absolute magnitude of the difference generally is less than 10%. Interestingly, other scholars studying panel effects in the courts of appeals have found just the opposite: that DDR panels behave more differently from DDD panels than RRD panels from RRR panels.¹⁷⁵

174. See *supra* Part II.A.

175. See Berdejó, *supra* note 116, at 283-84.

It is also important to consider what may be one of the most important factors in determining how the Board will rule: the ALJ decision itself. Figure 5 presents the data broken down by the ideological tone of the ALJ decision using Coding Style 2. DDD and DDR panels almost unanimously vote to uphold the ALJ decision if the ALJ decides in favor of labor. By contrast, when the ALJ decides in favor of industry, DDD panels only vote to affirm 50% of the time. Like Democratic panels, RRR panels exhibit partisan behavior; they unanimously affirm cases that are in line with their pro-industry tendencies, but only affirm 36% of pro-labor decisions emanating from the ALJ when using Coding Style 2.

Figure 5



Furthermore, panel effects appear to be especially prevalent when looking at the propensity of the Board to validate or uphold the ALJ decision. Miles and Sunstein compared validation rates with respect to rates of liberal voting in a study of appellate court review of NLRB and Environmental Protection Agency decisions and found panel effects to be more prevalent on rates of liberal voting than for validation.¹⁷⁶ That proposition finds support here. Using Coding Style 2, we see an interesting pattern in Figures 6 and 7 below whereby DDR panels evidence greater validation rates than DDD

176. Miles & Sunstein, *Do Judges Make Regulatory Policy?*, *supra* note 105, at 870.

panels. In contrast to Figures 3, 4 and 5, the panel effects in Figures 6 and 7 do not appear to be as extreme and the error bars between panel types overlap, meaning that the differences between panel types is not statistically significant. Overall, majority Republican panels have a higher rate of reversal of liberal ALJ decisions, as nearly 34% and 15%, respectively, of RRR and RRD panels are reversals in a conservative direction, whereas DDD and DDR panels reverse in favor of industry only 5% of the time. The pattern is not as stark for reversals of conservative ALJ decisions. About 16% and 8% of DDD and DDR decisions, respectively, are liberal reversals of conservative ALJ decisions. By contrast, only 5% of RRD panels ever reverse in a liberal direction and no RRR panels reverse a conservative ALJ decision in whole or in part (granted, however, there are very few RRR panels hearing cases in the time frame under study).

Figure 6

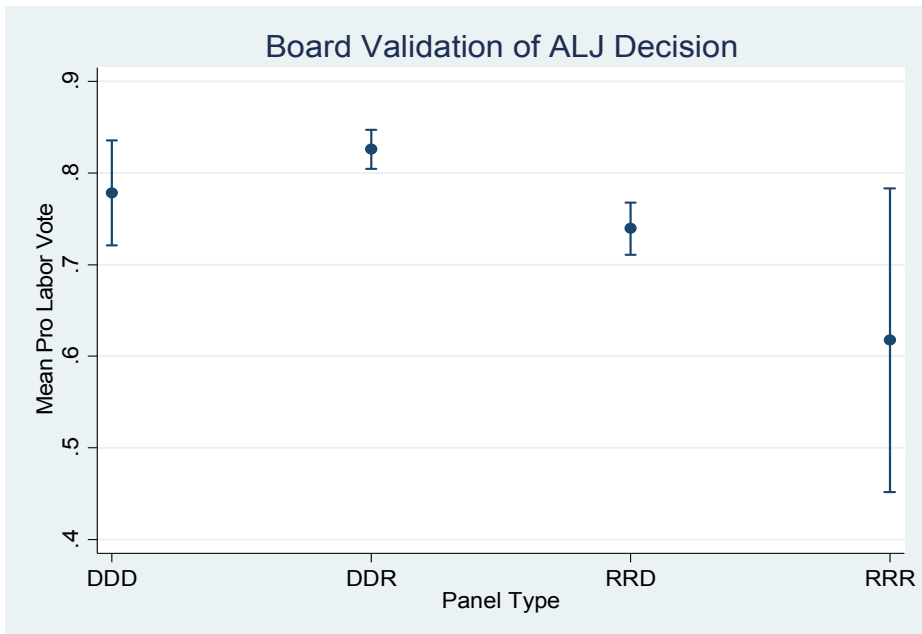
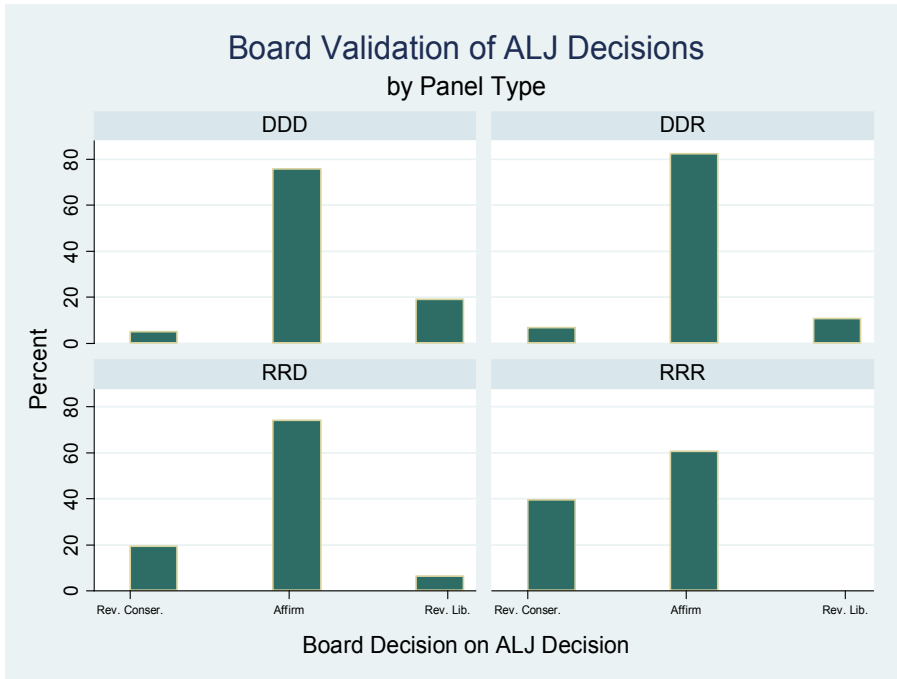


Figure 7¹⁷⁷

We see similar patterns if we look at the data in a more fine-tuned way. Many cases result in a split verdict, with the NLRB deciding some charges in a pro-labor direction and others in the opposing direction. Figures 8 and 9 below display the results for an alternative coding of the dependent variable where split decision are assigned as either “leaning” toward labor or industry with a higher score meaning the decision is more pro-labor. This figure uses the Coding Scheme 2 variable where I looked at the party challenging the case to assess whether the case should be assigned as favoring labor or not, though the results are similar using Coding Style 1.¹⁷⁸ Democratic panels (DDD or DDR) decide about 75% of cases wholly or in part in support of labor. Adding a Republican to the panel decreases the probability. Even more remarkably, a panel composed entirely of Republicans will only rule entirely in favor of labor 26% of the time—nearly a 44% point difference from the rate by which unified Democratic panels rule entirely for labor. We see a

177. Figure 7 shows three categories: (1) reverse the ALJ decision in a conservative direction (reverse the liberal ALJ decision and rule in favor of the employer or industry); (2) affirm the ALJ decision; or (3) reverse the ALJ decision in a more liberal direction (reverse the conservative ALJ decision and rule in favor of labor).

178. The results using Coding Scheme 1 evidence the same pattern. Indeed, for Coding Scheme 1, the difference between DDD and RRR panels for pro-labor cases is nearly 33% (52% v. 19%).

similar spread when we compare the likelihood of all-Republican panels ruling entirely against labor (46% for RRR versus 13% for DDD). With respect to split verdicts, the panels also evidence partisan effects. About 28% of RRR panels' decisions are split decisions in favor of industry; this compares with the 12% of industry-favored split decisions rendered by RRD panels and 5% of DDR panels. These patterns continue when the data is broken down by subject matter or how the ALJ ruled.

Figure 8

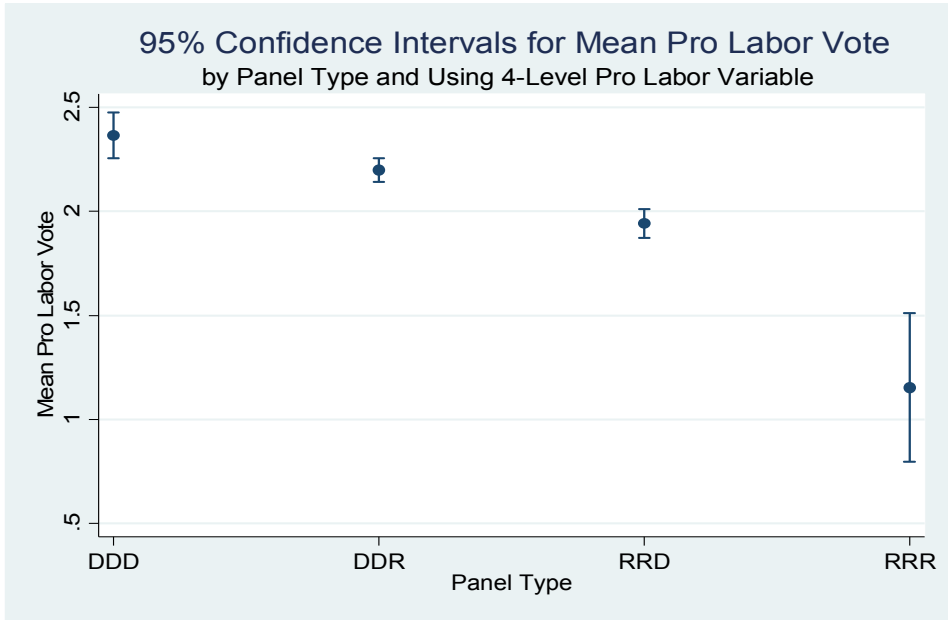
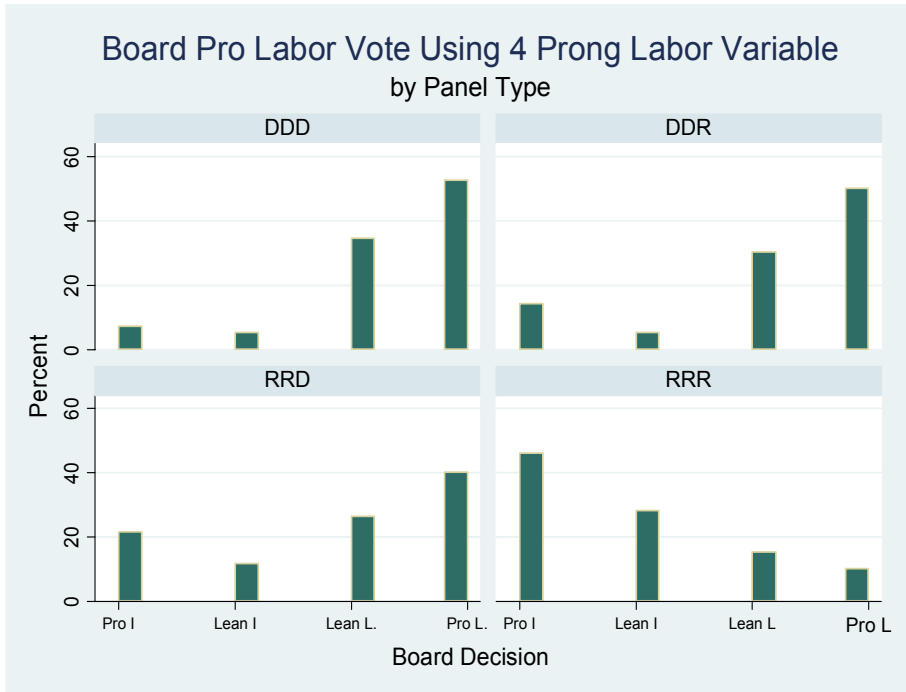


Figure 9¹⁷⁹

D. Multivariate Statistical Analysis

I next present the statistical analysis to assess what impact, if any, ideology and panel effects have on the Board's tendency to favor labor.¹⁸⁰ I hypothesize that the propensity to favor labor increases with each additional Democrat added to a panel.

