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ADMINISTRATIVE LAW JUDGE DECISION MAKING IN A POLITICAL ENVIRONMENT, 1991 – 2007.

by

COLE DONOVAN TARATOOT

Under the Direction of Dr. Robert M. Howard

Abstract

Unelected bureaucrats make a broad range of important policy decisions raising concerns of accountability in a democratic society. Many classics in the literature highlight the need to understand agency decisions at stages prior to the final vote by agency appointees, but few studies of the bureaucracy do so. To this point, scholars have treated the issue of shirking as one where laziness and inefficiency are the driving forces. However, it is more realistic to expect that shirking comes in the form of ideological resistance by administrators. I develop a theory that the independence afforded to the bureaucracy is functionally comparable to that of the judiciary, allowing for the insertion of individual attitudinal preferences by bureaucrats. Drawing from the attitudinal model of judicial research, I look at whether attitudes affect the decision making of administrative law judges at the National Labor Relations Board, the influence administrative law judge decisions have on reviewing bodies, and whether attitudinal decision making can be controlled by external political and legal actors. Results demonstrate that Democratic judges are more likely than Republican judges to rule for labor in unfair labor practice cases, administrative law judge decisions provide the basis for subsequent decisions of reviewing bodies, and that few political and legal controls exist over this set of bureaucrats. This research provides evidence that lower level bureaucrats make decisions based on their own political preferences and that these preferences have far ranging consequences for policy and law.

INDEX WORDS: administrative law judge, National Labor Relations Board, Congress, President, Federal Circuit Courts of Appeals, bureaucracy, attitudinal model, agency.

ADMINISTRATIVE LAW JUDGE DECISION MAKING IN A POLITICAL ENVIRONMENT, 1991 – 2007.

by

COLE DONOVAN TARATOOT

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

in the College of Arts and Sciences

Georgia State University

2008

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ADMINISTRATIVE LAW JUDGE DECISION MAKING IN A POLITICAL ENVIRONMENT, 1991 - 2007

by

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Office of Graduate Studies
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August 2008

DEDICATION

This work is dedicated to the memory of my grandfather, Isadore Taratoot. His wit and wisdom was something that could not be learned in any book, but taught me more than he ever realized.

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First, and most importantly, I want to thank my wife, Baozhen Luo, for her love and support during the time I wrote this dissertation. She dealt with my stress, time away, and failure to help out around the house with an understanding that only a fellow Ph.D. candidate could offer. She is a truly amazing woman. She motivated me to keep coding when I thought I could not look at another case, and gave me the emotional support I needed to deal with my stress.

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Chapter 1

A Theory of Administrative Law Judge Decision Making

Introduction

In 2007, the public became suddenly aware of a little known type of judge when Judge Roy L. Pearson made headlines. Judge Pearson gained the public spotlight by suing a Korean owned dry cleaning business for a whopping 65 million dollars, although the dry cleaner merely had misplaced Judge Pearson's pants. At the time, Pearson was employed as an Administrative Law Judge (ALJ) for the District of Columbia. While the story made headlines for its over-the-top character, it is probable that most of the public had never even heard of the position of administrative law judge. As the story progressed, the public and the media began to focus in on Judge Pearson's legal position, with many accusing the judge of abusing his legal position for personal financial gain.

Previously known as trial examiners, hearing officers, or hearing examiners, administrative law judges have been around for quite some time. Even though suing for 65 million dollars over misplaced pants seems extreme, over the years the powers and position of administrative law judges have been the source of much contention. One source of concern over the decision making of administrative law judges, as with other types of judges, has been the question of how personal attitudes affect decision making and whether attitudes lead to bias. In 1997, in the case of *Eldeco v. NLRB*, 132 F.3d 1007, (1997), Eldeco, a company that had been found guilty of unfair labor practices, questioned the impartiality of an administrative law judge by providing statistical evidence that the judge had decided in favor of unions in 89% of cases (Garren et al. 2000, p. 508). While the court ultimately ruled that statistical evidence was not enough to demonstrate the presence of bias, it does highlight that concerns over even-handed

decision making in the judiciary. While the literature in political science has given a great deal of attention to the affects of attitudes on decision making at the federal level in the Supreme Court, the Circuit Courts of Appeals, and district courts, very little attention, if any, has been paid to administrative law judges and their role in modern governance.

