

## Appellate Court Decision Making in NLRB Cases

By Amy E. Semet

**Abstract: In this article, I review the decisions of the appellate courts in National Labor Relations Board (“NLRB”) cases over a twenty year period, 1994 to 2014, to ascertain what political, economic and legal factors impact judicial decision making. Unlike many other analyses of appellate decision making, this study makes a deliberate effort to take into account legal and procedural differences between cases. A judge likely decides a statutory interpretation case quite differently than one where the court need only decide whether substantial evidence supports the administrative agency’s ruling. In addition, the impact of influences such as partisanship or whether one’s judicial colleagues on a panel impact vote choice can very much vary depending on the type of case and its legal and procedural posture. Yet, scholars studying judicial decision making, partisanship and panel effects have largely grouped all cases together, reaching monolithic conclusions about influences. By coding for legal and procedural differences, this article attempts to offer a much more nuanced theory concerning the factors that influence judicial decision making for appellate courts charged to review the actions of a notoriously partisan administrative agency. The results contribute to important debates in administrative law about the amount of deference that the appellate courts should give to agency decisions as well as to the wisdom of creating specialized appellate court so as to encourage national uniformity.**

No other adjudicatory agency has suffered more claims of political bias than the National Labor Relations Board (“NLRB”). Founded during the 1930s, New Dealers designed this agency to ensure the fairness of labor practices and to monitor representation elections for unions (Gross 1985). Since its founding, however, critics of the NLRB have claimed that the agency is unduly political and that its Board makes inconsistent legal rulings, switches precedent and overrules existing legal standards whenever enough Board members exist to form a new majority to overturn past rulings. The low chance that a case will be appealed combined with the fact that appellate courts grant a great deal of deference to agency decisions results in appellate courts giving the rubber stamp of approval to the rare Board decision that is ultimately appealed. Yet, despite claims by the media and scholars alike that the NLRB is too political for its own good, we know very little empirically on how the NLRB actually makes decisions and further, how those decisions are ultimately reviewed by the upper level appellate courts. The little analysis

that exists is dated, as it primarily consists of the study of cases prior to the ideological turn of the Reagan years. More recent studies fail to account for the mechanism of case selection effects and litigant behavior. Moreover, as with most research dealing with the quantitative study of administrative agencies, legal differences between cases are often ignored. As a legal and practical matter, the judge's sheer opportunity to interject their own personal will into a decision may vary depending upon the type of case he or she hears. If a case is decided under a highly deferential standard and if the case is precedential, then we might expect judges to be cautious in their voting patterns. Moreover, if the case concerns an issue of statutory interpretation that will have import for thousands of future cases, the judge may be more likely to interject his or her own personal philosophy into a legal ruling that will have such a long-lasting effect as opposed to cases that concern only a single litigant.

The paper seeks to examine what happens then to the small minority of NLRB cases that make their way to the federal courts of appeals. What is the interaction like between the NLRB and the court of appeals? Do we see partisanship impacting the process? Do we see the same type of panel effects that appear to pervade decision making on the Board (Semet 2016)? Moreover, what political and economic factors motivate how the federal appeals court rules on NLRB matters? While there has been some study in isolation of the NLRB or of how federal courts of appeals review NLRB cases, few have really looked at the issues together to see the interacting relationship between the agency and the federal court of appeals. Such an analysis would do much to enlighten our understanding of how the federal court of appeals reviews agency decision-making.

In this paper, I turn to that task and focus on analyzing what political and economic factors motivate a federal court of appeals court to decide to enforce or not enforce a Board

order, focusing specifically on examining partisan panel effects. I first orient the study in the theoretical literature on panel effects. I then give some background on the NLRB and discuss how cases from the NLRB end up in the appellate courts. I next turn to discussing the extensive data set I constructed and detail the independent and dependent variables I use in the statistical analysis. In the fourth part, I analyze the statistical results in depth. I find that the ideological tone of NLRB decisions in the appellate courts seems to be influenced primarily by the ideological tone of the Board decision as well as by the partisan panel composition. I find there to be persistent partisan panel effects, with Democratic majority panels behaving differently than Republican dominated panels. However, unlike other analysis, I do not analyze panel effects in a vacuum, treating all cases alike. Rather, I code 1,016 court of appeals decisions and 3,048 individual judge votes for issue content as well as legal procedural posture so as to get at the impact those factors may play in animating panel effects. Moreover, this article uses multiple methods to arrive at similar results. In addition to using just logistic regression, I also employ propensity score matching analysis to better control for case differences. Further, I leverage the fact that some cases are randomly assigned in certain circuits to do a diff in difference analysis. No matter the method chosen the results on panel effects is consistent. Panel effects persist even when I did a detailed analysis of legal issues, suggesting that panel effects influence judges on panels irrespective of whether the case, for instance, concerns a matter of statutory interpretation or simply concerns a routine fact pattern. The panel effects are especially robust for Republican judges, as Republican judges sitting with at least one Democrat are more likely to vote in favor of labor than Republican judges sitting all together. I find panel effects with respect to rates of liberal voting but I do not find such effects to be as strong with respect to whether the court defers to the Board, a finding consistent with what other scholars have found. After discussing

the limitations of my analysis as well as the additional econometric analysis I plan to conduct in the future, I discuss what implications my findings have for our democracy and separation of powers system.

## **Factors that Impact Appellate Court Decision-making**

### *Theories of Partisan Panel Effects*

A rich literature in judicial politics explores the factors that impact Supreme Court decision-making (Segal and Spaeth 1993). More recently, scholars have applied the same econometric techniques used in its infancy to study the Supreme Court to the wider study of the lower level federal courts, particularly the appellate courts who generally sit in panels of three to hear cases arising from the lower district courts. These studies devote themselves to answering the following question: What factors impact how the appellate court will ultimately rule? Does ideology impact the judge's decision? Are they influenced by their co-panelists? Does outside external pressure from political or economic entities influence how the judge decides a particular case? Scholars studying the topic have come up with many different answers, with some finding that political factors, such as the ideological identity of the Congress or the appointing president, influence how appellate court judges rule, while others point to case-specific factors. Most studies of appellate court decision-making rest on studying the universe of all cases heard by the panel (most of which were initially filed in the lower level district courts) while some other studies limit the analysis to a certain subject matter (such as civil rights litigation). Few studies conduct a time series analysis of cases arising from administrative adjudication, a task that the present analysis is devoted to.

Much of the literature examines the impact that so-called "panel effects" have in influencing judicial outcomes. Scholars studying a host of legal issues emanating from the

federal courts of appeals have concluded that judicial votes differ depending on the composition of the panel (Kim 2009; Kestellec 2012; Wawro et al. 2004). While the results vary according to issue area, scholars studying judicial review of agency action on the federal court of appeals have concluded that panel composition motivates decision-making, sometimes even more so than individual preference (Sunstein et al. 2006; Revesz 1997). For instance, Frank Cross and Emerson Tiller (1998) analyzed D.C. Circuit court cases applying deference review under *Chevron* and found panel effects prevalent. Panel effects can take many forms. While some find persuasive evidence of partisan panel effects (meaning that partisans are more likely to side with their co-partisans than judges of the contrary party) (Sunstein et al. 2006; Revesz 1997), others explore the extent to which racial or gender panel effects pervade appellate court decision-making (Farhang & Wawro 2004; Kim 2009; Cox & Miles 2008; Boyd et al. 2009).

Although consensus exists that panel effects occur, scholars differ in explaining why they happen. Some contend that panel effects occur because of a deliberative process whereby internal exchanges among colleagues influence outcomes (Kim 2009). Judges, for instance, may persuade colleagues of a specific viewpoint, or there could be some sort of psychological compulsion to conform to the group's preferences. Such an account of decision-making is consistent with the "norm of collegiality" that exists on multi-member courts. A real "conformity impact" could also be at work, as the deliberating minds of like-minded people tend to go to the extremes. Judges may also conform because they do not want to undertake the additional "expense" of having to spend time writing a dissent. In such a way, a process of "ideological amplification" would impact how each individual judge ultimately votes when pared with another judge of like persuasion (Sunstein et al. 2006). Similarly, a judge's proclivity to vote his or her own ideology could be "dampened" if his or her co-panelists come from the

opposing party (Sunstein et al. 2006). Another variant of the explanation, developed by Cross and Tiller (1998), contends that judges use dissents to have a whistleblowing impact to signal to a higher court (or the *en banc* court of appeals) that there is a problem in the case that needs to be addressed. By whistleblowing, the dissenting “exposes manipulation or disregard of the applicable legal doctrine” (2156). Other theories rely less on internal interaction among the panelists themselves; these theories rest more on an understanding of how judges interact with other actors in the wider political system. Under this view, judges consider what ramifications their vote will have and may thus behave in a strategic fashion (Kim 2009). A judge, for instance, may fashion his or her vote taking into account how they think the higher appellate court — such as the Supreme Court — might react to the decision.