In my first analysis of the data, because the dependent variable in interest is dichotomous (1 = pro-labor, 0 = pro-industry), I used logistic regression analysis to estimate an equation predicting the propensity of the Board to affirm the ALJ ruling in favor of labor.¹⁸¹ If the partisan identity of the panel

179. Figure 9 has four categories: (1) Pro I: a non-split decision entirely in favor of the employer/industry; (2) Lean I: a split decision which, on balance, seems to be decided more in favor of the employer/industry than labor; (3) Lean L: a split decision which, on balance, seems to be decided more in favor of labor than the employer/industry; and (4) Pro L: a non-split decision entirely in favor of labor.

180. The equation is as follows: $Y = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_k + \epsilon$, where β_{1i} indicates variables concerning political characteristics, β_{2j} indicates variables indicating economic considerations and β_{3k} indicates case-specific variables.

181. The variable Y is a binary variable taking a value of "1" if the Board decides the case in time t and is "0" otherwise. There are key three dummy variables of interest, DDR, RRD and RRR, taking the value of "1" depending on the partisan configuration of the panel. The reference category is DDD. Vector X contains other economic, political and case-specific variables that could impact the Y .

impacts voting, I would expect the indicators on the panel variables to be negative, with the RRR having the largest substantive value. For purposes of the statistical analysis, I used the Coding Style 2 as the basis for the coding of the dependent variable, unless otherwise stated. The general findings are the same irrespective of coding style.

1. *Key Independent Variables of Interest: Ideology and Panel Composition*

I measured the key independent variable of interest—partisan ideology—in a few different ways.¹⁸² In order to test the hypotheses, I created a variable to measure the panel’s partisan configuration.¹⁸³ There are four combinations of panels that can occur on a three-member panel: unified Democratic (“DDD”), mixed with a Democratic majority (“DDR”), mixed with a Republican majority (“RRD”), and unified Republican (“RRR”).¹⁸⁴ Most cases are heard by mixed panels: 51% are DDR and 40% are RRD. Just under 1% of panels are unified Republican panels and a little under 8% are unified Democratic panels. Figures 10 and 11 graphically display information about the panel breakdown. Certain panels are only prevalent in certain years. During the Bush II years, for instance, we see more RRD panels, with the opposite being true during the Clinton years. Based on the Board member’s political affiliation,¹⁸⁵ I assigned each case to one of the indicated panel types

182. Scholars have debated the appropriate metric to use to measure ideology; some favor looking to the party of the appointing President while others prefer a continuous, numerical measure. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 90-91 (2002). Still others measure the ideology of Supreme Court Justices by looking to newspaper editorial content as a proxy for ideology. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of Supreme Court Justices Revisited*, 57 J. POL. 812, 812 (1995).

183. This figure is not based on the party of the appointing President, because presidents often appoint members of the opposing party. Rather, the Board members’ partisan affiliations are well known and advertised on the NLRB’s website. See NATIONAL LABOR RELATIONS BOARD, OUR HISTORY, www.nlr.gov/who-we-are/our-history (last visited Aug. 10, 2016); see also Turner, *supra* note 8, at 74 (setting forth in the Appendix the partisan identification of each Board member).

184. Although cases are apparently randomly assigned to panels, as an additional check, I examine the direction of the lower court ALJ vote (whether in favor of labor or not) across each panel type. There was no statistically significant difference among panel types concerning the direction of the lower court decision, thus suggesting there is no linkage between the type of case and the judges assigned to hear it. As Eisenberg et al. point out, there is a non-random aspect to all case assignments, as there could be differences based on case specialization, seniority, or workload. See Theodore Eisenberg et al., *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL. STUD. 246, 250-51 (2012). If assignments were not random, questions might arise with respect to whether panels receive different pools of cases. See *id.* at 251. To confirm random assignment, I regressed variables hinting at case characteristics on a dichotomous variable indicating the partisan composition of the panel, along with a time trend. See Berdejó, *supra* note 116, at 282 (noting analysis to confirm random assignment). I also did a specification focusing in the directionality of the lower court decision, including whether the ALJ was a Democrat or a Republican.

185. Admittedly, measuring judicial ideology by a binary measure is crude. See Yung, *Judged by the Company You Keep*, *supra* note 10, at 1135-36. Though some academics construct an index of judicial

in order to see whether panel type impacted case results for the Board overall. A “1” signals the presence of the panel type, with all-Democratic panels as the reference category.

In an alternative specification, I measured the tone of the Board’s decision by compiling the individual ideology scores of the members present on the deciding Board using information from the Nixon database of commissioner ideology.¹⁸⁶ David Nixon measures ideology by using an analysis similar to NOMINATE, which uses past behavior of commissioners who served in Congress.¹⁸⁷ Based on these scores, I calculated the average ideology of the three-member Board hearing the case. I then created three dummy variables for liberal, moderate, and conservative Boards.¹⁸⁸ This alternative coding of the relevant dependent variable creating the panel variable by ideology instead of appointment did not impact the results.

ideology using the party of the appointing President, here I use the actual party of the judge. The NLRB makes this information public, as it advertises the judge’s political party on its website. *See supra* note 183. Moreover, it is customary for a judge to reappoint a member from the party of the departing member. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139 n.137 (2000) (“By tradition, two of the five seats on the NLRB have been reserved for individuals who are not members of the President’s party.”). President Clinton, for instance, appointed two Republicans to the Board. Turner, *supra* note 8, at 74.

186. *See* David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438, 450 (2004) (setting forth scores).

187. Nixon bases his scores on the ideology of the “pivotal veto override legislator” at the time of appointment. *Id.* at 450 tbl.1. Use of this measure helps avoid the endogeneity problem of using votes to measure attitudes.

188. Some scholars, especially those in political science, prefer using this alternative way of measuring ideology. *See, e.g.*, Sisk & Heise, *supra* note 117, at 1215.

Figure 10

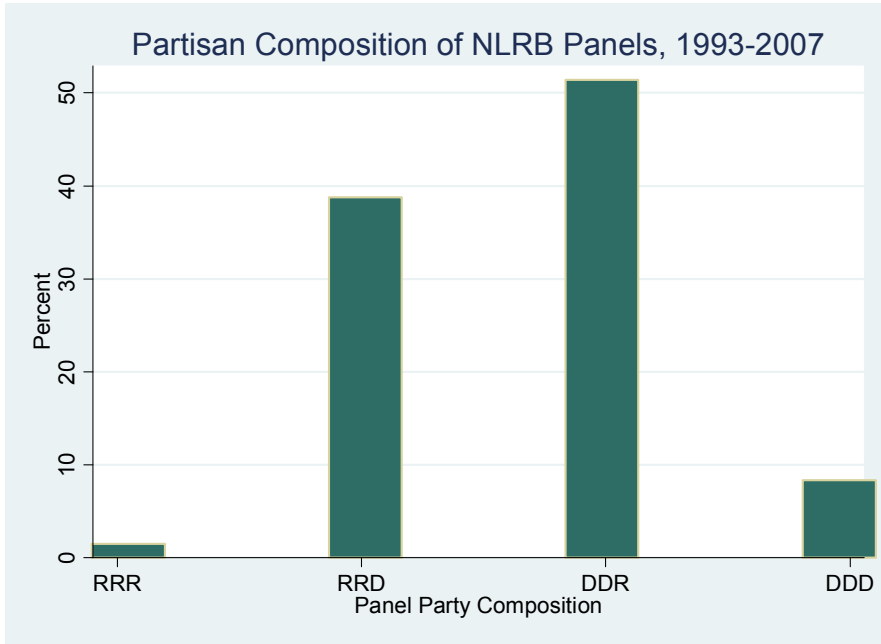
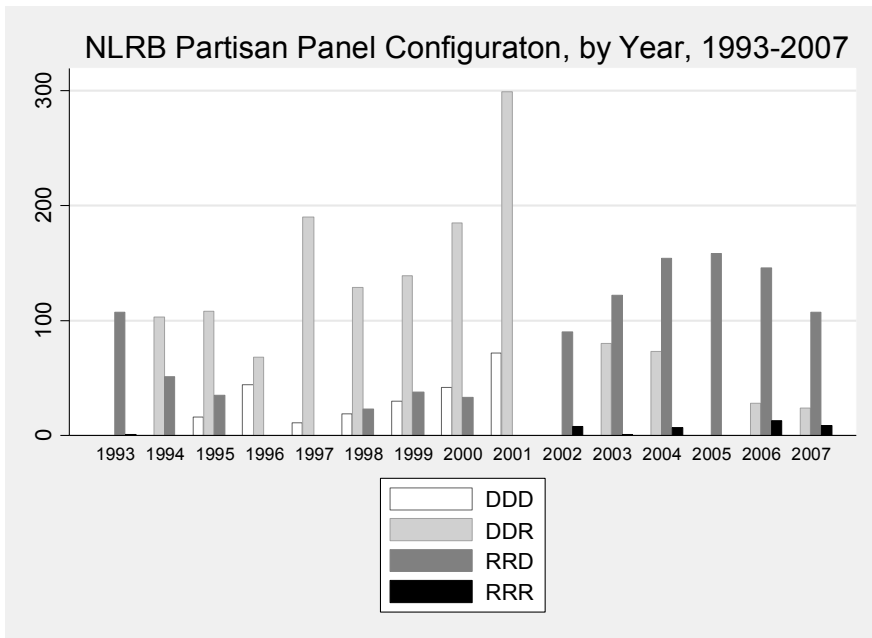


Figure 11



2. Political Variables

President. The ideology of the presidential administration could impact case outcomes. Presidents make appointments to the Board and can choose the chair.¹⁸⁹ In addition, the President can use the resources of the Office of Management and Budget to monitor the Board's activities and to influence the Agency's budget.¹⁹⁰ Moe found that the President's party is the most important explanation variable of the Board's propensity to rule in favor of labor.¹⁹¹ NLRB appointees serve five-year terms, and because of the unwritten norm that presidents reappoint members of the same party, Republican presidents often appoint Democrats to the Board and vice versa.¹⁹² As such, Republican Board members might moderate their views in advance of an upcoming election. I account for presidential administration by coding "1" for "Clinton" and 0 for Bush II.¹⁹³

Congress. The composition of Congress could impact how the NLRB rules. Indeed, studies of other federal agencies show that Congress' acts have a measurable impact on agency performance.¹⁹⁴ The congressional committee serves as a "gatekeeper" for when the legislature will hold hearings on an agency or take other actions.¹⁹⁵ Congress also holds the purse strings on the NLRB and can amend or repeal its governing statute.¹⁹⁶ Moreover, particularly in the NLRB's early years, Congress often held hearings in response to what it perceived as unsuitable adjudications at the NLRB.¹⁹⁷

189. 29 U.S.C. § 153(a) (2012).