The Gap in the Literature

The undertaking of this project is extremely important to the field of political science. Not only because administrative law judges play an important role in governance, but because, to this point, the literature in political science has largely ignored this actor. Only a handful of studies exist where administrative law judges were given any attention, and in most of these studies the inclusion of ALJs was tertiary at best. For instance, Schroeder (1987) looked at how the role of ALJs in the processing of cases affected the outcomes of Board decisions. Schroeder's primary focus, however, was on Board decision making and not on decision making factors of administrative law judge decision making. Schroeder still points to how ALJs can influence the decision making of the Board and the processing of cases. This was also the case for Moe (1985) and Cooke et al. (1995) who examined the role of lower-level decision making, including that by administrative law judges, and how it could ultimately impact the decisions by political appointees.

There are studies that exist that look more directly at the role of ALJs, but to this point they remain unpublished works. Broadwell (1986) looked at reversal rates of administrative law judges at the Social Security Administration (SSA) as a condition of their satisfaction of their working conditions. The study found a significant difference in reversal rates of judges based on perceptions of their own work conditions.

Other work has been conducted on ALJs at the Social Security Administration as well. Lockhart (1983) attributes differences in case outcomes to different perceptions of the role orientations of judges at the SSA. Similarly, Mills (1994) looks at compliance by SSA ALJs to rules and regulations intended to promote fair and even-handed decision making in disability cases and finds that judges ignored substantial portions of these laws. The author attributes the departure from these laws to extralegal decision making factors employed by the judges.

Further research has focused on the position of ALJs more generally. Using survey data from 427 ALJs, Burger (1985) finds that the change from the title "trial examiner" to "administrative law judge" had the effect of shifting actors' role perceptions from a bureaucratic function to a judicial function. Schreckhise (1999) compares state and federal level administrative law judges to examine how selection mechanisms affect role orientations of these actors.

In spite of this research, a gap remains in the literature examining the importance and motivations of administrative law judges through systematic, statistical means. Previous research relied on survey data provided by the judges themselves (Burger 1984; Broadwell 1986), interviews (Lockhart 1982), or qualitative methods (Mills 1994 in part). The intention is to focus primarily on how attitudes affect decision outcomes of ALJs at the NLRB as well as how ALJs interact with the broader political and legal environment.

A New Approach to Lower-level Bureaucratic Decision Making

The growth of the administrative state at the federal level has become an inevitable part of modern governance. After the industrial revolution in the United States, the federal government faced an increasingly difficult task in determining how legislators, who were generalists, could solve problems that required increasingly specialized knowledge and expertise.

Members of Congress began to rely on expert bureaucrats for their specialized knowledge and ability to address complex issues. The problem this introduced, as Dwight Waldo (1948) first pointed out, is determining the proper place in a democracy for unelected bureaucrats who make decisions affecting the American public.

Progressive era politics of the late 19th century gave administrators considerable independence to ensure that the corruption that plagued political decisions would not have an influence over the administration of government. As a young scholar, Woodrow Wilson (1887) argues that there should be a dichotomy between politics and administration. Wilson (1887, p. 210) states, "Politics is thus the special province of the statesman, administration of the technical official." The result of this independence was a growing concern over how to hold unelected bureaucrats accountable for their actions in a society built on democratic values. The question becomes whether the cost of sacrificing the ability to hold government accountable through electoral means is worth the benefit of decisions that are rooted in expertise.

In spite of the writings by scholars such as Paul Appleby (1945), Rohr (1990), and Wamsley (1990), who recognized that politics was indeed part of administration, the ideal of removing certain government tasks from political influence remains in the hope decision making would be rooted in expertise, not politics. For those like Mashaw (1983), the idea is to give administrators the necessary independence from political officials in order to effectively use their expertise to make decisions without political meddling.

The bureaucratic control issue is not the only setting where the tradeoff between expertise and accountability has been posed in research about American politics. In fact, political scientists have often demonstrated that other unelected governmental actors are not making decisions simply on the basis of expertise, but rather on the personal preferences of the actors

themselves. For instance, Segal and Spaeth (2002) provide evidence that justices of the Supreme Court are not deciding cases merely on the basis of law and legal principles as many would believe, but are basing decisions largely on their own political preferences. This violates a normative principle of judging because the Supreme Court is politically insulated from the elected branches of the federal government as a means of ensuring that they can make impartial and fair decisions without undue political pressure. However, this independence also provided the means by which justices could make decisions based on their own personal political preferences rather than the law.