#### ***Circuit Court Panel Effects Specific to Administrative Decision-making***

Scholars have studied panel effects as they relate to Supreme Court and circuit court review of administrative decision-making. On the Supreme Court, scholars have found that more conservative judges are less likely to validate agency decisions than liberal justices (Miles and Sunstein 2006, 823). Likewise, more conservative members are less likely to validate liberal agency decisions than conservative ones, with liberal members evidencing the opposite pattern. These patterns persist on the federal courts of appeals. In cases involving both the EPA and NLRB from 1990-2004, Miles and Sunstein found that Republican appointees on the court of appeals invalidated liberal agency decisions more so than Democratic appointees. These differences are even greater when judges sit with partisan panelists of same party (Miles and Sunstein 2006, 823). Miles and Sunstein further found that when the agency makes a liberal decision, Democratic appointees are 14 percent more likely to validate than the average Republican appointee; when the decision is conservative the Democratic judge is 19% less likely

to validate than the Republican one. These partisan differences become more apparent when one considers panel composition. Democratic appointees sitting with co-partisans are 31.5 percent more likely to validate a liberal decision than a conservative one and all-Republican panels are over 40 percent more likely to validate a conservative decision. Miles and Sunstein find these results surprising. They found a gap of 40 percentage points between unified Democratic panels and unified Republican ones. The whole purpose of the *Chevron* doctrine was to impose some sense of uniformity to the process and to give a greater role to the agency to exercise its expertise in making decisions. Miles and Sunstein contend that validation should ideally not be correlated with ideology because *Chevron* was intended to eliminate such differences. The authors also found that validation rates rise from 50% when agency decision does not match ideological predisposition to over 80% when it does match. These differences are not as stark for politically mixed panels. Miles and Sunstein found there to be a dampening effect when panels are politically mixed, as the effects described above with respect to fully partisan panels are muted. In mixed panels, Democrats are 20% more likely to validate a liberal agency decision, but there is virtually no difference in validation rates for Republicans sitting on mixed panels. Republicans sitting on mixed panels are only 6% less likely to validate when an agency decision is liberal, a result that was statistically insignificant. In other words, only Democrats sitting on mixed panels experienced panel effects concerning validation of agency decisions. Miles and Sunstein found more evidence of panel effects once the ideology of the agency decision was controlled for. Miles and Sunstein are not alone in finding such effects. Williams Eskridge and Connor Raso (2010) too found that judge's ideology correlates with the deference regime applied. In all, scholars have found panel effects across a diverse set of legal issues: asylum

cases (Fischmann 2011), Establishment Clause cases (Sisk & Heise 2012), sexual harassment cases (Farhang & Wawro 2004; Boyd et al. 2009); and affirmative action cases (Kastellec 2014).

Miles and Sunstein (2006) also compared validation rates with rates of liberal voting and found panel effects to be more prevalent on rates of liberal voting than for validation. Again, the authors found panel effects to be more prevalent among Democratic judges, with Republican judges showing the same rate of liberal voting irrespective of how many Democrats joined them on the panel. The authors opined that this may be the case because Democratic judges may have such strong convictions with respect to labor making them more willing to dissent from the colleagues.

Other scholars have similarly studied the issue with respect to appeals court deference to administrative agencies. Cross and Tillman (1998) studied appellate court's application of *Chevron* deference to administrative agency decisions to question whether courts deferred to the agency. The authors found that panels dominated by members of the same party were far more likely to implement partisan implications of judges than split panels. In other words, heterogeneous panels tended to make "better" decision, assuming you mean "better" to mean application of doctrine to facts. They explain this phenomenon by arguing that the presence of a so-called whistleblower impacts outcomes because the majority gets subconscious about reversal forcing the panel to pay more attention to obey legal doctrine. Yet, still other scholars have found contrasting results when analyzing court of appeals decisions emanating from administrative agencies. Revesz (1997) studied procedural challenges to EPA cases and found no partisan impacts; for *Chevron* issues, he found that the court decided appeals without regard to ideological preferences.

### **The NLRB's Adjudication of Unfair Labor Practice Disputes**

In the present study, I apply the theories of partisan panel effects to the universe of NLRB cases heard by the federal regional appellate courts from Board cases originally heard in the period 1993-2014. The present empirical study is two-fold: first, the study is intended to provide empirical information on what happens to NLRB cases that gets appealed. Only by understanding the empirics of what happens can we begin to discuss normative implications. Second, the study is designed to test empirically whether and to what extent partisan panel effects exist on the federal court of appeals in their review of NLRB cases and if so, how panel effects on the regional court of appeals differ from the panel effects prevalent on the Board itself. I also seek to examine what political, economic and case-specific factors impact how appellate courts rule in NLRB cases.

### *The NLRB Process*

The NLRB, founded during the New Deal era to provide an administrative mechanism to deal with labor strife, does most of its work through the adjudicatory process as opposed to the more common rulemaking process undertaken by other administrative agencies. The NLRB hears two types of cases: unfair labor practice disputes (the primary focus of the present analysis) as well as disputes arising out of union election procedures. Only unfair labor practices cases can be appealed. Figure 1 details the NLRB process in unfair labor practice disputes. Any party that feels that their rights were violated by their employer or union may file a dispute with the regional office of the NLRA acting as a representative of the General Counsel's Office. After the General Counsel makes a decision to proceed, a local Administrative Law Judge ("ALJ") then hears the case and makes a decision. The losing party can then appeal that case to the Board, which is generally composed of three members (except in exceptional cases, the full five member Board may hear a case). Parties losing before the NLRB have the opportunity to present

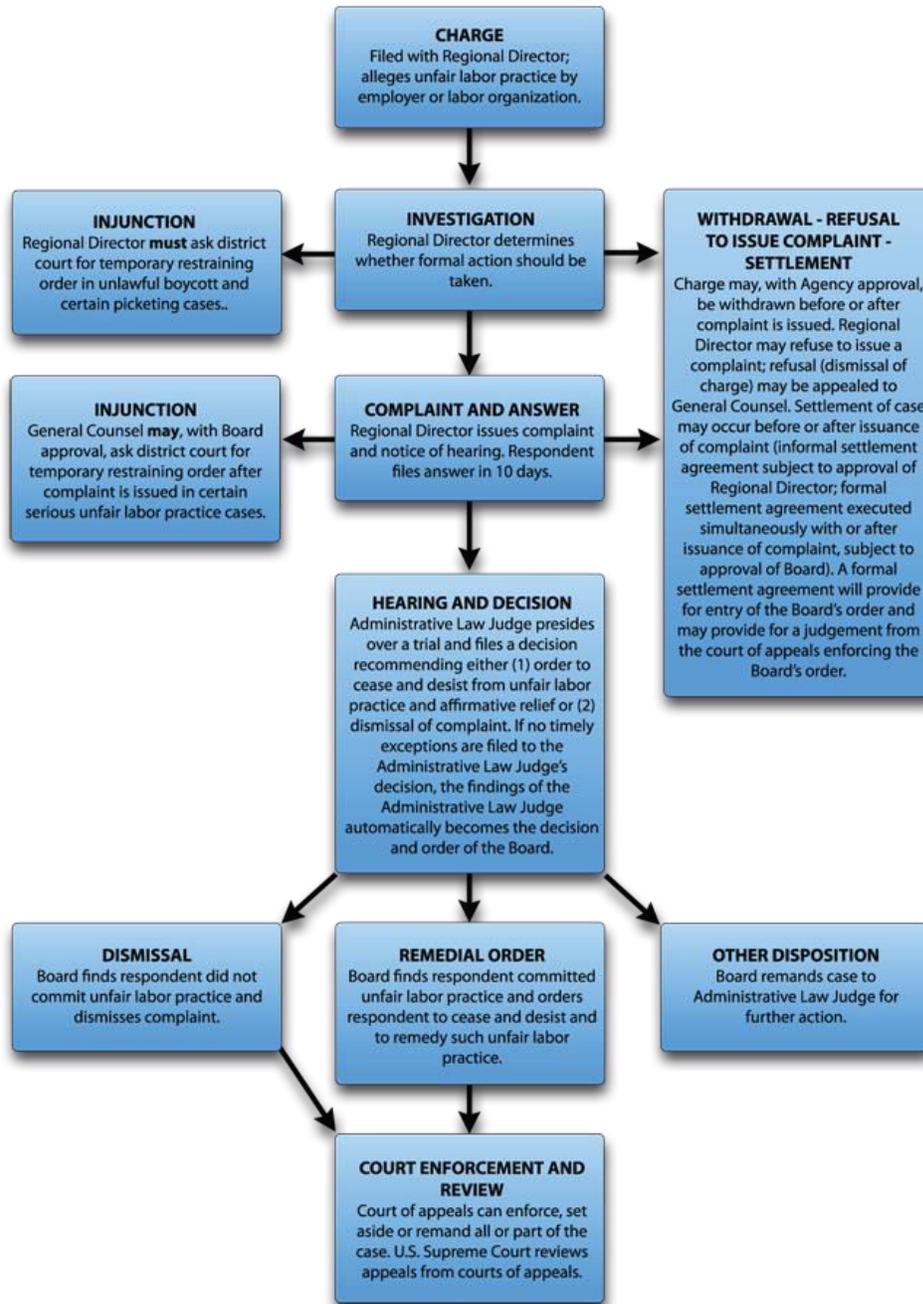
their appeal to the applicable federal appeals court based either in the region of the parties or in Washington D.C. at the United States Court of Appeals for the District of Columbia circuit. Appeals of this nature can take one of two types. First, NLRB orders are not self-enforcing.<sup>1</sup> If the party losing before the Board refuses to comply voluntarily with the Board's order, the NLRB, through its General Counsel, will file a complaint with the applicable appeals court to enforce the order. Second, the aggrieved party can file an appeal of the merits of the Board's ruling. So essentially, most appeals involve two separate motions: a motion to enforce filed by the NLRB General Counsel and a separate motion to review the merits of the Board's decision filed by the losing litigant. Winning on appeal is difficult. Much like the Board itself the appeals court cannot simply retry the case. The reviewing court may enforce, modify or reverse the ruling of the Board, in whole or in part, or remand the case back to the Board for further action.<sup>2</sup> The mix of cases that ultimately get appealed are a unique batch. In most situations, cases involving minor issues or issues relevant to single employees usually settle. For the most part only the most difficult legal issues will get appealed. As a practical matter, the court of appeals represents the last chance for a losing party in their case; although later review by the Supreme Court is a theoretical possibility, the high Court generally hears only one or two NLRB cases yearly.

## **Figure 1**

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<sup>1</sup> 29 U.S.C. §160(e)(1982); 29 U.S.C. §160(f) (1982).

<sup>2</sup> 29 C.F.R. §101.14 (1977).