190. See, e.g., Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 614 (1989) (noting role of Office of Management and Budget in approving budget requests for independent agencies).

191. Moe, *supra* note 8, at 1110. However, Moe found one exception to this pattern: inflation had a more important impact during the Nixon years than presidential party. *Id.*

192. See Breger & Edles, *supra* note 185, at 1139 n.137. For instance, President Clinton appointed Republicans to the Board to replace departing Republicans. Turner, *supra* note 8, at 74 (setting forth in Appendix the party identifications of all Board members).

193. In other specifications, I also employed Poole & Rosenthal's presidential NOMINATE scores. See KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997). These scores fall on a continuum from -1 to 1 and are directly comparable to the NOMINATE scores I used to measure congressional influence. See *id.* at 5-6, 11-15.

194. See, e.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247-48 (1987) (discussing Congress' role as principal in an agency relationship); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 151-58 (1984) (analyzing congressional influence over the Securities and Exchange Commission).

195. See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 89 (2011).

196. See William H. Hardie III, *The Independent Agency After Bowsher v. Synar – Alive and Kicking*, 40 VAND. L. REV. 903, 920 (1987).

197. Flynn, *supra* note 14, at 1368-1377.

Consistent with other scholars, I use Poole & Rosenthal's NOMINATE scores to measure the ideology of Congress at the time of the Board decision.¹⁹⁸ Following their example, I compiled the NOMINATE scores of the median member of both the House and Senate committees that oversee the NLRB.¹⁹⁹ Agencies might be more responsive to some parts of Congress than others, as members of the relevant oversight subcommittee and its chairman exert far more influence on the agency's day-to-day operations than a congressperson not on such a committee. During the time period under study, the ideology of the relevant House oversight committee shifted from being fairly liberal at the beginning of the Clinton administration to being much more conservative by the Bush II administration's end. The 1994 midterm elections moved the median ideology to be much more conservative and in the years since, the median ideology has grown more conservative with each midterm election during the Bush administration. In the Senate, ideology scores have fluctuated more.

Although some scholars have found that Congress impacts the NLRB's voting,²⁰⁰ the Agency's adjudications are unlikely to change in tune with partisan shifts in Congress. As a practical matter, Congress rarely exercises "control" over an agency. Congress hardly ever holds hearings anymore on the NLRB, and when Congress does hold hearings, they typically concern the Board's workload as opposed to its policy.²⁰¹ Congress has essentially adopted a stance of "conscious inaction" with respect to labor policy.²⁰² In alternative specifications, I used a dummy variable to capture shifts in control of congressional control. For instance, during this time frame, House control shifted with the 1994 election, and Senate control shifted several times, as previously indicated. This alternative coding of the variable did not impact the results.

Judicial. The composition of the reviewing appellate court could impact how the NLRB will rule. Since Board decisions can be directly appealed to the relevant circuit court of appeals, it may be the case that the circuit courts

198. See POOLE & ROSENTHAL, *supra* note 193, at 12-30; Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 561 (noting use of Poole and Rosenthal's presidential common space scores). Other scholars used Americans for Democratic Action scores or the AFL-CIO's COPE scores. See, e.g., Moe, *supra* note 8, at 1100 (using Americans for Democratic Action scores); Cooke et al., *supra* note 8, at 248 (using AFL-CIO C.O.P.E. scores). Use of the NOMINATE scores allows for better comparisons between variables.

199. In the House, the Education and Workforce Committee oversees the NLRB, while in the Senate, the Health, Education, Labor and Pensions Committee oversees the NLRB. In an alternative specification, I use the NOMINATE scores of the relevant subcommittee that oversees the actions of the NLRB instead of the committee. There are no discernible differences in the results. I also employed a specification where I simply used the NOMINATE score for Congress in general at the time of the Board decision.

200. See Moe, *supra* note 8, at 1107, 1109 (finding that the Board's propensity to rule in favor of labor is influenced by the liberalness of congressional oversight committees).

201. *Id.* at 1101.

202. Brudney, *supra* note 36, at 227-30.

influence how the NLRB will rule prospectively. For example, the Board may be more likely to uphold a liberal ALJ decision if the Board knows its own decision will be reviewed in a liberal circuit (e.g., Ninth Circuit) as opposed to a conservative circuit (e.g., Fifth Circuit). Taratoot found that the ideology score of the relevant reviewing court impacted how the Board will rule.²⁰³ Moe too found similar results and noted that courts can have a “potent” power in nullifying or altering Board decisions.²⁰⁴ Similar to Taratoot, I used judicial common space scores (comparable to the NOMINATE scores discussed above) calculated on the basis of state congressional delegation of the President’s party consisting of the median ideology of the relevant court of appeals in the region from which the case emanated.²⁰⁵

Yet, as with Congress, there are a few reasons why it is unlikely that the NLRB affirmatively considers the ideology of the courts in deciding how they will rule. The NLRB would have to be quite knowledgeable about the appellate courts. It would have to not only know in which appellate court the case would be heard, but also have a sense of the ideology of the judges on that court. With respect to the first proposition, a party appealing an NLRB case has a choice of forum: they can appeal to the D.C. Circuit or to the respective regional courts of appeals where the conduct arose.²⁰⁶ This venue uncertainty makes it difficult to know *a priori* what circuit would likely hear the case at a subsequent time. Moreover, it is generally the case, depending on the circuit, that randomly assigned panels hear circuit court cases.²⁰⁷ Thus, it would be difficult (if not impossible) to know in advance the ideology of the prospective panel and how that ideology would affect the case’s outcome. Further, only about 1% of the NLRB’s decisions are appealed.²⁰⁸ The NLRB has also embraced an affirmative policy of nonacquiescence to the federal circuit courts: the Agency has explicitly refused to follow precedent from

203. Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 567.

204. Moe, *supra* note 8, at 1101.

205. See Michael W. Giles et al., Research Note, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001) (calculating common space scores for appellate judges “for the state congressional delegation of the President’s party in the year of the judge’s appointment”). Similar to the Poole & Rosenthal scores, judicial scores ranges from -1 for most liberal to +1 for most conservative. These scores are highly correlated with the party of the appointing President (.825). See POOLE & ROSENTHAL, *supra* note 193, at 5-6.

206. Losing parties can seek judicial review of an adverse Board decision in the federal court where they can petition for relief or seek enforcement of a Board order. 29 U.S.C. § 160(e)-(f) (2012). The General Counsel can also seek enforcement of a Board order. *Id.* Parties can file appeals “wherein such person resides or conducts business” or in the D.C. Circuit. *Id.* § 160(f).

207. Michael Hasdey, *Ending the Reign of Slot Machine Justice*, 57 N.Y.U. ANN. SURV. AM. L. 291, 291 (2000). This assumption has been called into question. See Adam E. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 1 (2015) (“Our results provide evidence of nonrandomness in the federal courts of appeals.”).

208. Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 426 n.165 (1995).

circuit courts contrary to NLRB precedent.²⁰⁹ With these various factors in mind, it would be quite surprising if circuit courts' ideologies turned out to be a statistically significant variable in predicting the tone of NLRB decisions.²¹⁰

3. *Economic Variables*

Unemployment Rate. The NLRB's decisions can echo through the economy, and the NLRB may also react to changes in the wider economic environment. Although some scholars have found the unemployment rate to coincide with votes for labor, others have found the opposite.²¹¹ Moreover, some scholars have suggested that unions are less active during periods of high unemployment.²¹² I gathered information on the annual unemployment rate at the time of the Board decision from the U.S. Department of Labor's Bureau of Labor Statistics.²¹³

Rate of Inflation.²¹⁴ To measure inflation, I use the annual consumer price index ("CPI") reported by the Labor Department. As with

209. Brudney, *supra* note 36, at 237-38. The NLRB claims it follows this policy so as to ensure uniform application of law throughout the country. *Id.* at 238. The NLRB also thinks itself to be superior to other bodies in interpreting the labor law since it has developed expertise on the issue. *Id.* Furthermore, the NLRB contends that since losing litigants have a choice of venue it is impossible for the NLRB to successfully anticipate in advance how the appellate court will likely rule. *Id.* For more on the NLRB's nonacquiescence positions, see Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639 (1991); see also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 705-712 (1989).

210. In an alternative specification, I also employed the ideology of the United States Supreme Court at the time of the Board decision. It would be quite surprising for the ideology of the Supreme Court to have a downstream impact on the tone of the NLRB's decisions for the simple reason that Supreme Court review is so remote. Moreover, the Supreme Court will rarely hear direct appeals from the appellate courts on NLRB cases that do not also involve broader questions concerning the administrative state generally. See Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FLA. INT'L L. REV. 437, 450 (2010). As such, it is not surprising that the Supreme Court's ideology appears to have no bearing on NLRB decisions.

211. See, e.g., Cooke et al., *supra* note 8, at 252 (finding that unemployment influences the propensity of the Board members ruling in favor of labor in complex cases); Moe, *supra* note 8, at 1109 (higher unemployment leads to more pro-labor Board decisions). *But see* Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 567 (finding inflation not to be statistically significant).

212. See Douglas A. Hibbs, *Industrial Conflict in Advanced Industrial Societies*, 71 AM. POL. SCI. REV. 1033, 1057 (1976); Moe, *supra* note 8, at 1103.

213. See DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, www.bls.gov/ces (last visited Sept. 15, 2015). In alternative specifications, I include lags for the economic variables. I also tried using the change in the unemployment rate from the time of the ALJ decision.

214. Others look at other economic variables such as the number of strike days. See Roomkin, *supra* note 8, at 250.

unemployment, scholars have reached differing conclusions on the impact that inflation has on Board outcomes.²¹⁵

4. Case-Specific Variables

Ideological tone of ALJ Decision. I coded, and confirmed with the Agency databases, the tone of the ALJ decision in the same way as I did for the Board decision, coding “1” if the decision was pro-labor and 0 otherwise. If the ALJ ruling affirmed the Regional Officer’s decision in whole or in part, I awarded a “1.” The coding becomes difficult because sometimes the ALJ will affirm parts and dismiss parts, and sometimes, all or only part of the Regional Officer’s decision will be appealed. Accordingly, I tried alternative specifications where I looked at the split cases to discern if the case is more or less pro-labor. Controlling for the ALJ decision in this way is important because the Board is largely constrained by the ALJ’s decision.²¹⁶

Case Mix. Selection effects may also be at work in Board decisions. Litigants may behave strategically in response to Board behavior and adjust their filing behavior accordingly.²¹⁷ According to the famous Priest-Klein model, if parties have perfect information, 50% of cases would be affirmances and 50% would be reversals because parties would settle to avoid other possibilities.²¹⁸ Pro-labor litigants such as labor unions may believe that a Democratic Board will be more likely to issue a favorable ruling than a Republican Board, and will thus wait to bring charges if it appears likely that the Board will soon tilt.²¹⁹ Therefore, labor unions may bring more cases when the probability of having a Democratic Board is the greatest.²²⁰ Litigants may also use the NLRB for “self-serving purposes”: to achieve delay in a union election, to commence negotiations with a union, or to simply harass the opponent.²²¹

There also may be a “feedback effect” at work. In his study of the NLRB, Moe found that the percent of labor-filed cases increases in line with both the regional staff’s filtering decisions and the Board’s formal decisions.²²² To

215. Compare Moe, *supra* note 8, at 1109 (finding that lower inflation corresponds with more pro-labor Board decisions) with Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 567 (finding inflation to not be statistically significant).