I assert that the same insulation and independence from democratically elected politicians that is provided to federal civil servants, provides the means by which bureaucrats can insert their own personal preferences into their decision making. In that sense, it is intuitive to examine bureaucracy through the same lens the literature uses for the judiciary. Previous studies have already demonstrated the political nature of decision making in federal agencies at the appointee level (see Canon 1969; Gormley 1979; Moe 1985; Cohen 1986; Cooke et al. 1995). Research on lower level bureaucrats has also received attention as many writers have focused on "street level bureaucrats." However, the focus was on how self-serving decisions were motivated by a desire to protect their "turf" or shirk their duties rather than on how individual political preferences affected decisions (Lipsky 1980; Brehm and Gates 1997).

What if members of the bureaucracy, even at the sub-appointee level, are no less political than the politicians they are separated from? In 1985, Moe suggested that scholars focus on other levels of the administrative process besides the appointee level. The current research takes up Moe's call for research as a means for answering the question posed above. Lower-level bureaucrats are specifically insulated from politics, so finding evidence of the influence of

individual political preferences on decisions occurring at the lower levels of bureaucracy would cause us to reassess our increased reliance on the decisions made by expert bureaucrats. What if politics dominates in the decision making of bureaucrats rather than a reliance on expert knowledge? If questions were just handed off from politicians to insulated, politically motivated bureaucrats, what would this mean for democracy? Perhaps our focus would shift away from efficiency considerations such as caseloads and prosecution volume that have dominated research on the bureaucracy and move toward focusing on outcome considerations.

My approach to this classic bureaucratic politics question is through the application of American judicial politics literature to the decisions of bureaucrats. Whereas public administration scholars and the like have treated the issue of shirking as a one in which laziness and inefficiency are the driving forces, it is more realistic to expect that shirking, as it exists in a political environment, comes in the form of ideological resistance by administrators. Therefore, the application of the attitudinal model seems a logical approach to answering these questions.

In order to examine whether personal attitudes and political preferences also affect the decision making of lower level bureaucrats, I focus on a group of federal employees called administrative law judges. To this point, administrative law judges have received very little attention in political science literature in spite of the importance of this position in the federal government. ALJs represent a unique class of bureaucratic and judicial actor that possesses specialized legal knowledge in various fields of administrative law. Acting in both a bureaucratic and judicial capacity, the study of this position allows us to bridge the gap between judicial and bureaucratic literature. This allows us to adopt the theoretical underpinning of the attitudinal model from the judicial literature and apply it to a bureaucratic setting by looking at this quasi-judicial actor.

In doing so, this work is primarily concerned with two major points. First, that administrative law judges play a very important role in American democracy that has been largely ignored by political science up to this point. I will make this point by demonstrating the influence that ALJ decisions have over the decisions of agency appointees and the federal courts of appeals. Second, I will demonstrate that administrative law judge decision making is motivated by the policy preferences of the judges themselves, and that few democratic controls exist to control this behavior.

In order to make these two points, I conduct a detailed and multifaceted examination of Administrative Law Judge decision making at the National Labor Relations Board. This examination will be composed of four studies looking at individual motivations in the decision making of Administrative Law Judges at the NLRB, the subsequent effect of ALJ decisions on reviewing bodies, and possible tools of control over ALJ decision making. The examination will make use of over 5,000 ALJ decisions, 2,000 Board decisions, and 300 decisions by the federal circuit courts of appeals.

Outline of the Project

Chapter 2 will begin by providing a brief history of the National Labor Relations Board. Chapter 2 will also provide a description of the structure of the agency as well as the administrative procedure for processing unfair labor practice cases. This discussion will be supplemented with an examination of the role and functions of administrative law judges. An understanding of history, structure, process, and the role of ALJs will provide the reader with a theoretical foundation for understanding how models were constructed in subsequent chapters.

Chapter 3 will look at individual level decision making and the relative influence of legal and attitudinal factors on ALJ initial decisions. If political attitudes play a large role even in the

face of legal factors, this demonstrates that lower level administration is not devoid of politics despite the goals and structure of independence. If political attitudes, rather than expertise, dominate bureaucratic decision making, then perhaps the degree of insulation from political influence should be reconsidered. Additionally, alternative forms of control over the bureaucracy as a means to ensure the use of expertise in decision making should be put into place. Finally, it also makes us reconsider whether delegating power to unelected bureaucrats actually insulates questions from political influence.