Review by the court of appeals is generally governed by the “substantial evidence” standard. As a legal matter, the appellate court can only disturb the Board’s ruling if they find there to be a lack of substantial evidence to support it or if it finds that the Board’s interpretation

of a statute to be unreasonable.<sup>3</sup> Pursuant to the United States Supreme Court case in *Chevron*,<sup>4</sup> decisions of administrative agencies are entitled to deference absent the agency acting in a matter contrary to law. Under *Chevron*, the court cannot simply substitute its own judgment for that of the court if it disagrees with the court's policymaking discretion. Rather, under *Chevron*, the Court must undertake a two-step test to determine whether it, by law, must defer to the agency's interpretation of a statute. Under step 1 of *Chevron*, the court determines whether there is any ambiguity in a statutory provision and if there is, in step 2, the court must then determine whether the agency's interpretation is reasonable. Most cases do not raise issues of statutory interpretation. Unlike other administrative agencies who must regulate under many different statutes, the NLRB only has one governing statute that has not been amended in almost fifty years. As such, in many cases, the court simply assesses whether there is "substantial evidence" to govern the agency's decision, that is, the courts analyze the Board's decision to weigh the sufficiency of the evidence to support the indicated violations (or in some cases, lack of violation of law). Just as the Board could not overrule the ALJ's credibility determinations, so too the appellate court cannot try to review the factual underpinnings of the case unless it is clear that the legal judgment sought lacks a substantial basis in evidence. For instance, applied to the NLRB, appellate courts must often assess whether the employer bargained in "good faith," a requirement under section 8(a)(5) of the NLRA, the governing statute for unfair labor practice disputes. The factual underpinnings of that judgment, for instance, testimony about how the employer acted or what activities the employer engaged in, is something that the agency assesses. The court can only overturn the judgment if the court's overall conclusion on lack of "good faith" rests on a lack of credible evidence. As another example, the Board frequently

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<sup>3</sup> 29 U.S.C. §§151-168 (1982).

<sup>4</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

reviews whether an employer wrongfully discharged an employee because of his or her union activities. The Board must weigh the evidence to determine whether the employer's reason was pretextual or whether the employer discharged the employee for legitimate, business reasons.

### ***The Dataset and Preliminary Findings***

The dataset contains 1,016 cases during the period 1994-2014 appealed to the federal appellate courts, comprising 3,048 individual judge votes. This dataset does not encompass every NLRB case filed during the period; rather, it encompasses all appeals of cases heard by the Board from the period 1993-2007. It can often take up to four or five years for a court to hear a Board case, so even though the Board may have heard the case back in 2007, it may not have come up for review until 2011, for instance. Moreover, the General Counsel often may wait to officially file for enforcement to wait to see if the parties can work out a settlement. I found the cases in two ways: First, I looked up all NLRB cases heard in the regional appellate courts on Westlaw. I included all cases in which the court ruled on an unfair labor practice dispute on the merits. I eliminated approximately 5% of the cases after reading them because the case involved a legal issue not applicable to an unfair labor practices disputes under section 8(a) or section (b) of the NLRA. I included some procedural cases, such as whether the complaint was time barred, because the court would be ruling on an NLRA challenge. I also included cases in which one party claimed it was not "equitable" to ask for enforcement of the Board's ruling. However, I did not include about thirty or so cases where the issue was purely procedural, like for instance, jurisdiction issues, collateral estoppel or res judicata. Moreover, I also eliminated cases dealing with more tangential or remedy issues, such as appeals concerning the award of backpay. Oftentimes, the remedy issue will be the second case heard by the Board or court; the Board would have earlier ruled on the merits, and in a supplemental opinion, the Board altered or

changed the remedy, which could then be separately appealed to the federal courts. I also excluded cases arising from unique procedural postures, such as cases in which the Board granted summary judgment. Moreover, because NLRB cases are not self-enforcing, on occasion, the higher court's review of the NLRB decision is merely perfunctory and the court simply issues a summary order enforcing the case. I excluded such cases from my database because the appeal seemed purely ministerial. In addition to looking up the cases on Westlaw through search terms, I also doublechecked the appellate court database by looking at every single NLRB case from the period 1993-2014. In another article (Semet 2016), I explored partisan panel effects at the Board itself and in the course of such analysis I constructed a dataset of over 3,000 NLRB cases. I researched the subsequent history of all the cases included in the earlier NLRB cases to arrive at the dataset I use in this paper so I would be able to link up each appellate court case with the Board outcome. I included both "CA" cases (cases filed by an employee or union against an employer — the vast majority of cases) as well as "CB" cases (cases filed against the union alleging unfair labor practice). I did not include cases that were both "CA" and "CB" as it would be impossible to accurately predict whether they were for or against labor.

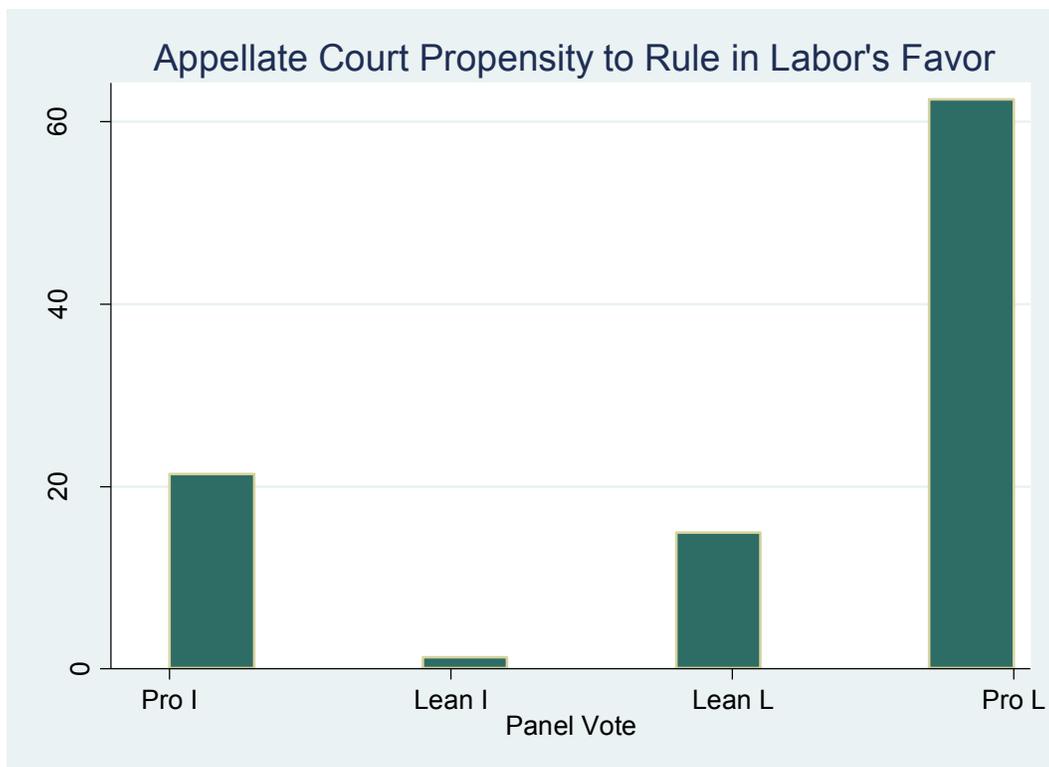
Of the cases included in the dataset, the appeals court ultimately ended up deciding 76% of them in favor of the labor litigant with 24% being decided in favor of industry.<sup>5</sup> The case can be broken down further using two different coding schemes. In the first coding scheme displayed in Figure 2, I coded cases depending upon whether the court ruled in whole or in part decided favorably for labor ("Coding Style 1"). Many cases concern different allegations, so some parts may be decided in favor of labor while other allegations are decided in favor of industry. To ease complexity, I wanted to construct a dichotomous variable so I grouped the

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<sup>5</sup> If the court remanded a case, I coded the decision in the ideological direction of the court decision. In most cases, the court remands with instructions to the Board so it is quite easy to tell which ideological direction the court leans.

cases as ruling for labor in whole or in part. I allocated cases as being “pro labor in part” if the court ruled for labor for a majority of the allegations in the case. Of the remaining cases, as shown in Figure 2, 23% were decided solely in favor of industry, a surprising statistic given that the percentage that the Board rules is favor of labor is about 19% (Semet 2016). Just under 1% leaned industry while 15% leaned labor. About half of the cases were decided wholly in favor of labor.

**Figure 2**

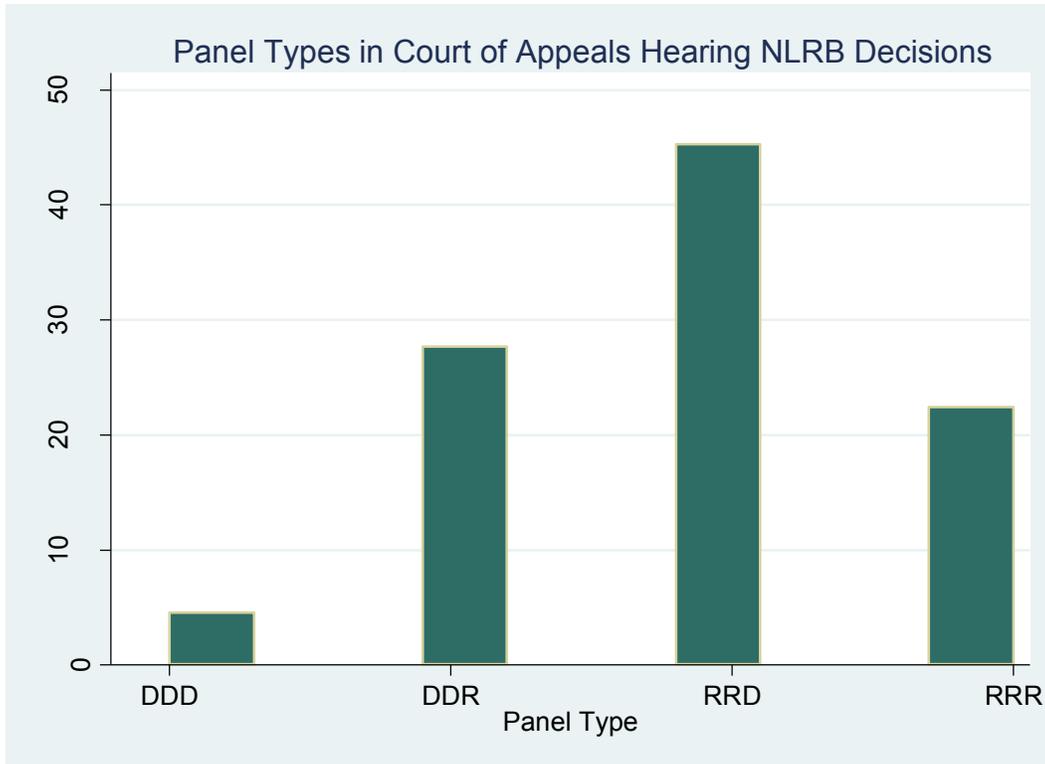


In the alternative coding (“Coding Style 2”), I looked at which party actually challenged the court decision. I reviewed carefully the legal reasoning of the case and I looked to what party filed an appeal of the case to try to get a better understanding of the side that the court ruled for. The results evidence a similar pattern to above. Under this alternative scheme, the appeals court decided about 60% of cases wholly in favor of labor, with an additional 8% leaning in

favor of labor. Likewise, a slightly higher percentages of cases — 25% — were decided solely in favor of industry in whole or in part. The increased allocation of cases to one side or the other (industry or labor) occurred because by reading the cases closely and seeing exactly what provision was being challenged enabled me to get a better sense of what side the court ultimately came down on.