216. See Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 555-56.

217. See Roomkin, *supra* note 8, at 250 (suggesting “a positive relationship between the demand for Board intervention and the likelihood of a charging party winning its case”).

218. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984).

219. See Roomkin, *supra* note 8, at 254. Roomkin, however, found that while unions may be more likely to file cases under Democratic administrations, they were no more likely to win them. See *id.*

220. *Id.* at 254-56.

221. *Id.* at 249.

222. Moe, *supra* note 8, at 1113. The number of cases is also negatively related to unemployment and positively related to inflation. *Id.* at 1109. Union membership also influences constituent behavior with it being positively related to the propensity of labor to file cases. *Id.* at 1113-14. Nonetheless, while

understand this, it is important to explain how cases are filed at the NLRB, as noted in Part II.B.i. and detailed in Figure 1, and how each part of the process influences what cases are heard.²²³ Litigants may alter their behavior in response to shifting legal rules, which may in turn affect the types of cases coming before the Board.²²⁴ That is, shifting legal circumstance may transform the behavior of litigants and the types of cases heard by the Board. As Moe argues, “[a]n exogenously caused change in any one component would reverberate through the whole system, causing a whole series of adjustments in all three components as they mutually adapt.”²²⁵ For instance, if the Board moves decisions in a pro-labor direction, unions may file more cases and the regional board staff may adapt to both constituent filing decisions and Board decisions.²²⁶ This can lead regional staff to side more with labor initially; however, if the newly filed cases are less meritorious, then this may ultimately bring down the overall rate of pro-labor decisions by regional staff.²²⁷ If one assessed Board behavior by looking at its propensity to favor labor over industry, we would then expect to see the Board move in a pro-labor direction followed by a set of “moderating adjustments” in response to changes in the case mix.²²⁸

To measure case mix, I calculate the rate by which employers file exceptions to ALJ cases as a percent of all cases. Through the period under study here, employers filed exceptions in 78% of all cases, and in 84% of all CA cases filed against employers. There are some interesting variations to this pattern, however. For instance, in 2002 employers filed exceptions in only 76% in CA cases—a decline of 8% from the average of 84% for the entire period under study. This decreased number of employer exceptions relative to the number of overall cases could be explained by possible uncertainty at the time on how the Board under Bush II would rule. There might have been more settlements or withdrawals of cases during this period as well. Because there is approximately a two-year lag (a median of 559 days

Moe finds economic factors to influence constituent filing behavior, he contends that the probabilities of success at both the regional and the Board level motivate propensity to file more so than economic conditions. *Id.* at 1114.

223. See *supra* Part II.B.i & Figure 1.

224. Moe, *supra* note 8, at 1098; see also Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 337-38 (1990) (discussing selection effects); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman’s Mistakes*, 14 J. LEGAL STUD. 215, 243 (1985) (same).

225. Moe, *supra* note 8, at 1098. Moe also notes that there could also be a “mutually adaptive adjustment” between political actors and the NLRB. *Id.* at 1100. However, he said it was reasonable to assume that the actions of political authorities are exogenous. *Id.*

226. Indeed, Moe found empirical support for the notion that constituent filing behavior and Board decisions explained nearly all the variance in staff filtering decisions. *Id.* at 1111-12. Moreover, constituent filing decisions were also strongly related to staff filtering decisions and Board decisions. *Id.* at 1112-13.

227. *Id.* at 1099.

228. *Id.* at 1099-1100.

in 2008, for instance) between the ALJ decision and the Board decision, much of the time lag occurs between when the ALJ hears the case and when the Board issues its decision, with the time lag being a median of 269 days in 2008 and an even longer 420 days in 2003.²²⁹ ALJs first heard many of the cases decided in 2002 back in 2000 or slightly before. Although there may be alternative ways to construct this variable, the percentage of total cases in which employers file exceptions likely serves as a good guide to control for some of these trends regarding case mix.²³⁰ The highest rate of exceptions occurred during the latter stages of the Bush presidency, once it was firmly established that the Board would be Republican-dominated.

However, it is unlikely that selection effects significantly impact the results, contrary to what one may think on first blush. While the Board's propensity to decide for or against labor has no doubt fluctuated over time as it responds to pressures from labor and the wider political and economic environments, there is really no long-term trend in either direction in the data under analysis in this Article. In his earlier study of the NLRB, Moe similarly found that the Board's propensity to decide cases in favor of labor had a historical mean of .5, meaning that notwithstanding any fluctuations, the Board has overall been equally likely to rule for an employer or a union.²³¹ Moreover, while changes in presidential administration motivate shifts in the Board's propensity to rule in favor of labor, an equilibrating mechanism eventually takes hold and cases revert to the mean after an initial shift.²³² Further, as recent research by Daniel Klerman and Alex Lee indicates, the selection issues may not be as troublesome as earlier scholars predicted.²³³ Specifically, they find that while selection effects may mute results with result to the plaintiff win rate, it does not necessarily mean that the win rate is meaningless.²³⁴

Other factors may also reduce the opportunity for a party to behave too strategically. One could argue that the results could be biased because parties may choose to settle once they learn of the panel that will hear the case.²³⁵ However, scholars studying this issue in circuit courts of appeals have found that early announcement of the panel did not appreciably affect settlement

229. Estreicher, *supra* note 157, at 372; *see also* 73 NLRB ANN. REP. 138 (2008); 68 NLRB ANN. REP. 199 (2003).

230. In addition, in other iterations of the model not reported here, I lag this variable by two years.

231. Moe, *supra* note 8, at 1106.

232. *Id.* at 1106-07.

233. Klerman & Lee, *supra* note 146, at 209 (observing that "even taking selection effects into account, one may be able to make valid inferences from the percentage of plaintiff trial victories, because selection effects are partial").

234. *Id.*

235. R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding?: An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1175 (2004).

behavior.²³⁶ Moreover, as noted above, the time lag between the ALJ decision and the NLRB decision can be many years.²³⁷ The party filing an unfair labor practice dispute has no way of anticipating the composition of the Board years down the road when the Board will hear the case, especially if there is an intervening presidential election. Parties will only learn the actual panel composition shortly before the hearing.²³⁸ At that point, the marginal cost of an appeal is relatively low.²³⁹ Furthermore, at many points in the process, the general ideological tendency of the Board is no secret; during a Democratic administration, there is a greater chance you will get a majority-Democratic Board, while during a Republican administration, the odds change. Consequently, the panel announcement may not offer any additional useful information because the general ideological tendency of the Board may be known even at the time of the ALJ decision. The information is also available to both sides, so while disclosure may prompt one party to want to settle, it can equally compel the other party to harden its stance to have the case heard by a friendly Board.²⁴⁰ Moreover, many of the parties in NLRB proceedings are repeat litigants, and thus may have less incentive to settle because they may want the Board to issue a favorable legal ruling applicable to future cases.²⁴¹ Taken together, the foregoing factors underscore the impracticality of strategically bringing or withholding charges before the Board based on prospective assumptions of panel composition. Such strategic behavior by litigants is therefore unlikely to be a factor in panel outcomes.

To ensure that the mix of cases is fairly consistent across panels and years, I regressed case characteristics—such as statutory section, number of charges, region of the country, tone of ALJ decision, and tone of Board decision—on panel type and found no statistically significant differences among panels. I did a similar analysis with respect to years and found no discernible differences to indicate that case composition differs measurably from year to year. All told, the types of cases that the Board hears are fairly consistent from year to year.

Number of Charges. I coded each case to reflect the number of charges against the charged party. The number of charges could influence Board

236. See Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 B.Y.U. L. REV. 55, 60-61 (2007).

237. See *supra* sources cited in and text accompanying note 229.

238. Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 688-89 (2000).

239. See Meehan Rasch, *Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 ARK. L. REV. 249, 264 (2009) (“[E]motion-laden, nonprevailing parties have little to lose by appealing, especially given the minimal court costs associated with taking an appeal.”); Yung, *supra* note 10, *Judged by the Company You Keep*, at 1198.

240. For other reasons why early disclosure may not prompt settlement, see Jordan, *supra* note 236, at 78-91.

241. See Revesz, *supra* note 238, at 700-01.

decisions in one of two ways. First, the number of charges could be positively related to liberal Board outcomes, because the probability of a decision against the respondent may increase when the number of charges increases.²⁴² Second, there might also be diminishing returns with increased charges, making more charges redundant to the results.²⁴³ The number of charges also would likely contribute to an increased probability that the Board will split the decision (rule in favor of labor on some charges and against labor on others).²⁴⁴

Type of Case. I separately analyzed CA (against employer) and CB/CC/CD cases (against unions), and I separated out the analysis for CA cases based on the portion of the statute the employer is accused of violating section 8(a)(1), 8(a)(2), 8(a)(3), 8(a)(4) or 8(a)(5).²⁴⁵ Hypothetically, as discussed in Part I.C, it could be easier for the Board to inject partisanship into the decision-making process in cases where the legal standard is more nebulous. Even if the Board wanted to find for a particular party in these cases, as a legal matter, it would be difficult to do anything other than affirm the ALJ decision. By contrast, section 8(a)(5) cases involve the looser standard of deciding whether or not the employer (or union in CB et al. cases) acted in “good faith.”²⁴⁶ While the underlying factual issues of such a “good faith” determination rests on credibility grounds, the ultimate weighing of those facts and the assessment of whether the totality of those facts constitute “good faith” offers the opportunity for ideological attitudes or partisan decision-making to influence the process to a greater degree. Thus, taking into account the specific statutory sections challenged lends greater credence to the robustness of the results.

Region. The region where the case arises could also impact the results, with the Board perhaps deciding cases differently across regions. Cases hailing from the South, for instance, may be less pro-labor because the South, as a whole, is more conservative.²⁴⁷ Moreover, the Board may think more highly of the work from one region and thus may be more likely to affirm decisions of ALJs from that region.²⁴⁸ I coded this as a dummy variable, with “1” indicating that a case arose from the South.²⁴⁹

242. See Taratoot, *Review of Administrative Law Judge Decisions*, *supra* note 8, at 563.

243. See *id.*

244. See *id.* at 564.

245. There were only a few cases with challenges under section 8(a)(2) or 8(a)(4).

246. See Brudney et al., *supra* note 83, at 1707.

247. See, e.g., Ramji-Nogales et al., *supra* note 11, at 363 (finding that the South is more conservative than other regions in adjudicating asylum cases).

248. For more discussion of how NLRB cases are analyzed at the regional level, see, for example, Diane E. Schmidt, *The Presidential Appointment Process, Task Environment Pressures, and Regional Office Case Processing*, 48 POL. RES. Q. 381 (1995).