In order to gauge the importance of ALJ decisions and how attitudinal decision making permeates into the review of these decisions, I conduct two studies. Chapter 4 examines the review of ALJ decisions by the political appointees of the NLRB. The primary purpose of this chapter is to establish that ALJ decisions are the most influential of all factors that affect Board decision making. Chapter 5 will then investigate the extent of influence ALJ decisions have over federal appeals court decision making. By examining the extent to which the U.S. Courts of Appeals rely on ALJ opinions, I can determine whether political decision making by ALJs extends its influence into the federal court system as well. As a result, looking at these two steps of the review process can reveal the pervasiveness of the phenomenon of political decision making by looking at how far the influence of ALJs extends beyond just the initial decision while simultaneously demonstrating how influential ALJs are in our democracy.

Chapter 6 will examine whether ALJs act strategically within the political and legal environment in which they find themselves. This study can reveal three pieces of information. First, if results with regard to individual decision making and the influence of political attitudes support the null hypothesis (i.e., attitudes do not affect decision making), a study of this nature may reveal that this is an artifact of the desire of ALJs to act strategically and avoid having their

decisions overturned. Second, results might demonstrate that ALJs may be voting politically as a result of pressure from the reviewing body rather than their own individual motivations. This is an important distinction between politically motivated ALJ decisions and politically induced ALJ decisions. Results of this sort would cause us to reconsider the independent nature of lower level bureaucrats. Third, the chapter can reveal whether external actors can act as an ex ante control over the behavior of ALJs. So, for instance, can the Courts of Appeals limit the behavior of ALJs ex ante as research suggests? Are ALJs that are deciding cases in Appeals Court jurisdictions that more closely resemble their own attitudes able to vote their own preference more so then when deciding cases in jurisdictions that are divergent from their own?

Finally, Chapter 7 will conclude by summarizing the findings of the previous chapters in a unified manner. The chapter will begin by discussing the implications for our democratic system of government. Because, at this point, I will be able to ascertain whether bureaucrats actually employ expert knowledge to resolve governmental issues and carry out government tasks as Wilson promotes, or if decisions are largely guided by political attitudes. Finding evidence of the former can allay fears associated with the role of expert administrators in a democracy. However, evidence of the latter would alter our perceptions of the necessity of independence for "expert" administrators to make decisions. Either way, the chapter will conclude by discussing the policy implications of the results of the study.

Chapter 2

The National Labor Relations Board: History, Process, and Administrative Law Judges

"…the NLRB regulates labor-management relations largely by processing constituent-filed grievances according to set procedures, and makes decisions subject to constraints by politicians and courts." – Terry Moe (1985).

Introduction

This chapter is dedicated toward understanding three important concepts that will help to provide a theoretical framework for the rest of the book. First, it is designed to briefly provide information on the National Labor Relations Board itself, including its founding and purpose. Second, the chapter will outline the process the NLRB employs to dispose of unfair labor practice cases. In doing so, the chapter will also explore the various actors involved in this process. Most importantly, I will explore the position of the administrative law judge as a means for understanding this very unique judicial and bureaucratic position in the federal government.[1]

The National Labor Relations Board

The NLRB is an independent regulatory agency created in 1935 as part of Franklin D. Roosevelt's New Deal program to respond to the economic crises of the Great Depression. Created during a very pro-labor climate, the agency still largely reflects that orientation today. The NLRB was designed to implement the National Labor Relations Act (NLRA), also known as the Wagner Act. The NLRA provides unions with the means to organize, promulgated guidelines for conducting representation elections, outlined unfair labor practices, and provided a forum where unions and employers could settle disputes. In contrast to other independent agencies, the

[1] It should be clear to the reader that this chapter is in no way intended to provide an exhaustive history of the Board, a comprehensive outline of the position of administrative law judge, or a complete examination of the process of the disposition of cases. Entire books have been dedicated to these subjects and my intent is only to outline each of these subjects insofar as it assists with the construction of models in the next few chapters.

NLRB usually avoids rulemaking, relying on the administrative hearings process to establish policy through the accumulation of case law (Schuck and Elliott 1991).

The NLRB provides a solid framework to study Administrative Law Judge rulings for two reasons. First, the work of the NLRB is largely adjudicative.[2] The NLRB employs the second highest number of ALJs in the federal government behind the Social Security Administration (SSA). This ensures that the sample of judges is large enough to draw accurate conclusions with regard to the influence of political preferences on ALJ decision making.

Second, scholars assert that labor cases do not invoke political attitudes as much as other areas of law. For instance, Rowland and Carp (1996) demonstrate that there was little substantive difference in the voting patterns of Republican and Democratic judges on the federal district courts when reviewing NLRB decisions. Thus, because labor cases seem less likely to invoke political attitudes, this provides the most stringent circumstances for determining whether political attitudes influence the decision making of administrative law judges. Positive results in the area of labor decisions at the NLRB would lead us to believe that political attitudes play a role in the decision making of ALJs dealing with more politically charged issues handled by other agencies.