I then looked at the propensity of the court to rule in favor of labor by panel type. The breakdown of panel types is very different in the court of appeals than it was for the Board, as shown in Figure 3. The DDD panel type is a distinct minority in the appellate courts with less than 5% of NLBR decisions being heard by DDD panels. Moreover, RRR panels are much more common than they were for the Board (where only 2% of cases were heard by RRR panels), with 22% of cases being heard by all-Republican panels. Mixed panels are the norm, with most of the panels being Republican majority (45%) than Democratic majority (28%).

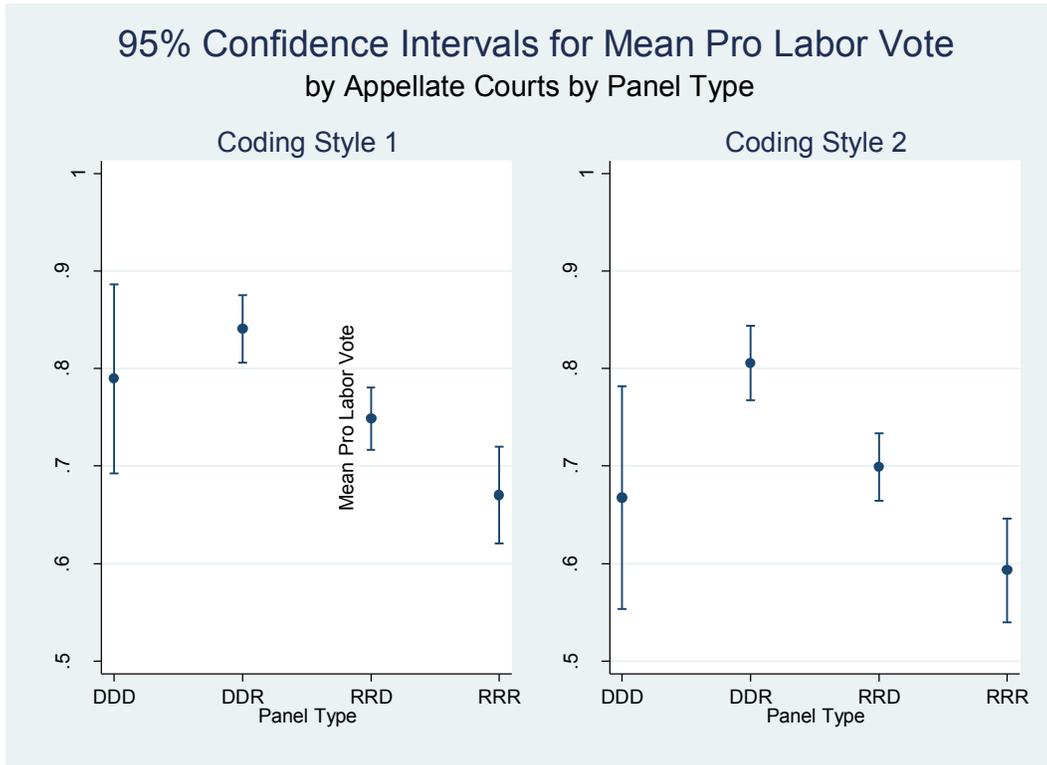
### **Figure 3**



Under Coding Style 1, looking at whether the court voted in favor of labor in whole or in part, all-Democratic and mixed party panels vote at fairly similar rates in favor of labor as shown in Figure 4. Interestingly, as shown in Figure 4, DDR panels show greater pro-labor voting (82%) than DDD panels (78%) as well as more than RRD panels (82% v. 73%). Majority Republican panels vote similarly to DDD panels (73% v. 78%). There is a noticeable jump downward for RRR panels, who vote in favor of labor just 67% of the time. This is a higher rate than we saw for all-Republican panels at the Board, though the results are still within the margin of error. Moreover, because the margin of error for DDD panels is so large, although DDD panels vote in favor of labor 78% of the time, the outcome comes within the margin of error for RRR panels. Using Coding Style 2, we see a similar trend, but with a clearer difference between DDR and RRD panels (81% v. 70%). The addition of one Democrat to an otherwise Republican panel then appears to somewhat bias results in a more liberal direction. The breakdown is the

same when limited to CA only cases. Moreover, the breakdowns are similar when one analyzes each statutory section (i.e., section 8(a)(1), etc.) separately.

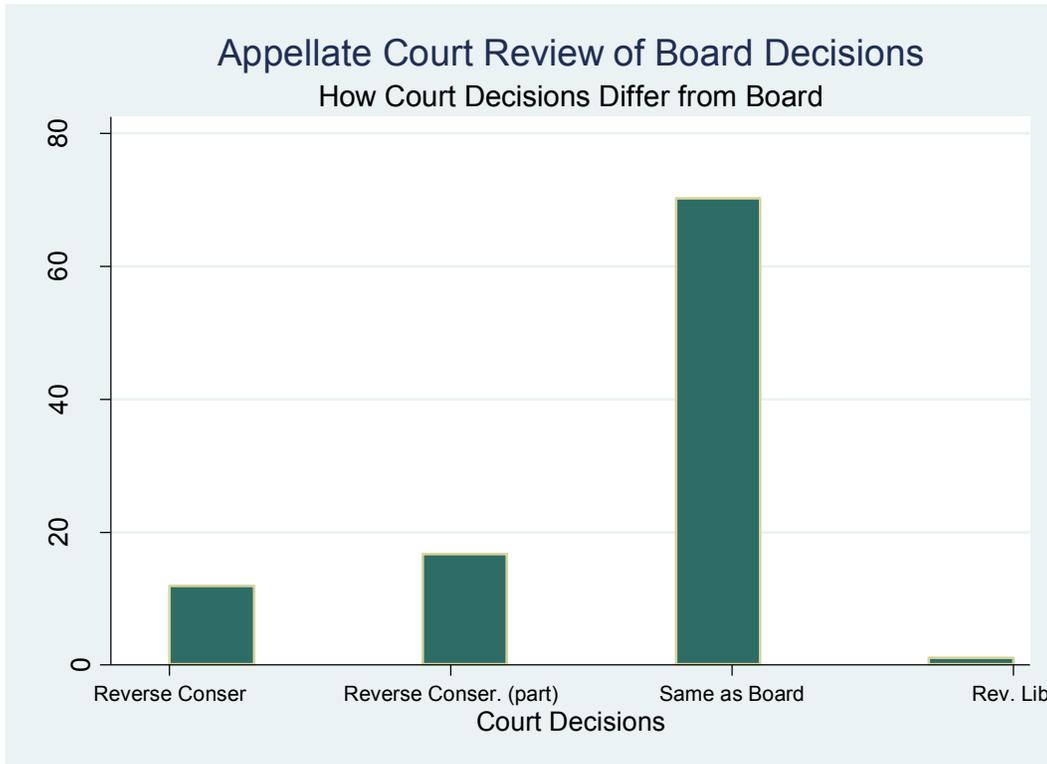
**Figure 4**



Overall, the federal appeals court upholds a majority of the Board cases, though for about 30% of cases, the court's decision differs from that of the Board. As shown in Figure 5, in over a quarter of cases, the courts overturns the Board in a more conservative direction. In 13% of cases, the courts completely reverses a fully liberal Board decision and in still another 17% of cases, the courts will rule against the pro-labor party in part. Courts are much less likely to overturn a conservative Board decision, as less than 2% of cases come out in a more liberal direction than the Board decision. The takeaway from this is startling: essentially, if the losing party hopes to overturn a conservative court decision, it faces a stiff challenge in the courts of appeals because the courts hardly ever rule in a more liberal direction than the Board. That