249. The ALJs hear cases out of four regions: Atlanta, Washington D.C., San Francisco and New York. See NATIONAL LABOR RELATIONS BOARD, REGIONAL OFFICES, www.nlr.gov/who-we-are/regional-offices (last visited Aug. 15, 2016). In alternative specifications, I included dummy variables

Year Fixed Effects. The status of labor in American society remained relatively stable throughout the sixteen-year period under study. Congress passed no major laws, and there were no significant changes in the public's attitude toward labor or labor unions. There could, however, be some uncaptured time trend not picked up by the other variables that might explain the Board's voting behavior. I included year dummy variables for each year; in another specification, I included a time trend variable. I also separately analyzed pre- and post-2002 cases in another specification as I detail later.

E. Statistical Results

The results of the statistical analysis are presented in Tables 1 and 2 using Coding Styles 1 and 2 respectively. In Table 1, in the models containing CA cases, the coefficients on RRD and RRR are negative and statistically significant at the 99% confidence level, indicating that the indicated panels are all less likely to grant relief than all-Democratic and mixed-Democratic panels. The coefficient for the DDR variable is also statistically significant at the 95% confidence level. For the CB case model, only the RRD variable is statistically significant. Most striking is the difference between panel types when looking at CA cases. Figure 12 shows the predicted probabilities for CA cases. Holding all other variables at their mean, an all-Democratic panel will grant relief to the pro-labor litigant 90% of the time. Substituting a Republican in for one Democrat changes this figure to 84%. The figures decrease for each additional Republican added to the panel: when the panel has only one Democrat instead of two, the predicted probability of a pro-labor decision is 75%; this number declines to 60% when the panel is all-Republican. Panel effects are even more stark using Coding Style 2, where there is nearly a 50% difference between all-Democratic and all-Republican panels. Moreover, there is a large difference between RRD and RRR panels, with RRD panels having a 69% probability of voting in favor of labor, while RRR panels vote in favor of labor just 31% of the time. Furthermore, DDR panels are not different statistically from DDD panels using the more legalistic Coding Style 2. In addition, while the tone of the ALJ decision is the most substantively important variable predicting labor outcomes at the Board, the panel configuration still persists as a statistically significant variable in regression models irrespective of the coding style. In all, irrespective of legal considerations, panel type matters. These results are the same even if one restricts the analysis to just CA or CB cases, or to cases involving only certain statutory violations.²⁵⁰

for each of the aforementioned areas, using Washington D.C. as the reference category. The results did not differ.

250. The results are also robust to different configurations of the standard errors.

Table 1: Logit Regression, Coding Style 1: Predicting Ideology of Board Outcomes

	(1) All Cases	(2) CA Cases	(3) CB Cases
DDR²⁵¹	-1.242** (0.405)	-1.204** (0.460)	-1.126 (0.790)
RRD	-2.541*** (0.439)	-2.505*** (0.493)	-2.430** (0.831)
RRR	-3.623*** (0.670)	-3.455*** (0.738)	
Clinton	0.0961 (0.337)	0.144 (0.355)	-0.508 (0.964)
Congress	-1.293 (0.836)	-1.123 (1.007)	-0.788 (1.997)
Court	0.385 (0.386)	0.232 (0.429)	0.909 (0.958)
ALJ Pro-Lab.	4.515*** (0.187)	4.603*** (0.208)	3.826*** (0.493)
Inflation²⁵²	0.00903 (0.0140)	-0.00131 (0.0155)	0.0350 (0.0397)
Case Mix	0.0239 (0.0199)	0.0569* (0.0224)	-0.104 (0.0541)
# of cases	-0.000523 (0.0201)	0.00319 (0.0216)	0.0221 (0.0532)
S8a1	0.939*** (0.231)	0.365 (0.366)	
S8a2	0.716 (0.468)	0.708 (0.550)	
S8a3	-0.113 (0.173)	-0.152 (0.187)	
S8a4	-0.208 (0.312)	-0.169 (0.351)	
S8a5	0.127 (0.179)	0.0385 (0.190)	
South	-0.246 (0.236)	-0.243 (0.260)	-0.111 (0.536)
_cons	-3.842 (2.419)	-4.271 (2.590)	2.412 (6.455)
<i>N</i>	2675	2461	214
<i>Pseudo R2</i>	0.5034	0.4625	0.3928

Robust standard errors in parentheses. Time fixed effects not shown for brevity.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

251. DDD panels served as the reference category.

252. In other specifications, I alternatively substituted in unemployment rate. Due to multicollinearity between the variables, I rejected using both variables in the same analysis, though when I included both variables, neither were significant.

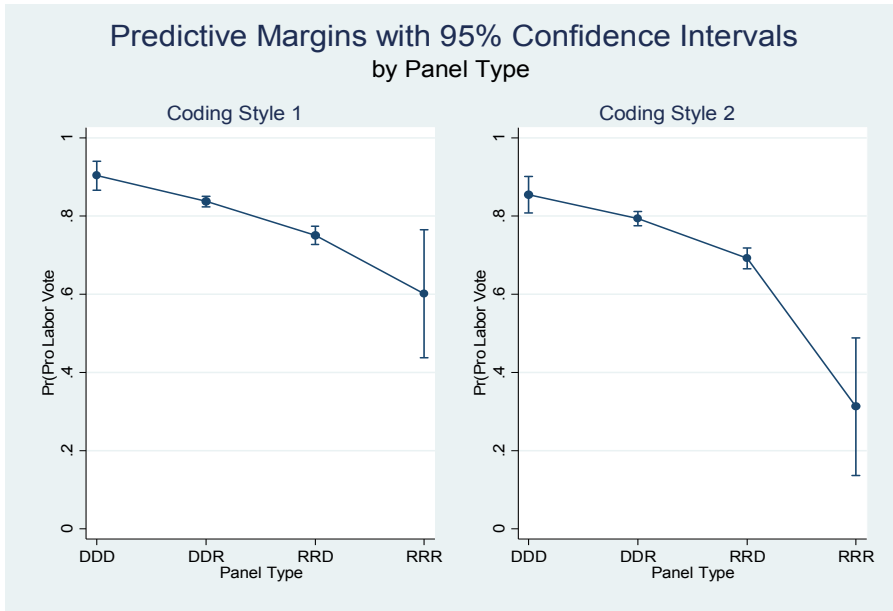
Table 2: Logit Regression, Coding Style 2: Predicting Ideology of Board Outcomes

	(1) All Cases	(2) CA Cases	(3) CB Cases
DDR ²⁵³	-0.685* (0.316)	-0.603 (0.354)	-0.813 (0.684)
RRD	-1.552*** (0.333)	-1.467*** (0.369)	-1.624* (0.721)
RRR	-3.531*** (0.573)	-3.371*** (0.610)	
Clinton	-0.208 (0.249)	-0.214 (0.262)	-0.165 (0.762)
Congress	-0.454 (0.684)	-0.364 (0.799)	-0.0404 (2.245)
Court	0.0538 (0.268)	-0.128 (0.283)	1.240 (0.843)
ALJ Pro-Lab.	3.406*** (0.156)	3.484*** (0.175)	2.884*** (0.431)
Inflation	-0.0208* (0.0106)	-0.0306* (0.0116)	0.0332 (0.0329)
Case Mix	-0.00321 (0.0153)	0.0174 (0.0173)	-0.0970* (0.0475)
# of cases	0.000891 (0.0160)	0.00575 (0.0173)	0.0139 (0.0444)
S8a1	0.497* (0.187)	0.220 (0.267)	
S8a2	0.0453 (0.436)	0.00141 (0.477)	
S8a3	-0.163 (0.133)	-0.174 (0.141)	
S8a4	0.0295 (0.287)	0.0627 (0.309)	
S8a5	0.117 (0.135)	0.0750 (0.144)	
South	-0.0926 (0.167)	-0.0209 (0.178)	-0.624 (0.496)
_cons	3.373 (1.791)	3.509 (1.865)	1.988 (5.300)
<i>N</i>	2675	2461	214
<i>Pseudo R2</i>	0.3130	0.2721	0.2605

Robust standard errors in parentheses. Time fixed effects not shown for brevity.

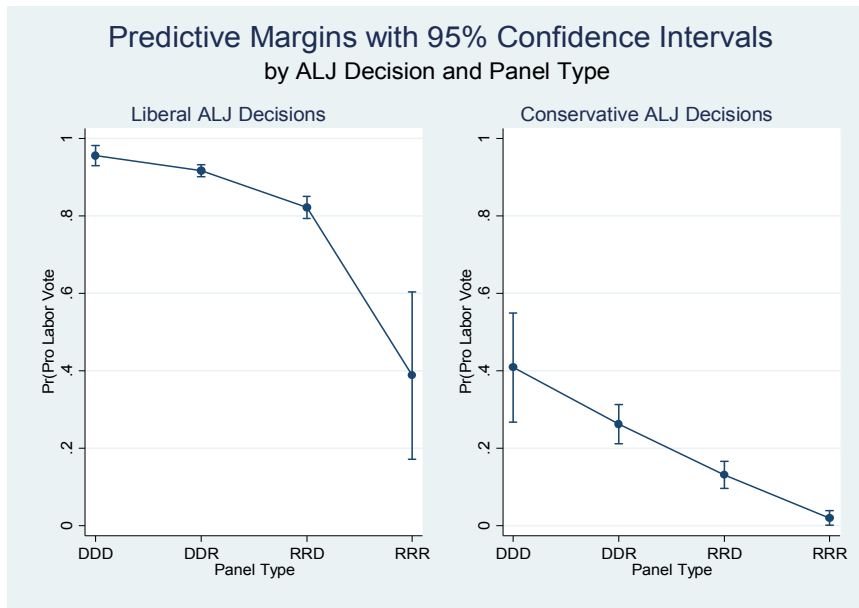
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

²⁵³ DDD panels served as the reference category.

Figure 12

The results also persist looking at the data broke down by the ALJ decision. As shown in Figure 13 and looking at CA cases, holding all variables at the mean and assuming that the ALJ ruled in favor of labor, all-Democratic panels vote in favor of labor 96% of the time whereas all-Republican panels vote in labor's favor only 40% of the time. If the ALJ decision is conservative, panel effects are clear between Democratic-majority and Republican-majority panels. Republican-majority panels have almost a 0% probability of voting in labor's favor in these circumstances, whereas an all-Democratic panel will vote opposite to the ALJ in a liberal direction 40% of the time. Likewise, there are noticeable differences with mixed panels, with DDR panels having a predicted probability of 26% and RRD panels having a figure 13% voting in favor of labor when the ALJ rules in a pro-industry direction.

Figure 13



To confirm my results, I also exploited the fact that cases are supposed to be randomly assigned in order to do a simple test using Board composition fixed effects. During the study period, the Board's composition usually changed every few months as new members were added to the Board or as appointees waited to be confirmed, sitting as recess appointments in the interim. Because cases at the Board are generally randomly assigned, one can thus do a simple test, similar to a difference-in-differences test, to analyze the difference between a treatment (which in this case is whether or not the Board had additional Republican members) and a control (the absence of Republican members).²⁵⁴ Due to the dichotomous nature of the problem, I did simple logit regressions using Board composition fixed effects as an additional covariate to account for the period in time in which the Board heard each case. There were twenty-nine different combinations of the Board during this time frame. I compared all of the different iterations of the Board (DDD v. DDR, DDD v. RRD, DDD v. RRR, DDR v. RRD, RRD v. RRR) to see if the results would differ. In this way, the data is almost like a natural

254. The analyses were conducted using a technique similar to that used by Matthew Hall. See Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMP. LEGAL STUD. 574, 581 (2010) (using natural experiment of random assignment to study decision-making in the courts of appeals); Matthew Hall, *Experimental Justice: Random Judicial Assignment and the Partisan Process of Supreme Court Review*, 37 AM. POL. RES. 195, 206 (2009) (exploiting random assignment to assess how partisanship of judges impacts whether the Supreme Court will hear a case and overturn the lower court decision).

experiment, with the only difference between the cases being the partisan composition of the panel hearing the case. This approach has the benefit of being able to account for endogeneity in the data (to the extent any exists) because under an assumption of random assignments, we can assume that case characteristics among the panels would be similar across panel type, with the only difference between panels being the “treatment” of panel type. Table 3 and Figure 14 displays the results for CA cases. The results using this alternative system comported with the earlier analysis.