NLRB Process[3]

Types of cases

The NLRB handles a wide variety of issues as outlined in the National Labor Relations Act, and like federal courts, the NLRB cannot decide on issues unless the issue is brought before the agency by a charging party. Charges may be filed by individuals, unions, and employers with

[2] The agency even describes itself in primarily adjudicative terms as the website notes that the Board "primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings" (www.nlrb.gov).

[3] This section is in no way intended to be a complete examination of NLRB process. For a thorough, in-depth discussion, please see Garren et al. 2000. The purpose of this section is to highlight the elements of NLRB process that have a bearing on the construction of models in subsequent chapters.

relation to alleged violations of the NLRA. The NLRB handles many different types of issues. These include unfair labor practice charges against employers or unions, jurisdictional disputes between unions, illegal strikes by health care workers, illegal picketing, and representation issues.

Each of these issues is designated by a "letter code". For instance, unfair labor practice charges are designated by a letter code of "C", while representation cases are designated by the letter code "R". These letter codes are then further subdivided by a second letter designation that provides even more information about the type of case. "CA" cases, for example, designate unfair labor practice charges against employers, while "CB" cases designate unfair labor practice charges against unions. The second letter falls in line with the appropriate sections of the National Labor Relations Act. So, CA cases fall under section 8(a) of the act, and CB cases fall under section 8(b) of the act. Table 1 lists the types of charges that fall under the CA and CB designation of cases.

[Insert Table 1 About Here]

This distinction demonstrates that even the guiding statute is embedded with the recognition of a division of cases along a liberal/conservative continuum as it demarcates cases filed by unions and employers.

The dichotomous and adversarial natures of the cases that are decided by ALJs at the NLRB fall in line with the preferences of the two major political parties as well as along a liberal-conservative ideological continuum. Outcomes in unfair labor practice cases (ULPs) can be decided either in favor of labor or in favor of management. Thus, it seems that even the agency recognizes the division of cases along a liberal/conservative continuum. Past research has also largely focused on CA and CB cases, or ULPs, rather than representation issues. For

instance, Moe's (1985) study of Board outcomes is dependent on a ratio measure that is divided between 8(a) cases and 8(b) cases, or CA and CB cases respectively. Moe uses this division to create a pro-labor measure of Board decisions. Cooke et al. (1995) also focus on ULP cases rather than representation cases, though they make no specific mentions of CA (8a) or CB (8b) terminology.

This dichotomy corresponds to the way the two major political parties in the United States are characterized for their support of organized labor and businesses. Republicans tend to support employers, while labor unions such as the AFL-CIO, United Auto Workers (UAW), and Teamsters have typically had strong ties with Democratic Party. In fact, since 1940, labor unions have supported the Democratic presidential candidate in almost every election with the exception of the 1972 presidential election when the Teamsters endorsed Richard Nixon over George McGovern, while the AFL-CIO did not endorse any candidate. As a result, I would expect that if bureaucrats are making decisions based to some degree on their own political preferences Democratic ALJs would support labor unions, while Republican ALJs would support management. The partisan and ideological directionality of these decisions also allows for comparison with other bodies, including the agency's Board members (political appointees) and the Federal Courts of Appeals where appointments occurred along partisan lines and a liberal-conservative continuum.

Annual reports from the NLRB show that from 1991 through 2005, CA cases represented 77.5% of all unfair labor practice cases, while CB cases represented only 22.5% of all cases filed. The number of CB cases dwindles even further when looking at the number of CA versus CB cases from 1991 – 2006 that were actually decided by ALJs. Here, CB cases represent only

9.1% of all cases, while CA cases represent 90.9% of all cases decided by ALJs. Because of the small number of CB cases, this study will primarily focus on CA cases.[4]

The letter code distinction helps distinguish between types of cases that are the focus of this study. Prior research on the National Labor Relations Board has focused on unfair labor practice charges (DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982; Moe 1985; Cooke et al. 1995) rather than representation or other types of cases. Scholars excluded other types of cases because they are not conducive toward studying attitudes toward unions and employers. For instance, representation cases concern internal union matters which lack employer involvement. Jurisdictional disputes, designated by the CD letter code, involve disputes between multiple unions. The expectation is that these types of cases will not invoke political attitudes because they do not involve the traditional ideology of unions versus employers. Additionally, jurisdictional disputes are handled directly by the Board and lack involvement of an administrative law judge. Because the focus of this study is the role of the administrative law judge, cases that do not involve the ALJ are excluded.