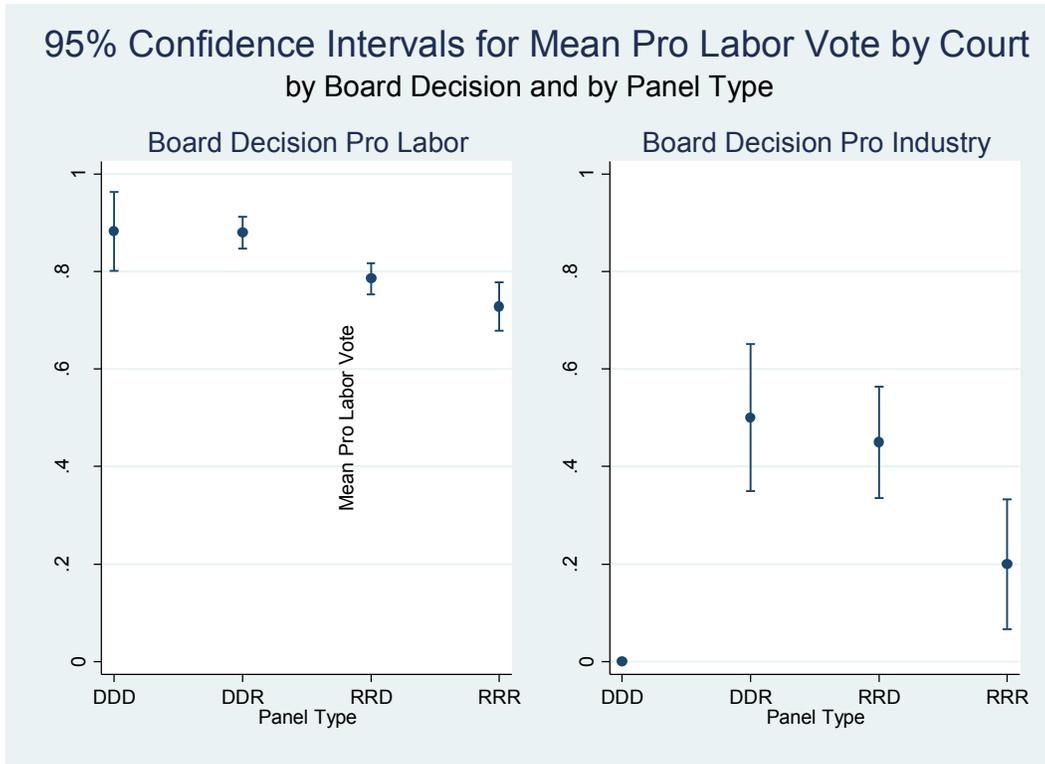
statement should be taken with caution, however, because so few conservative cases are even appealed to the federal courts in the first place, as only about 13% of the cases heard before the appellate courts are ones where the Board ruled in a conservative direction. The high number of pro-industry rulings is not surprising because oftentimes only the most difficult legal issues make their way up through the federal appeals court process and it may be the case that only employers have the money, time and resources to appeal. Moreover, the federal appellate judiciary has a mean ideology score that is more conservative than the mean ideology of the Board so it should be no surprise that the decisions lie somewhat more in a conservative direction. This pattern continues irrespective of the type of case. A vast majority of the cases appealed are CA cases (80%), and the percentages based only on CA cases are exactly the same as percentages based on both CA and CB cases. The rates of winning for CB cases are slightly less as 74% of cases are decided the same way in the appeals court as before the Board.

## **Figure 5**



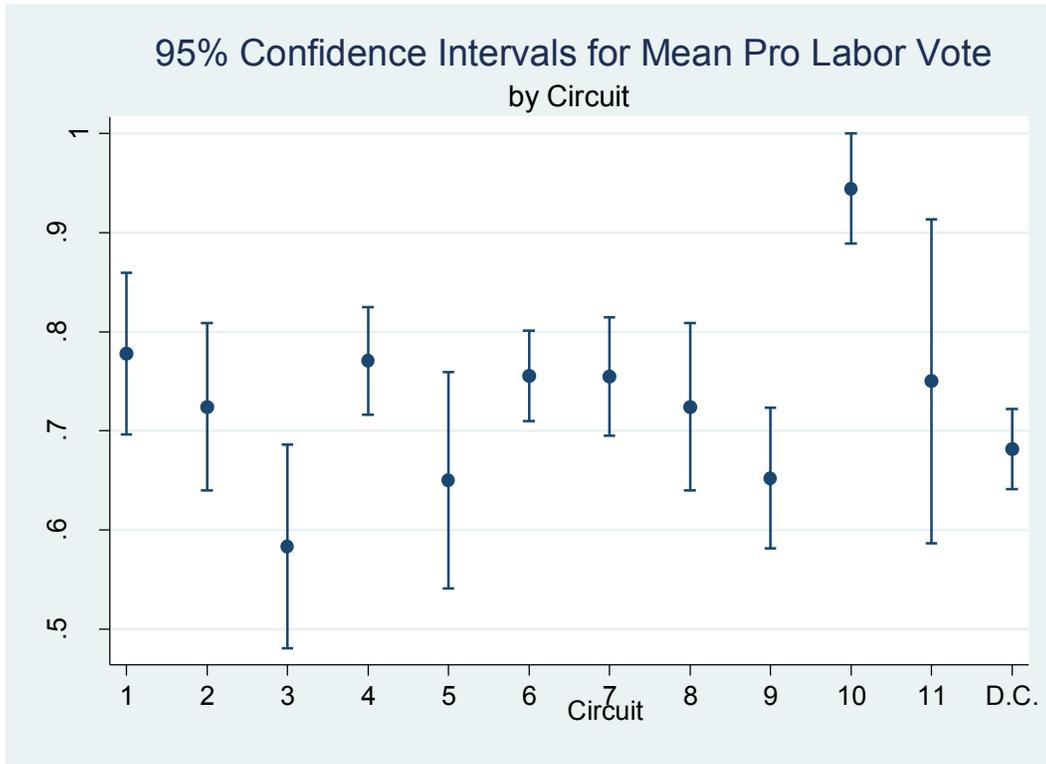
Looking at the data broken down by the tone of the Board decision, panel effects appear, as shown in Figure 6. Using Coding Style 2, one sees that there is a difference between DDR and RRD panels, although the panel effects are not as extreme as they were before the Board. Panel effects are more evident when the Board decision is conservative. Only 2 DDD panels heard conservative Board decisions, which they affirmed, so the “0” score there must be taken with a grain of salt. Mixed partisan panels voted about half the time in a pro-liberal direction; again, these results should be taken with caution as there were only forty cases in total where mixed partisan panels voted in a more liberal direction than Board. This may also simply be the result of the fact that so few conservative Board decisions get appealed.

**Figure 6**



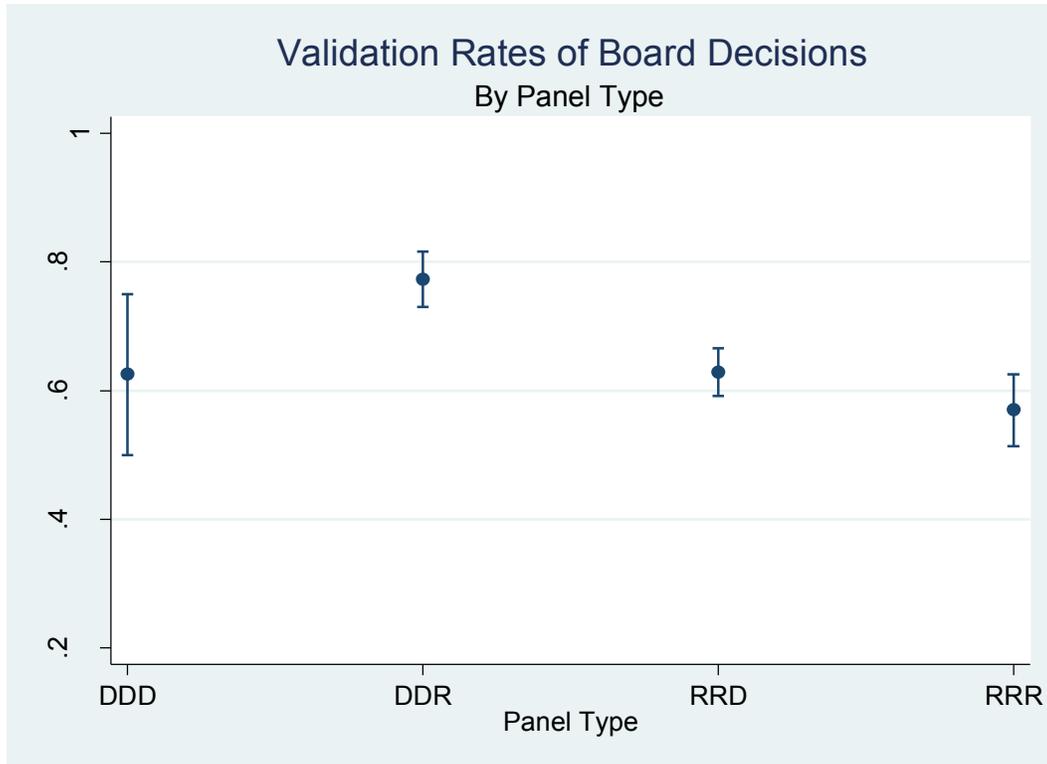
Further, we see noticeable differences among circuits. Different circuits rule in favor of labor at different rates. As noted in Figure 7, circuits like the 3<sup>rd</sup>, 5<sup>th</sup>, 9<sup>th</sup>, and the District of Columbia Circuit ruled in favor of labor between 59%-65%. Other circuits like the 1<sup>st</sup> and 2<sup>nd</sup> Circuit were more liberal, ruling for labor almost 80% of the time. This result is not unexpected. Scholars have found there to be quite a variation among circuits, with certain circuits, such as the 4<sup>th</sup> circuit, having a reputation for being more conservative. Moreover, two circuits in particular — the 6<sup>th</sup> circuit and the D.C. Circuit — heard a disproportionate number of cases. Nogalas et al. (2008) found in their asylum study that in one circuit, Democratic appointees remanded cases at twice the rate of Republican judges. Moreover, they found that applicants in the 7<sup>th</sup> Circuit have a 700-800% greater chance of prevailing in their appeal than applicants from any of the other three Southern circuits.

**Figure 7**



Finally, we also see panel effects when we look at validation rates, that is, the propensity of the court to affirm the lower court ruling. As shown in Figure 8, in CA-cases filed against employers, all-Democratic panels vote in a liberal direction to validate the Board decision about 63% of the time, whereas RRR panels vote in favor of validation 56%. Moreover, mixed partisan panels evidence noticeable differences in validation rates, with DDR panels affirming 76% while RRD panels affirming 61% of the time, with the differences being statistically significant between RRR and DDR panels.

**Figure 8**



The conservative tendency of the federal judiciary would suggest that we should similarly see partisan panel effects impacting how the federal courts rules on NLRB matters. Looking at the court decisions in a dichotomous matter (favor labor or not), partisan panel effects are evident. Compared to the Board’s panels, there is a greater chance a litigant will face an all-Republican panel as over 20% of the panels involved in the cases under study comprise RRR judges. By contrast, all-Democratic panels are a distinct minority, with only under 5% of cases being decided by DDD panels. All told, panels at the court of appeals are more likely to be dominated more by Republican judges rather than Democratic judges, as compared to the panels at the Board. Naturally, we would expect this difference to have an effect in impacting how the court ultimately rules. In all, majority Democratic panels (DDD) rule in favor of labor 68% of the time while all-Republican panels (RRR) go in labor’s favor about 58% - a 10% point

difference that is a far cry from the large difference seen with Board panels. Panel effects are mixed panels are also a little less obvious. DDR panels actually rule in favor of labor more than DDD panels at 80% and RRD panels rule 69% of the time in favor of labor. Moreover, as shown in Figure 31, panel effects concerning validation rates are also evident.