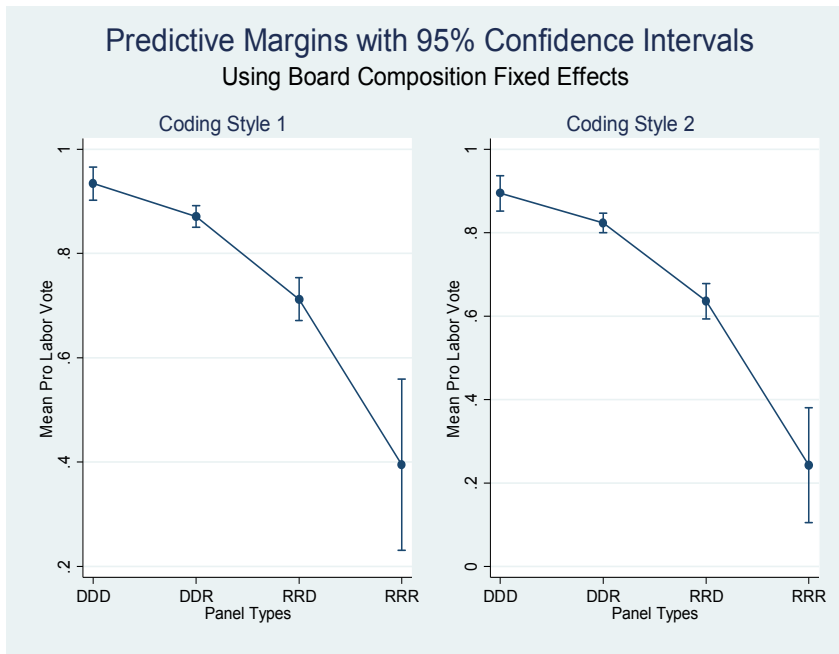
Table 3: Logit Regression Using Board Composition Fixed Effect Randomization²⁵⁵

	(1)	(2)
	Coding Style 1	Coding Style 2
DDR	-0.743** (-2.87)	-0.597** (-2.64)
RRD	-1.742*** (-5.81)	-1.577*** (-5.96)
RRR	-3.074*** (-6.72)	-3.273*** (-7.08)
_cons	3.806*** (3.31)	3.745** (3.22)
N	2675	2675

t statistics in parentheses; fixed effects for Board composition eliminated for brevity.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

255. I also did this analysis using other covariates (the other independent variables used in the analysis for Tables 1 and 2), and came to the same results.

Figure 14

As noted in Part II.D.iv, the analysis above may be tainted by the fact that the propensity to get a certain panel depends on the specific time frame. Consequently, the analysis may overestimate the effect of panel composition, even though case mix and year fixed effects/time trend are included in the model. To address this potential concern, I redid the analysis separating the Clinton (1993-2001) and Bush II (2002-2007) Boards, for CA cases only.²⁵⁶ The results were the same. In the pre-2002 period dominated by a Democratic Board, panels with at least two Democrats (DDR or DDD panels) ruled for labor about 89% of the time, holding all variables at their means. However, panels with two Republicans (RRD panels) ruled for labor only 79% of the time. As before, the coefficient on the RRD panels is statistically significant, while there is little to no difference between DDD and DDR panels statistically. In the post-2002 period, DDR panels ruled in favor of labor 85% of the time while RRD panels ruled in labor's favor 68%, holding all other variables at their means. The number declines to 31% for all-Republican panels. Adding more Republicans to the panel decreases the propensity to rule in favor of labor irrespective of the time period.

In other specifications not reported here for brevity, I explored distributed lags on some of the right-hand side variables. For some of the data, particularly the economic data, it would be proper to impose a lag of

256. The analysis for all cases and CB-only cases is similar.

one period of time in order to give the Board time to react to changes in economic conditions.²⁵⁷ I also explored interactions between economic conditions, presidents, and Congress, as the impact of economic conditions may vary depending on relevant political actors and their own responses to economic conditions.²⁵⁸ As a final additional robustness measure, I also looked at the data with an alternative dependent variable, breaking the analysis down by Board member vote as opposed to looking at case outcomes as a whole. This alternative specification produces similar results, with a large discrepancy remaining between all-Democratic and all-Republican panels.

The model presented in the prior tables used as its dependent variable a simple dichotomous measure of whether the case favored labor in whole or in part. Such a measure is quite crude, and it could mask significant variation underneath the surface. As noted previously, the NLRB renders a significant number of split decisions, and as such it may be unfair to ascribe partial decisions to always be in favor of labor. To address this effect, I present an alternative model that estimates via ordered logit analysis the NLRB's propensity to vote for or against labor. Given the greater information available from a more fine-tuned selection of data, I wanted to explore whether panel effects persist once the data is looked at in this alternative specification.

In this next iteration of the model, the dependent variable has four levels: (1) pro-labor, (2) leaning labor, (3) leaning industry, and (4) pro-industry. Table 4 above displays the results using an ordered logit regression. I conducted this analysis by both ordinary least squares ("OLS") multinomial logit and found the same results. I did the graphs using only CA cases coded in Coding Style 2. As before, variables such as the ALJ decision influence decision-making. Panel variables are also significant. For instance, looking only at the case outcome decided fully in favor of industry reveals that all-Republican panels have a predicted probability of 36% to vote fully in favor of industry, whereas all-Democratic panels vote this way only 8% of the time. Likewise, all-Democratic panels are more likely to vote entirely in favor of labor, with DDD panels having a predicted probability of 47% of voting entirely in favor of labor with RRR panels voting entirely in favor of labor just 12% of the time. If one looks only at the cases decided partly in favor of labor or industry, panel effects are much less evident; rather, the predicted probabilities for DDR and RRD panel types are virtually indistinguishable.

257. See Moe, *supra* note 8, at 1108.

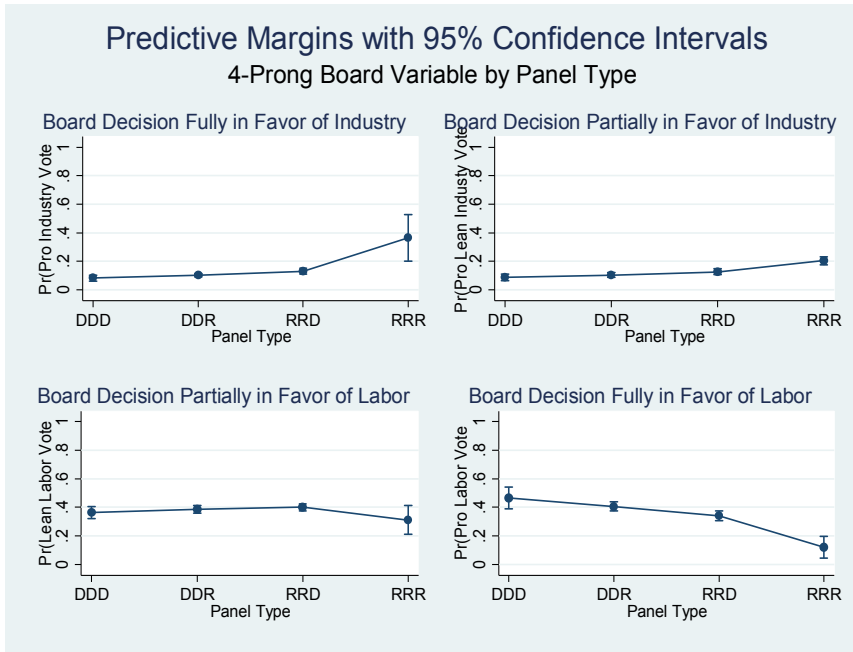
258. See *id.* at 1111.

Table 4: Ordered Logit Analysis Using 4-Prong Dependent Variable

	(1) All Cases	(2) CA Cases	(3) CB Cases
DDR	-0.241 (0.156)	-0.143 (0.156)	-1.029 (0.695)
RRD	-0.526** (0.173)	-0.409* (0.175)	-1.965** (0.722)
RRR	-1.856*** (0.397)	-1.730*** (0.391)	
Clinton	0.0724 (0.161)	0.105 (0.165)	-0.506 (0.734)
Congress	-0.343 (0.439)	-0.395 (0.475)	-0.248 (1.840)
Court	-0.194 (0.178)	-0.337 (0.186)	1.449 (0.794)
Inflation	-0.0122 (0.00671)	-0.0168* (0.00699)	0.0365 (0.0298)
ALJ Pro-Lab.	3.709*** (0.188)	3.777*** (0.223)	3.244*** (0.413)
Case Mix	-0.0100 (0.0102)	-0.000832 (0.0109)	-0.0950 (0.0429)
# of Cases	-0.0178 (0.0089)	0.0185 (0.0105)	0.0179 (0.0097)
S8a1	-0.0661 (0.155)	-0.0657 (0.192)	
S8a2	-0.0202 (0.245)	0.0289 (0.259)	
S8a3	-0.485* (0.0873)	-0.481* (0.0908)	
S8a4	-0.235 (0.163)	-0.247 (0.168)	
S8a5	0.102 (0.0879)	0.0900 (0.0908)	
South	0.0144 (0.110)	0.0707 (0.116)	-0.649 (0.470)
cut1 _cons	-2.649 (1.239)	-2.605 (1.293)	-2.539 (4.854)
cut2 _cons	-1.819 (1.232)	-1.759 (1.286)	-1.651 (4.837)
cut3 _cons	-0.102 (1.229)	0.0534 (1.283)	-1.054 (4.833)
N	2675	2461	214

Robust standard errors in parentheses; year fixed effects omitted for brevity.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Figure 15

The study, of course, has several limitations. First, concentrating merely on votes is overly simplistic. This is particularly true here because so many of the cases under review concerned split decisions. For instance, a Board member may have determined that finding additional violations was unnecessary because such violations would not have affected the remedy. Second, focusing purely on votes risks missing a great deal of information that may be equally important in explaining vote choice. For example, Board members may bargain with each other over how broadly or narrowly to decide cases, or over whether to write a formal opinion at all. In two cases with nearly identical facts, the Board may simply affirm the ALJ decision without writing a formal opinion in one case, but write a detailed precedential opinion in other case. Finally, there may also be more subtle forms of influence.²⁵⁹ Board members sitting on multiple panels that meet the same day may be more or less concerned with some cases than others. It is impossible to speculate the extent to which vote trading could occur. Indeed, how to incorporate “legal” reasoning in a quantitative analysis is something difficult to do in practice, given the realities of how judges make decisions. More work could be done to better “control” for legal doctrine by, for

259. See Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 158 U. PA. L. REV. PENUMBRA 1319, 1345 (noting how judges may vote strategically).

instance, coding decisions with respect to the specific legal issues involved in the case or the standard of review used.