### **Statistical Methodology**

Next we turn to making a more detailed assessment of two aspects of court decision making, namely, whether panel effects invade decision-making at the court of appeals on cases emanating from the NLRB as well as an assessment of what factors impact the propensity of the appellate court to rule for or against labor or to find that the NLRB's ruling to be lacking in evidence. It can be difficult to untangle the multiple variables that could be impacting the analysis. While there has been some analysis of NLRB votes on the court of appeals, most of the work is somewhat dated and does not include many variables that could impact the analysis. James Brudney and Deborah Merrill (2001) analyzed 1,100 labor decisions and concluded that Democratic judges were significantly more likely to favor the labor litigant in unpublished cases heard by the federal appellate courts. They also found that appellate court judges who represented management in their prior careers were more likely to rule in favor of supporting union legal precedents. The authors advance the theory that knowledge of the innerworkings of the NLRA may predispose them to have "greater judicial respect" for its "doctrinal scope." Likewise, Miles and Sunstein (2006) analyzed in part some NLRB appellate court cases and concluded that panel effects were muted with respect to court validation of NLRB decisions.

As with my earlier analysis on the NLRB (Semet 2016), I hypothesize that the court will rule in a more labor friendly direction the more Democrat judges there are on the panel. Likewise, I would estimate that court decisions would be more conservative in all-Republican

panels than all-Democratic or mixed partisan panels. I would expect the same to be true with respect to validation rates and I would also expect that panel effects for validation would be less extreme than for rates of liberal voting. I might also hypothesize that the intensity of panel effects could differ among the types of cases heard. That is, if panel effects are something politically motivated, we might expect to see panel effects more intensely in cases dealing with more important legal issues, such as cases dealing with statutory interpretation, as opposed to more routine settlement of disputes.

One can do a logistic regression to analyze panel effects. However, that approach has limitations, as it may not properly account for differences between case types. For instance, the impact that the panel has can very much vary depending on the legal and procedural posture of the case. The court of appeals, for instance, may interpret a case using simply the “substantial evidence” standard whereby it must defer to the Board so long as there is a sufficiency of the evidence supporting the decision. This approach may differ from one where the court is tasked to interpret a statute; even though under *Chevron*, the court must defer to the Board so long as the interpretation of the statute is reasonable, partisan decision making may play a greater role in such cases than ones where the standard is simply substantial evidence. Likewise, cases in which the court interprets a decision *de novo* or where the issue concerns a matter of procedure such as contract interpretation may differ from cases in which the standard is more deferential. While logistic regression can account for these differences by including dummy variables, there are other approaches that can be used to perhaps give more precise estimates of panel effects.

As such, as an alternative measure, in addition to doing the analysis by logistic regression, I also employ a propensity score matching method where I match cases by both issue content as well as procedural posture/standard of review to ensure that the cases are generally the

same. Boyd, Epstein and Martin (2010) pioneered the matching analysis applied to panel effects in sex discrimination cases. Others, following up on the Boyd et al. approach, have similarly applied a matching analysis to show panel effects on the basis of gender or sex (Kastellec 2012). I coded each of the over 3,000 judge votes by matching according to statutory section challenged, standard of review, procedural posture, lower Board decision, ALJ decision, judge conservatism and circuit. I divided cases into types: “routine” cases decided under the substantial evidence standard (62% of cases), arbitration cases, procedural cases, jurisdiction cases, time bar cases, contract interpretation cases (which are reviewed *de novo*), statutory interpretation cases (about 10% of the total and also reviewed *de novo* under certain circumstances), complex cases involving allegations against unions and remedy cases (which were excluded). I primarily wanted to see if the routine cases differed from the statutory interpretation cases, which one might expect, as well as whether procedural cases may be decided differently. Unfair labor practice disputes against employers fall under section 8(a)(1)-8(a)(5) of the NLRA, and the ability of the appellate court to overturn the lower Board decision could vary depending upon the nature of the allegations. For instance, charges brought under section 8(a)(1) rest largely on credibility determinations, which, as a legal matter, the appellate court has little power to overturn as they must give deference to the credibility determinations of the Board so long as they rest in sound evidence. By contrast, cases alleging violations of section 8(a)(5) of the NLRA force the court to rule on whether or not the employer acted in “good faith.” The “good faith” determination is a much more nebulous standard that would allow the appellate court judge to interject his or her personal ideological philosophy into the ruling more so than cases that rest largely or exclusively on credibility determinations. In alternative specifications, I tried various other matching methods such as procedural v. non

procedural, statutory interpretation v. routine, as well as more fine-grained analysis under specific statutory sections. I used the treatment of being a majority Republican panel and in an alternative specification, I used the treatment of having three Republicans on the panel as opposed to not having three Republicans (RRR v. RRD/DDR/DDD). Overall, even before matching, there was overall a pretty close balance among the treatment and the control, with most variables differing by only a percent or two. I used Republican as the “treatment” instead of “Democrat” because from my preliminary analysis, it seemed like it was the fact that adding additional Democrats to the panel did not impact voting except if there was a majority-Democratic panel. DDD and DDR panels voted similarly in the court of appeals, so it seems like the panel effects have something to do with adding Republicans to the panel instead of adding Democrats.<sup>6</sup>

Once cases are matched, I employed three types of analysis: 1) logistic regression on the full sample; 2) logistic regression on the matched sample using both nearest neighbor matching as well as optimal matching (I display the results for nearest neighbor, though the results are similar); and 3) a diff in difference analysis on the full sample leveraging the possible assumption that cases are randomly assigned. In this third specification, I used circuit composition fixed effects, following Hall (2009, 2010). One critique of the present analysis is that even though I included time and circuit fixed effects, it still may be the case that there is some sort of selection effect at work. For instance, it could be the case that unions or employees strategically file cases during certain time periods or in certain circuits to enhance the possibility of getting a desired outcome in favor of labor. As with many statistical analysis, there is often a causation issue. To deal with the potential selection effects, I leveraged the fact that cases are

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<sup>6</sup> I alternatively did the analysis adding the treatment of Democrats instead of Republicans.

generally randomly assigned to three judge panels to buttress my results that panel effects occur.<sup>7</sup> In this way, the data itself is almost like a natural experiment. Although there is some debate on whether judges in the circuit courts are actually randomly assigned (Hall 2009, 2010), I used the fact that random assignment occurs to just compare rates of liberal voting by panel type, and found there to be noticeable differences statistically that mirror the results on the full panel. I looked at the cases broken down by each circuit during each possible combination of judges on a panel where the only difference between cases was the partisan composition of the panel. Following Hall, I excluded cases from the Second, Third and Sixth Circuits because his interviews indicated that assignment was not random; I also excluded cases from the Fourth Circuit before 2000 (when random assignment was not in place), the Fifth Circuit before 2003, the Eighth Circuit before 2003 and the Tenth Circuit before 1998.

### *Dependent Variable*

The dependent variable in the first iteration is the dichotomous variable consisting of a single judge vote decided in favor of labor. I proceeded to estimate the following equation:

$$Y = \beta_0 + \beta_{1i}X_i + \beta_{2j}X_j + \beta_{3k}X_k + \varepsilon$$

Where  $\beta_{1i}$  indicates categories of variables concerning political characteristics,  $\beta_{2j}$  indicates categories of variables indicating case considerations and  $\beta_{3k}$  indicates economic variables. I expect that the  $\beta$  coefficient on the panel dummy variables (party of the judge's colleagues, depending on whether the judge is a Republican or Democratic) to be positive, meaning that the court is more likely to rule in favor of labor as compared to the RRR (all Republican panel), which is the reference category. I would also expect that the  $\beta$  for the Board decision to also be

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<sup>7</sup> I only included the circuits where scholars have concluded that regression analysis supports random assignment. I thus excluded the following circuits:

positive, indicating that as the Board decision is more liberal so too will the appeals decision be liberal.

I likewise coded the dependent variable two separate ways, one in which I followed the convention of other scholars and simply coded it as pro labor if any part of the case was in favor of labor (Coding Style 1). As with the NLRB analysis, however, I also coded this variable an alternative way to capture the fact that the actual party that appeals the place has an impact in determining how the court will ultimately rule (Coding Style 2). The results in Table 1 references the second method of coding. If, for instance, the General Counsel of the Board mounts a case to enforce an order, and the losing party follows a cross petition challenging the order, the ultimate outcome of the appellate court case rests on the precise legal grounds by which the court rules. Furthermore, in an alternative specification, I also did a further analysis of the alternative dependent variable that was coded in four prongs: pro-industry, lean industry, lean labor and pro-labor, the latter of which would be “on” if the appellate court decided the case wholly in favor of labor; if the court was split, the case was coded “2” or “3” depending on whether the court was split more in favor of labor or industry; the case was coded 4 if the court decided solely in favor of industry. I do the analysis solely on the CA cases filed by labor against employers; there were only a few dozen CB cases in total in the dataset that were appealed and in many cases the CB cases were further eliminated from the dataset because the legal issue involved one that cannot be fairly said to be decisive of whether or not the Board correctly balanced the evidence in finding a violation of the law. As such, the following statistical analysis only examines CA cases which are cases filed by employees or unions against employers alleging unfair labor practices.

***Key Independent Variable: Panel Type***

I had three variables that measured panel effects. As such, I measure appeals court ideology using the Epstein et al. (2007) and Giles et al. (2007) database of appeals court common scores. I divide up the panels in two alternative specifications. In one specification, I divide up the panel depending upon the party of the nominating president and allocate each panel accordingly. In another specification, the one that is reported here, I divide up the panels based on the Epstein and Giles scores, with scores below 0 signifying Republican or conservative judges, coding each judge for party and then constructing the panel variable with four types: DDD, DDR, RRD and RRR. In almost all cases, the two measures matched and there was no discernible difference in the results. Because the analysis is by judge vote, I looked at the parties of the judge's colleagues.

#### *Other Independent Variables*

##### *Political Variables*

I also put in a host of variables to ascertain how political actors could motivate appellate court decision making. The ideology of the presidential administration could impact case outcomes as the president has control over the appointment of judges. Cases decided during the Clinton administration were coded "1." Congress too has influence in the nominating process of federal judges and can impact court budgets. I used Poole and Rosenthal (1997)'s DW-NOMINATE scores grouped by the median member of the relevant House and Senate oversight committee for the NLRB at the time of the appellate court decision. I also used a score to measure the impact that the United States Supreme Court would have on decision-making. Although review by the Supreme Court is highly likely, it is still important to include the variable as a control. Moreover, the appellate courts often look more to the Supreme Court for guidance so they may be more motivated by the Supreme Court than the NLRB would be, where

Supreme Court review would be highly unlikely given the number of cases heard annually by each individual NLRB Board member. In another specification, instead of the Supreme Court ideology, I used the ideology of the overall circuit court, based on the median of the circuit court as compiled by the Giles et al scores.

Also I reviewed the lower court Board decision to assess the tone of the decision as to whether it is supportive or not supportive of labor. A decision was coded “1” if the Board decided the case in favor of labor, and 0 otherwise. I also added some specifications where I include both the Board and the ALJ as variables, although there could be some multicollinearity in the models by including both. The coding style for the Board decision (Coding Style 1 v. Coding Style 2) matched whatever coding style I adopted for the particular issue under study in the appellate court.

### *Economic and Case-Specific Variables*

I also included a host of economic and case-specific factors. As the outcome of labor cases could be influenced by present economic conditions, I included the inflation rate as a control variable, and in other specifications not referenced here, I alternatively included the unemployment rate. I included a variable concerning the number of cases, as the court could be more likely to rule in favor of labor if there are more allegations in the complaint (Taratoot 2013). The region where the case originated from could influence outcomes, as the South generally is more hostile to labor. In addition, I included circuit court fixed effects as an independent variable. As Sunstein et al. (2004) found, there are significant party differences vary across circuits, with the 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> circuits having small party effects (less than 8) with the 9 circuit having large party effects (27%) in voting behavior. Moreover, any lawyer will advise that circuits have reputations for being more or less liberal or conservative, with the Ninth

circuit being touted as unusually liberal and some of the southern circuits, namely the 4<sup>th</sup>, 5<sup>th</sup> and 11<sup>th</sup> circuits being seen as more conservative (Ying 2009; Fischmann 2009). In addition to circuit court fixed effects, I included year fixed effects.

I also included some additional case specific factors that could impact the analysis. I relied for purposes of this analysis on all decisions. Each circuit has different rules on whether or not they publish decisions and what types of decisions they publish, with rule varying from circuit to circuit. Moreover, whether or not the opinion is published could be subject to strategic concerns if a judge does not like the outcome of a case (Kim 2009, 1351). As such I coded decisions as to whether they were published or not. Oftentimes the courts will issue a summary order affirming the case. I excluded such data from the analysis. In most of these cases the court is not really deciding the cases on the merits. Technically, the NLRB has to formally file a motion in court to have its order enforced (assuming the parties do not voluntarily do what the court ordered). As such, many, if not most, of the cases heard in the courts of appeals involve summary review of these enforcement decisions. I limited the analysis to cases in which one of two things were present: 1) the losing party filed a petition for review and the General Counsel filed a cross motion for enforcement; or 2) the General Counsel moved for an order of enforcement and the court issued a decision that was longer than a page. Since the present analysis seeks to explore how judges rule, it makes sense to limit the cases to only those in which judges are actually carefully considering the Board decision and exercising their judgment in whether or not to uphold the decision.

I also considered other factors but opted not to put them in the regression tables, as they proved not to be significant. Moreover, as an empirical matter, their potential influence on case outcome is trivial. For instance, whether or not amicus curiae briefs are filed is often a variable

considered in analysis. However, in this dataset, amicus briefs were just a handful of cases where amicus briefs were filed, and most of those cases hailed from the 5-member Board, whose decisions were excluded from the dataset. I also reviewed the judge's individual employment backgrounds to see if they had employment history related to labor. Only a handful of judges had labor law experience, and I did not find the experience to be relevant to their voting records.

### **Statistical Analysis**

The results are presented in Table 1.<sup>8</sup> The analysis seems to confirm what we saw in the earlier analysis: that is, there appear to be discernible panel effects in the courts of appeals especially comparing Democratic and Republican courts. There is a clear difference between panels, with predictive probabilities of 61% for all Republican panels and 69%, respectively for mixed majority Republican panels. Most notably, there is over a 20 percentage point difference between RRR and DDR panels, evidencing how homogenous panels may go to the extremes to vote in a specific ideological direction. Interestingly, DDD panels appear even slightly less likely to vote in labor's favor than mixed partisan panels, but the result there should be taken with caution as the margin of error for DDD panels is so large. Moreover, the results for the DDD panels may be driven by the fact that about half of the DDD panels come from either the District of Columbia Circuit or the Ninth Circuit, which despite its liberal reputation, the Ninth Circuit seems to vote more heavily against labor than other circuits. As such, the dynamics on those courts, especially that of the D.C Circuit, may be very different than judges on other circuits. Moreover, in his study of NLRB appellate issues, Brudney et al. similarly found there to be little difference between DDD and DDR panels; he ascribed the anomaly to the fact that Democratic judges are already very secure in their tendencies to vote in favor of labor so there would likely not be any panel effects with respect to Democratic judge. Importantly, however, it

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<sup>8</sup> Figure 9 was constructed using Coding Style 2.

appears to be the case that panel composition alone is not the sole motivating Board decision making; rather, legal considerations, such as the opinion of the Board, play somewhat a role at the 95% confidence level in determining whether or not the appellate court will rule in favor of labor or not.

**Table 1: Logit Regression: Predicting Appellate Court Ideology**

	(1) <b>Matching</b>	(2) <b>Full</b>	(3) <b>Randomization</b>
<b>RRD</b>	<b>0.3853**</b> (0.259)	<b>0.321**</b> (0.331)	<b>0.582***</b> (0.434)
<b>DDR</b>	<b>0.8835***</b> (0.294)	<b>0.8955***</b> (0.355)	<b>1.223***</b> (0.554)
<b>DDD</b>	<b>0.8563**</b> (0.322)	<b>0.8384**</b> (0.333)	<b>1.145*</b> (0.546)
Clinton	0.353 (0.519)	0.222 (0.503)	
Congress	-0.688 (0.622)	-0.716 (.655)	
Supreme Ct	-0.658 (1.056)	-0.688 (0.965)	
Inflation	0.0325 (0.0199)	0.0423 (0.0195)	
Pro L Board	<b>1.845**</b> (0.296)	<b>2.016**</b> (0.347)	
# of cases	-0.0388 (0.0409)	-0.0303 (0.0480)	
South	0.0314 (0.390)	0.0223 (0.368)	
Judge Own Ideology	1.323** (0.34)	1.499** (0.212)	
_cons	2.243 (4.543)	2.544 (5.433)	
<i>N</i>	3048	3048	2,253
<i>Pseudo R</i>	0.1238	0.1352	0.0954

Robust standard errors in parentheses, year and statutory section and circuit fixed effects deleted for brevity; compiled using Coding Style 2, robust standard errors clustered by case

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

These results persist using other specifications and alternative codings of variables. They also persist with lags of some of the economic variables and with substituting alternative variables in (like substituting unemployment for inflation). Moreover, the results also persist when I looked at the data at case-level rather than the panel level. Published versus unpublished decisions also does not impact the analysis.

Most interesting to the present analysis, however, is that the matched dataset has similar results to the full dataset. The matching process yielded a casemix that balanced out the cases according to legal posture and issue, and it does not appear that panel effects differ depending on the legal issues involved in the cases. This is not surprising given the fact that even before matching the cases seemed to be fairly evenly distributed according to panel type. Legal scholars, for instance might argue that panel effects are motivated by an ideological desire to get a certain outcome. If that is the case we might expect more intense panel effects in statutory interpretation cases as opposed to routine cases. We might also expect more robust panel effects when deciding cases dealing with decisions that may impact thousands instead of just an individual employee fired from a job. Here the results underscore that panel effects seem to be occurring in all kinds of cases. In another specification not reported here for brevity, I took the full data set and set up variables/dummy variables for the various legal issues/postures. None of them showed up as significant. I similarly did the analysis on the four-prong variable and came to similar conclusions.

The randomization analysis indicated somewhat stronger panel effects, particularly occurring on majority-Democratic panels. Of course, the stronger panel effects seen in this analysis may have something to do with casemix. As noted, I excluded some cases from certain circuits, including many conservative courts because those courts do not randomly assign cases. As such, there were a disproportionate number of cases from the liberal Ninth Circuit. Even including fixed circuit effects in the model, we still see stronger panel effects in this analysis. The differences, however, are slight, so it serves as confirmation that the prior two models reflect panel effects, particularly among Republican judges.

I turn in the next analysis in Table 2 to looking at the proclivity of panels to uphold the agency decision. Other scholars have argued that panel effects are stronger with respect to rates of liberal voting than with respect to the mere question of whether the Board defers to the agency. My results bear this out. I do not find panel effects to be as strong in cases where the dependent variable is whether the Board defers to the agency. This is an interesting finding because it indicates that courts may be more partisan in whether they vote for or against labor, yet when the question is deference partisan differences do not matter as much.