Although I tried alternative specifications to deal with the issue, potential endogeneity is also of concern. As detailed in Part II.D.iv, the NLRB is a part of a moving and mutually adaptive chain of lower and upper level legal actors, each of whom has their own political preferences on how they would like labor policy to lean. How to properly incorporate the interconnecting actors into any statistical model is fraught with difficulty. In nearly all of the regressions, the “tone” of the ALJ decision—whether the ALJ ruled for or against labor—had the most substantively important impact in influencing the Board’s vote. It may be the case, however, that some of the political, economic and case-specific variables in the model in turn predict the ALJ’s propensity to vote in a certain way. As such, the model may underestimate the impact that some of the variables have on Board voting. However, the substantive impact of the findings with respect to partisanship are so strong here that even accounting for these issues would not distract from the general finding that partisanship appears to be motivating Board votes. Disentangling the web of causation is a difficult task. Moreover, potential multicollinearity between the various independent variables could cloud any assessment of the result.

III.

CONCLUSIONS, POLICY PRESCRIPTIONS, AND FUTURE RESEARCH

In this last Part, I offer conclusions, propose reforms, and suggest areas of future research. In Part III.A, I first offer some thoughts on the study itself and what conclusions we can draw from it. In Part III.B, I make a normative argument suggesting possible reforms that might mitigate partisanship at the Board. Finally, in Part III.C, I offer some suggestions for future research.

A. Conclusions

In all, the results of my study suggest that Democrats on panels at the NLRB behave differently than Republicans, and that members’ voting proclivity may very well depend on the party of their co-panelists. Nonetheless, one should be cautious in making too much of these findings. As shown, the effect of partisanship may very well depend on the timeframe under study as well as factors impacting the pool of cases before the Board. While I sought to control those effects,²⁶⁰ making a direct comparison is still difficult because strategic factors could influence what kind of cases the

260. In other specifications, I tried alternative ways of measuring case mix. The results did not change.

Board hears.²⁶¹ Of course, the estimates of partisan ideology could be biased by the omission of variables that perhaps correlate with ideology. However, that risk is relatively low because Board cases are supposed to be randomly assigned, and because I use regression analysis to control for differences in voting rates across time and place. Further, the regressions include controls for various case characteristics to further reduce the risk of omitted variable bias.

Notably, political variables—regarding Congress, the President, and the Court—are insignificant. Time and time again, the most important predictors of how the NLRB will rule is the panel type and ALJ decision. The absence of significance for political variables suggests that politicians do not directly control the actions of the NLRB outside the appointment process. For instance, the NLRB does not appear to become more liberal if the House changes hands from Republican to Democrat, nor does the NLRB appear to be bound by the ideology of the reviewing appellate court. Rather, the impact of partisanship must be seen through the lens of the appointment process. The results in this study show why debates about NLRB appointments are so contentious: we can expect NLRB appointees to act as partisans once on the Board, and this partisanship appears to be magnified if they by chance sit on a panel with other co-partisans. The results concerning political variables were robust to different specifications of the variables.

Importantly, these results differ somewhat from the findings of Barry Weingast and Mark Moran and from others who provided evidence that changes in congressional oversight influence agency action.²⁶² In their seminal article, Weingast and Moran examine the behavior of the Federal Trade Commission (“FTC”) to assess the extent to which Congress dominates the Agency’s decision-making.²⁶³ Building on a model of legislative choice, the authors show how the FTC initiated controversial policies in line with signals received from congressional oversight.²⁶⁴ They conclude that the FTC’s activity—or lack of activity—is “remarkably sensitive” to changes in the composition of congressional oversight committees,²⁶⁵ underscoring the importance of so-called political principals in motivating agency outcomes and aligning agency discretion with political principals in the other branches of government. Others building on Weingast and Moran’s work explain more about the mechanics of political control,

261. Although my findings have been robust with respect to different types of cases (just section 8(a)(1) cases, etc.), I hope to do more fine-grained analysis of case content using a textual analysis program to confirm these results.

262. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

263. See *id.* at 766.

264. *Id.* at 777-79.

265. *Id.* at 793.

emphasizing the role that different controls by Congress can have on agency outcomes.²⁶⁶

Nonetheless, there are several explanations for why this study finds null results concerning the impact of political principals. First, Weingast and Moran studied the FTC's choice of cases, assuming that the Agency avoids controversy by pursuing trivial cases or promotes consumerism by selecting cases aligned with that goal.²⁶⁷ Here, the dependent variable is different; we are actually looking at the content of the decisions, as the NLRB itself has no discretion over whether or not to hear a case once the General Counsel decides to pursue charges.²⁶⁸ The choice of whether to pursue charges and the actual outcome of a case are very different procedural postures laden with different assumptions about congressional control. In particular, as noted previously, the Board has very little choice as a legal matter in many cases.²⁶⁹ For instance, if the case concerns credibility determinations, there is little the Board can do to overturn the ALJ decision.²⁷⁰ Moreover, Weingast and Moran (and other scholars) do not consider how lower-level agency decision makers (such as the ALJ) and subsequent decision-makers (such as the courts) impact cases.²⁷¹ They also do not consider how legalistic factors, such as the procedural posture or the actual statute relied upon, can mediate the extent to which politics dominates decision-making.²⁷² Furthermore, much of the research stemming from the congressional dominance school was conducted in the early 1980s studying data from earlier periods prior to the ideological turn of the Reagan years.²⁷³

What do this study's results say about the way an independent agency should act? The fact that we see Board members behaving differently depending on who is on the panel may very well be how we envisioned the NLRB to operate. The Agency's critics lambast it for its supposed constant switch in doctrine upon the advent of a new presidential administration.²⁷⁴ However, while this may occur to some extent on high-profile cases, for the most part, what is readily apparent from reading almost 3,000 cases is that the vast majority of NLRB cases deal with routine subject matters, such as

266. See, e.g., Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (identifying two oversight techniques used by Congress: police patrol and fire alarm oversight).

267. Weingast & Moran, *supra* note 262, at 777-79.

268. See 29 U.S.C. § 160(c) (2012) (setting forth powers of the Board).

269. See *supra* Part II.B.

270. See *supra* Part II.B and note 91.

271. See Weingast & Moran, *supra* note 262, at 789; Cooke et al., *supra* note 8 (not including ALJ in the regression analysis); Delorme et al., *supra* note 8 (same).

272. See Weingast & Moran, *supra* note 262, at 789.

273. For instance, Weingast and Moran look at the relationship between Congress and the FTC between 1964-1976. *Id.* at 784-88.

274. See *supra* Part I.A.

whether a given set of employees' rights were violated by an employer. Many litigants before the NLRB are individuals protesting allegedly illegal actions of their employers, and the court decisions arising from the NLRB reflect this case pattern. Thus, while there may be some shifts in doctrine on certain high-profile issues, the majority of ordinary employee-employer disputes are handled fairly consistently from year to year. After all, partisanship can only rear its head for certain types of cases; for instance, if the employer appeals the lower court case based wholly on credibility findings, there is little a partisan Board member can do about it.²⁷⁵ Since findings of fact are entitled to deference by the Board, the holding of the ALJ will stand no matter the proclivities of individual Board members.²⁷⁶

Perhaps this is how the Board should work: on the majority of routine cases, legal issues should predominate, but on high-profile policy issues, there should be room for individual Board members to inject their personal opinion into decisions. As presidential appointees, Board members properly reflect the President's agenda. In this way, panel effects may reflect that the system is working as intended.

Although we should expect Board members to reflect the ideology of presidents who appointed them, we should also primarily view the Board as an expert policymaking body. Indeed, there is a constant tension between expertness and democratic accountability in agency design.²⁷⁷ Having the Board members appointed by the President fulfills the aim of holding the Board democratically accountable to the people. However, while democratic accountability is important, so too is ensuring that the Board does not stray too far from of its role as an expert policymaking body.

B. Policy Prescriptions

As I discuss in more detail below, three changes could bring the Board closer to its primary role as an expert policymaking body. First, the Board's rules should be reformed to mandate panel diversity or to at least foreclose DDD or RRR panels from hearing cases. Second, the Board should use more rulemaking to set forth standards that could guide case outcomes. Finally, the agency appointment process should be changed to ensure that fewer partisan members are appointed to the Board. These three changes would do much to ensure that the Board does not swing too far in the direction of politicization.²⁷⁸

275. See *supra* Part II.B.

276. See *supra* Part II.B.

277. For discussion, see, for example, Barkow, *supra* note 103, at 19-26.

278. Some scholars even advance removing the NLRB from being an adjudicator. For example, Zev Eigen and Sandro Garofalo argue that the Board's adjudicatory power should be stripped and transferred to the federal district courts. See Eigen & Garofalo, *supra* note 25, at 1893-98.

1. Mandating Panel Diversity

The Board would be a less political body—or at least be perceived as being less political—if it mandated politically diverse panels. Scholars argue that diverse bodies simply make better decisions.²⁷⁹ Judge Harry Edwards of the United States Court of Appeals for the District of Columbia and Michael A. Livermore contend that diversity fosters collegiality, which in turn leads to the exchange of more correct information.²⁸⁰ Here, the panel effects are likely not caused by whistleblowing. The NLRB largely ignores appellate court decisions and the Supreme Court rarely hears cases, so there is really no one to hear a blown whistle. The panel effects here are likely caused by ideologues voting at the extremes with collegiality tempering opinions. Mandating mixed panels could reduce the ability of ideologues to vote in an extreme fashion. The NLRB does not have explicit partisan balancing requirements, and the results here indicate that perhaps justice is not best served by this arrangement. At least in part, the random partisan composition of the panel appears to determine the case's outcome, at least in part.

Mandating panel diversity might surface a tension between collegiality and dissent. On the one hand, the number of dissents might rise if the background of judges were varied enough to threaten norms of collegiality. On the other hand, the Board's decision "is more likely to be right . . . if it is supported by panelists of different predilections."²⁸¹ Moreover, if only mixed panels made decisions, the five-member Board might be less likely to subsequently overrule these decisions and flip-flop the Board's policy. Another solution may be to simply increase the size of the Board to seven members, with the Board sitting in panels of five. Such a change would in essence mandate panel diversity and would be "less antagonistic" to judicial tradition than a statutory requirement of mixed panels.²⁸²

2. Rulemaking on Major Issues

The NLRB could also engage in more rulemaking to make decisions less ad hoc. Unlike many other administrative agencies, the NLRB rarely engages in rulemaking.²⁸³ Indeed, over the Agency's history, the NLRB has only

279. See Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 356-57 (2012); Edwards, *The Effects of Collegiality*, *supra* note 107, at 1650-51.

280. See Edwards & Livermore, *supra* note 107, at 1951-52. For more on the literature on collegiality, see Frank B. Cross, Review Essay, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399 (2009).

281. SUNSTEIN ET AL., *supra* note 109, at 136; see also Edwards & Livermore, *supra* note 107, at 1952 (noting that dissents on collegial courts occur because of "honest disagreement" over the law).

282. Shapiro & Murphy, *supra* note 279, at 361. Shapiro and Murphy, for instance, advocate increasing panel sizes to five members instead of three so as to increase the likelihood of getting more balanced panels. *Id.* at 356-61.

283. Brudney, *supra* note 36, at 234.

promulgated one rule, instead preferring to do its work through individual adjudications.²⁸⁴ The time is ripe for the NLRB to at least consider codifying certain rules to guide decision-making in cases.²⁸⁵ For instance, instead of relying on Board adjudications to define the term “employee,” the Board instead could engage in notice-and-comment rulemaking or issue policy statements to set forth clear standards on who is entitled to protection under the Act.²⁸⁶ One of the NLRB’s greatest challenges as a policymaking body is that adjudications come too fast, at too great a volume, and are decided by too many different decision makers for the Agency to foster consistent policy. Using rulemaking to impose clearer standards would do much to make the Board a more expert policymaking body. Board member Alexander Acosta has advanced rulemaking as a solution to make the Board more efficient and consistent.²⁸⁷

Rules would also give greater guidance to the General Counsel on whether or not to issue complaints, perhaps leading to more settlements because Board decisions would appear more predictable.²⁸⁸ It would bring the Agency more in line with how most other administrative agencies conduct their business.²⁸⁹ Rulemaking would also offer the chance for the agencies and parties to collect and analyze information so as to foster best practices.²⁹⁰ In these ways, a system of limited rulemaking to guide adjudicatory decisions would do much to impose greater fairness and consistency in the system by mediating panel effects on case outcomes. Under this system, Board members would have to affirmatively consider the rule when making decisions, thereby leading to fewer ad hoc decisions.²⁹¹ Further, appellate courts may be more likely to defer to an agency rule as opposed to an adjudication since the rulemaking process by necessity is a more inclusive

284. The NLRB to date has only participated in one rulemaking. *See* *Appropriate Bargaining Units in the Health Care Industry*, 29 C.F.R. § 103.30 (1991); *see also* *Am. Hosp. Assoc. v. N.L.R.B.*, 499 U.S. 606, 620 (1991) (approving the NLRB’s health-care bargaining unit). For a discussion of the NLRB’s first foray into rulemaking, *see* Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

285. *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1473-77 (2015); Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescription, at the NLRB*, 5 FLA. INT’L L. REV. 347, 359 (2010).

286. *See, e.g.*, Acosta, *supra* note 285, at 359 (proposing that the Board engage in rulemaking); Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1117 (2005) (proposing policy statements as an alternative to rulemaking).

287. Acosta, *supra* note 285, at 359 (arguing that rulemaking “will help stabilize Board law and restore public and judicial confidence in the agency”).

288. *Id.* at 352.

289. *See id.*

290. Garden, *supra* note 285, at 1475; Brudney, *supra* note 36, at 235-36.

291. Brudney, *supra* note 36, at 234-36.

process.²⁹² This change need not be limited to notice-and-comment rulemaking; the Board could also offer insight to litigating parties through the issuance of guidance documents from the General Counsel Office or non-binding statements of policy, which do not have to undergo the procedural hurdles of notice and comment rulemaking under the Administrative Procedures Act.²⁹³ Indeed, even if the NLRB wanted to continue to engage exclusively in adjudications, it could do more to make its legal precedent more consistent. For instance, it could adopt a so-called “rule of four” such that all cases necessitating a policy reversal be heard by all five NLRB members and that at least four members vote for the proposed change.²⁹⁴ Alternatively, the Agency could require that the Board issue a special justification if it reverses established Board policy.²⁹⁵

3. *Changing the Appointment Process*

The political nature of NLRB decision-making also raises the question of whether changes in the appointment process are warranted. Prior to the 1980s, Board appointees were generally moderate in their decision-making.²⁹⁶ Indeed, nominations to early Boards hailed mostly from government service or academia.²⁹⁷ The appointment process, however, became much more ideological in the Reagan years, with the Senate asserting a more direct role by exercising less deference to presidential picks.²⁹⁸ Changes in the appointment process over the last decade—including the rise of so-called “package nominations” where groups of nominees for different governmental posts are “packaged” together for a Senate vote—exacerbated the trend of a more partisan nomination process.²⁹⁹ More extreme nominees—on both sides of the political spectrum—were placed on the Board, resulting in a sea change in the ideological nature of Board decision-making. In bemoaning the rampant rise of “packaged” nominations since 1994, former Board member William Gould argues that the “batching” of nominees “frequently means the lowest common denominator,” with

292. See Garden, *supra* note 285, at 1475; Hirsch, *supra* note 214, at 457-58.

293. Acosta, *supra* note 285, at 352. There are, of course, disadvantages to rulemaking as well, as it involves more time and costs and offers less flexibility to adopt to new and changing circumstances. See Hirsch, *supra* note 214, at 458; Acosta, *supra* note 285, at 357-58 (noting disadvantages to rulemaking).

294. Samuel Estreicher, *Depoliticizing the National Labor Relations Board: Administrative Steps*, 64 EMORY L.J. 1611, 1616 (2015).

295. *Id.* at 1617. Samuel Estreicher also argues that the NLRB could improve decision-making by improving access to better information. *Id.* at 1617-18.

296. See *supra* Part I.A.; Flynn, *supra* note 14, at 1366.

297. See *supra* Part I.A.

298. See *supra* Part I.A.

299. See Flynn, *supra* note 14, at 1366. Indeed, with one exception, excluding recess appointments, all of President Clinton’s nominees to the NLRB were package appointments. *Administration Faces Possibility of Four Vacancies, No Quorum, at NLRB*, 1997 DAILY LAB. REP. (BNA) NO. 202, at A-8 (Oct. 20, 1997) (noting that Clinton had to make recess appointments to keep the Agency up and running).

appointments being composed mostly of Washington insiders.³⁰⁰ This change, of course, was not limited to the NLRB; appointments to other agencies followed a similar pattern.³⁰¹ At the turn of the twenty-first century, the NLRB consisted of two ex-management lawyers, two former union lawyers, a former law professor, and a career Board employee—exactly the type of Board that Congress expressly rejected when designing the NLRB.³⁰²

The appointment process should be altered to put the President back in the driver's seat. Presidents generally have a greater incentive to choose more moderate nominees, whereas senators—particularly Republican senators with ties to industry—may need to curry favor with supporters intent on diminishing the role of organized labor. The Senate's internal rules (such as the increasing practice of allowing individual senators to issue "holds" on nominations to delay consideration of a particular matter) and the Senate committee system (which ensures that few senators actually have a stake in the outcome of NLRB decisions) give even more power to the Senate as an institution—and to individual senators on appointment committees—to control the appointments process and in turn to control who gets appointed to the NLRB.³⁰³ This is not really how a so-called "independent" agency is meant to function, with the "control" of the appointment process shifted from the President to a single group of senators on the appointments committee. Indeed, an adjudicative body handpicked by a select group of senators could hardly be the type of Board that was envisioned during the New Deal. This issue, of course, is not unique to the NLRB. The increased polarization of the appointment process characterizes many administrative agencies.³⁰⁴ But the process can be changed to ensure that the President has more say. For instance, the NLRA could be amended to expressly require a certain type of person be appointed to the Board; that is, perhaps the NLRB should return to its mid-twentieth century form when most of its members were appointed

300. William B. Gould, IV, *Politics and the Effects of the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1526 (2015).

301. See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1762 & n.112 (2015) (noting how insiders composed many of the appointments); Norris, *supra* note 5 (describing increasing influence of partisanship in selecting SEC commissioners).

302. Turner, *supra* note 8, at 74 (listing experience of Board members in the Appendix). When designing the NLRB, Congress expressly declined to adopt Senator Wagner's original bill that would have set up the Board members as having two members "designated as representatives of employers, two as representatives of employees, and three as representatives of the general public." Flynn, *supra* note 14, at 1363-64.

303. As one scholar notes, the administrative process is "little more than the sum of a disjointed set of political calculations," as the Senate "often delays confirmation until several nominations to the same agency accumulate, thus allowing it to require that the president include some nominees who are effectively designated by powerful senators." G. CALVIN MACKENZIE, *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997*, at 31 (1998).

304. See, e.g., Metzger, *supra* note 301, at 1762.

from public service or academia rather than management or labor.³⁰⁵ At the very least, the Board (and Congress and the President) should do more to heed the advice of former chairman Gould, who argues that the “very best people” reflecting diverse background should be appointed to the Board, as opposed to Washington insiders or candidates who are able to curry favor with Senators.³⁰⁶

C. Future Research and Conclusions

Ultimately, the debate continues about the meaning of “independent” agency. As many scholars have noted, there is a call for change at the Board to adjust the agency for the twenty-first century.³⁰⁷ We need more empirical analysis of administrative agencies to assess whether they operate consistently with our vision of agency independence. Do we want ideological appointments on independent boards to vote in line with their partisan preferences? After all, maybe an adjudicatory body can be both independent and partisan. Or do we want independent agencies to decide cases free from the reins of partisanship? Are we troubled by the random chance of a Democrat or a Republican on a panel influencing how the panel will rule? In light of the ideological nature of the appointment process, it is unlikely that the Board will return to its original mission of serving as an unbiased expert. But maybe that is good enough. Maybe the presidential appointment process provides the sufficient measure of checks and balances to protect against excesses by any one branch of government.

In all, almost 80 years since its founding, the NLRB is in some ways a very different agency than the one created during the New Deal. As Board member Acosta argued, the Board today is operating with institutions formed before World War II.³⁰⁸ All too frequently the Board is seen as a political vehicle for party in power to use to force a certain agenda for or against labor.³⁰⁹ The Board today functions very much like a court, which is all the more ironic given the fact that the Board was formed specifically to ensure that labor disputes not be routinely handled exclusively in the courts.³¹⁰ The NLRB should return to its roots and be respected for the expertise—both labor and legal-based—that it has.

305. See *supra* Part I.A. The NLRA, however, never expressly set forth specific requirements (partisan or otherwise) to be a member of the Board. See Gould, *supra* note 300, at 1507.

306. See *id.* at 1526.

307. See, e.g., Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It?* 64 EMORY L.J. 1495, 1499 (2015) (noting that the Board is partly to blame for its diminished role in labor policy).

308. See Acosta, *supra* note 285, at 360.

309. See sources in *supra* note 8.

310. See Part I.A.

The focus on the NLRB provides an excellent case study for exploring these issues with respect to the administrative state more generally. Independent agencies are prized for their expertise yet like the NLRB, all too often independence simply means that the dominating political power controls the fortunes of the agencies. Expertise fails to the wayside and serves as the smokescreen for political influence. Many of the issues discussed in this Article concerning the effect that partisanship has on multi-member panels as well as how agencies empirically decide cases should also be addressed by other agencies as well. From this analysis, we see that partisanship characterizes the process probably more than it should. While the system is designed in some sense to be a partisan process, there comes a point where expertise equates to partisanship. Agencies like the NLRB should not hide their decision-making behind the veil of expertise. Partisanship can and does have influence in determining how independent agencies will rule, but there comes a point where expertise falls to the wayside. The NLRB should adopt additional institutional features to lessen the influence of partisanship in the process. Changes like mandating panel diversity or engaging in more consistent rulemaking would better allow the Board to leverage its expertise. This change, moreover, would influence how appellate courts react to Board decisions, because instead of frequently overturning Board decisions, courts would be more likely to defer to the expertise of the agency.