**Table 2: Logit Regression: Predicting Deference to Board Rulings (Whether or Not Uphold)**

	(1) Matching	(2) Full	(3) Randomization
<b>RRD</b>	<b>0.432</b> (0.122)	<b>0.643</b> (0.221)	<b>0.882</b> (0.566)
<b>DDR</b>	<b>1.321*</b> (0.434)	<b>1.411*</b> (0.254)	<b>1.525*</b> (0.322)
<b>DDD</b>	<b>1.232**</b> (0.122)	<b>1.433**</b> (0.322)	<b>1.553*</b> (0.589)
Clinton	0.242 (0.254)	0.254 (0.354)	
Congress	-0.766 (0.755)	-0.815 (0.555)	
Supreme Ct	-0.544 (0.434)	-0.676 (0.534)	
Inflation	0.003 (0.0099)	0.0103 (0.0109)	
Pro L Board	<b>2.224**</b> (1.232)	<b>2.518**</b> (1.433)	
# of cases	-0.0433 (0.0456)	-0.0523 (0.0380)	
South	0.0214 (0.232)	0.0254 (0.554)	
Judge Own Ideology	1.212* (0.299)	1.654* (0.399)	
_cons	1.243 (0.843)	2.743 (1.233)	
<i>N</i>	3048	3048	2,253
<i>Pseudo R</i>	0.064	0.078	0.052

Robust standard errors in parentheses, year and statutory section and circuit fixed effects deleted for brevity; compiled using Coding Style 2, robust standard errors clustered by case

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

### ***Future Additions***

In future iterations of this article, I hope to undertake more statistical analysis of the data using alternative dependent and independent variables. Specifically, I hope to add a section detailing the analysis broken down by circuit; although my results for circuit fixed effects were not significant, there are some interesting differences by circuit which I would like to explore. I also hope to undertake greater analysis with respect to dissents and the proclivity to dissent

depending upon who one's co-panelists are. I also will expand the section on selection effects and explain in more detail how my statistical analysis deals with selection effects, as well as how it accounts for the fact that settlement activity could influence outcomes as well.

## **Conclusion**

Similar to what I found in earlier work on the Board itself (Semet 2016), the partisan composition of the panel appears to animate cases just as much on the court of appeals as it does on the Board. Quite simply, RRR panels appear to behave very differently than mixed partisan panels, lending support to the argument that homogenous panels go to the extremes. It is difficult to say that all-Democratic panels behave the same way because the sample size here is small and the margin of error is large, but at the very least, we can say that the more Democrats there are on mixed panels the more likely the court is to rule in favor of labor. These results persist when we look at validation rates, that is, the propensity of the court to affirm or not affirm, the courts also shows noticeable differences between panel types, with mixed partisan panels voting to affirm at a higher rate than RRR panels. Moreover, panel effects persist even when controlling for the Board decision itself, which is troubling. Quite simply, the random choice of panel generally motivates outcomes even controlling for a host of economic, political and legal factors. While panel effects are strong with respect to rates of liberal voting they are not as strong with whether or not the court actually defers to the agency. Most significantly, no one studying panel effects really considers the legal and procedural posture of the case in the case. Here, once that analysis is conducted, we see that panel effects persist in all types of cases —routine and hard cases.

What then may be the mechanism behind panel effects? There is unlikely to be a whistleblowing effect — Supreme Court and en banc review is too remote. Moreover, panel

effects with respect to Democratic majority panels are much more muted — Democratic judges on full Democratic panels do not behave much differently than if they are on a panel with a Republican, a result that contrasts with what I found at the Board itself (Semet 2016). As Brudney (2009) notes, this may be because Democratic judges are already secure in their views for labor so they are unlikely to be as influenced by panel effects. That is, it appears that the presence of a single Democrat on a majority Republican panel mutes the conservatism of the results as compared to an all Republican panel. This may be because they are more willing to listen to the Democrat’s viewpoint, or perhaps they are more willing to “split” the case in such circumstances. In turn, extreme ideological panels (RRR) evidence the greatest propensity to vote against labor, so it could be there is some sort of group conformity taking place on those panels that does not occur on mixed partisan panels.

The results here force us to think about the relationship between the NLRB and the federal courts. New Dealers were very suspicious of federal courts as it related to labor matters; indeed, that is the very reason that the structure of the NLRB is the way it is, with the appellate courts having less of a say in decision making than they do for other administrative agencies. For all intents and purposes, they wanted federal courts to stay as far away from the NLRB as possible. This overriding philosophy pervades the NLRB today and is in tension with the spirit of judicial review. What then do we see as the role of the federal courts in reviewing NLRB decisions? On the one hand, if indeed, the NLRB decides cases in an ad hoc fashion, we need a robust judicial review to rectify problems. On the other hand, however, if many of the issues that the NLRB decides pertain primarily to policymaking matters, courts should defer to the agency. As I detail below, the federal courts seem to have upset this delicate balance by overruling the NLRB in instances where they should defer. To rectify the imbalance, the NLRB needs to make

more clear that it is making policy judgments entitled to deference. Moreover, it is time now to debate whether a specialized judicial appellate court should review the decisions of the NLRB.

### *Make Policy Choices Explicit*

Scholars have noted that the NLRB has expressly downplayed the role it plays as a policymaker — a strategy which in turn has caused problems between the NLRB and the federal courts (Hayes 202). The Board routinely employs two tactics in its relations with the upper federal courts: 1) abiding by a policy of non-acquiescence, meaning that the NLRB essentially does not hold as precedent rulings of upper appellate courts; and 2) disguising its policymaking as “fact-finding” so as to ensure that its decisions rarely get overturned under the *Chevron* standard of review applied by the upper federal courts. Both “policies,” however, have upset the carefully created balance between the Board and the federal courts. In 1998, the United States Supreme Court in *Allentown Mack Sales and Service, Inc. v. NLRB*<sup>9</sup> set the path open for appellate courts to disregard NLRB fact-finding. Because the NLRB had for so long failed to make clear what is fact and what is not — and therefore what was entitled to deference and what was not entitled to deference — appellate courts often disregarded Board precedent and decided cases however they wished. In *Allentown*, the Supreme Court made clear that absent clear indications from the Board that its decision represented a policy judgement, reviewing appellate courts could consider Board rulings under the “substantial evidence” standard. The Board’s long-standing practice of “hiding the ball” to safeguard its judgments from the purview of the appellate courts resulted in this shift in power. After *Allentown*, appellate courts are more likely to look more carefully at the record and potentially reverse “nonpolicymaking” decisions because they deem them to be potentially mechanisms of the Board to hide its decisions from judicial purview.

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<sup>9</sup> See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

Although I did not do a record check, in many of the cases in the dataset here, the courts reversed NLRB decisions in their entirety due to lack of substantial evidence. In most of those cases, the court went into detail discussing the facts of the case. If the Board were truly seen as a policymaking body, the courts would not do this. Indeed, they should not do this. If the Board made more clear that many of its factual judgments are in fact policymaking considerations, it would be more clear that the court should simply defer. Moreover, because of the NLRB's widespread — and explicit — policy of not abiding by any appellate court decision as precedent, many appellate courts simply overturn the Board decision rather than remanding it back to the Board. Such a practice violates the principle of judicial review and usurps the power of the agency to make policy. This is not entirely the court's fault. The Board should not simply think that it is immune from judicial review. Rather, the Board should make explicit that it will abide by federal court decisions in certain instances, such as when the federal courts interpret a statute. If the relationship between the federal courts and the NLBR were better, each would be able to give each body the respect it deserves.

### *Specialized Appellate Court?*

The data explored indicate that appellate courts are more likely to reverse decisions of the Board than the Board is of the ALJ and that panel effects pervade decision-making in the court of appeals on NLBR cases. This calls into question whether we are indeed using independent agencies the way we should. Independent agencies are charged to have expertise in a given field. Frequent overturning of cases by appellate courts leads one to ponder whether this expertise is actually being used effectively. Perhaps it is necessary now to have a specialized labor appellate court, similar to that which exists for patent law with the United States Court of Appeals for the Federal Circuit. Having a specialized appellate court whose judges would hear labor cases

would do much to streamline the process in how cases are decided. Expertise — rather than political judgment — could perhaps be the guiding principle of decision-making. Moreover, the fact that so-called partisan panel effects exist on the federal court of appeals underscores the necessity for perhaps a smaller, specialized body to oversee Board decision-making on the higher level. Of course, partisan panel effects might not disappear completely — we see panel effects for instance on the Board itself — but norms of collegiality and desire to consensus might operate more faithfully among judges who sit together regularly and who can observe how other judges think on a given legal matter. As it stands currently, each individual federal appellate court hears only a few labor cases a year, so it is impossible for judges to really know the ins and outs of the legal issues underlying the decision. Indeed, when a circuit court fails to hear a “critical mass” of cases on a given subject matter, it may not perform optimally (Meador 1989).<sup>10</sup> A specialized labor court could perhaps do much to bring back expertise to NLRB adjudications. Judges on such a court would be more familiar with Board policy and might be better able to separate out the policymaking/nonpolicymaking divide that constitutes the standard as to whether Board decision-making should be deferred to or not. Moreover, in addition to having a specialized review body, it is also important for appellate courts to defer more to the expertise of the Board. Having expertise in the intricacies of the NLRA, Board members can better apply the statute consistently to given factional scenarios. Moreover, the Board has an army of permanent career staff and ALJs hearing cases whereas appellate courts rely on generalist judges assisted by law clerks newly out of law school with little expertise in NLRA law. A legal standard where the appellate court defers more to the fact-finding of the agency would do much to ensure that the NLRB’s expertise is used to its full advantage.

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<sup>10</sup> About 1% of circuit court cases concern the NLRB.

How do appellate courts decide labor cases coming from a partisan administrative agency? This paper's findings confirm that the process is not surprising necessarily partisan, with the random choice of a Democrat or a Republican to a panel impacting the propensity of the court to rule for or against labor. These results persist in all types of cases, whether they be cases dealing with statutory interpretation issues or cases dealing with routine firings of an individual employee. Moreover, interestingly, partisanship of the panel and the lower Board decision are the only statistically significant variables predicting how appellate courts will rule; economic, political and other case-specific variables have little bearing in influencing how the court will rule. Panel effects are muted with respect to whether the court defers to the Board, a result that is not necessarily surprising given the more legalistic nature of the deference decision. Nonetheless, the fact that panel effects still exists calls into question whether appellate courts should be using partisanship to overturn the decisions of what is suppose to be an "expert" administrative agency.

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