Based on the division of cases through the letter coding, I am able to determine the types of cases that will be the focus of this study. I make use of unfair labor practice cases, but exclude representation cases, jurisdictional disputes, and any other issues that do not involve a union versus employer charge. Any case that is union versus union or employer versus employer has been excluded from this study. I also eliminated cross-listed CA/CB cases from my analysis.[5]

The Regional Office

[4] However, Chapter 4 will give some attention to cases filed against unions.

[5] While the universe of CA and CB cases was the largest component of this study, there was a subgroup of these cases that had to be excluded from analysis. Sometimes cases will involve cross-charges in the same case. In other words, the union files charges against an employer and simultaneously the employer files charges against the union. When cross-charges are filed in one particular case it makes it difficult to create clear decision rules that can help to determine a clear winner.

To assist with the understanding of the process of the disposition of cases at the NLRB, I diagram Figure 1 below. The figure is presented in a manner that represents the hierarchical

[Insert Figure 1 About Here]

arrangements of the decision making and review process. The lowest level of the organization is listed at the bottom with the highest levels listed at the top. Additionally, the diagram has two parts, with the bottom part representing how cases are processed within the NLRB, while the top demonstrates the handling of cases within the federal court system. I begin with the lowest level of the agency.

Following Figure 1, the process begins when a complaint is filed with one of the Board's 51 regional offices. A Regional Director heads each regional office and determines whether the charges filed have merit. A field attorney and a field examiner from the regional office conduct a preliminary investigation into every complaint to determine whether there is sufficient evidence present to support the allegations made by the charging party. The Regional Director then makes a decision as to whether there is sufficient evidence to forward the case for hearing before an Administrative Law Judge. Said differently, Regional Directors can dismiss a complaint or recommend the complaint for hearing. Previous research included the decision by the Regional Director as indicator for determining Board outcomes (Cooke et al. 1995). However, it should be clear that the Regional Director is in no way making a decision on the merits of the case, but is solely concerned with determining whether a case has enough evidence to even support the charges being made. This is meant to act as a filter for frivolous complaints that may be filed with the NLRB.

Before cases found to have merit are transferred to an ALJ for hearing, "the Board agent normally will attempt to secure a settlement of voluntary adjustment that will provide a remedy

for the alleged unfair labor practice without the necessity of further proceedings" (Garren et al. 2000, p. 448). In other words, the agency will attempt to get the parties to settle the matter(s) without having to proceed with a hearing before an administrative law judge.

If a complaint is found to have merit and a settlement cannot be reached between the parties, a notice of hearing will be sent to all parties involved in the case. At this time, the respondent has 14 days to respond to the allegations of the complaint. If a respondent fails to respond to the complaint in this time period, the matter is transferred to the Board for a default or summary judgment.[6]

Pre-Hearing Conference with an Administrative Law Judge

If the Regional Director recommends the case for hearing before an ALJ, cases are assigned to one of the NLRB's four divisions in Washington, D.C., Atlanta, New York, and San Francisco. The main judge's division in Washington, D.C. is headed by the Chief Administrative Law Judge, while each of the other divisions is headed by an Associate Chief Administrative Law Judge. The structure is similar to federal district court judges in that ALJs operate out of distinct locations under a regional framework. Also like federal judges, ALJs have no control over their docket. Unless a pre-hearing settlement can be reached, all cases that are recommended for hearing by the Regional Director must be heard by the judge.

The judge usually tries to get the parties to agree to a settlement prior to the hearing. This is a common method employed by the judges and is listed in the disposition of cases in the

[6] Default judgments will be discussed later in this chapter under Board decision making section.

Annual Reports of the agency, and ALJs are able to dispose of a great number of cases this way. If no agreement can be reached, then a hearing is scheduled and parties are informed of the time and place of the hearing. Before I detail the hearing process, one must understand the position of administrative law judge. The administrative law judge is the primary focus of this study, so understanding this position is crucial because it will help to form the theoretical framework for subsequent chapters.

Administrative Law Judges

One might find it difficult to classify these positions as one could argue that they are judges, that they are simply bureaucrats, or perhaps that they are both. Previously called Hearing Officers or Trial Examiners, the ALJs perform a quasi-judicial function for federal agencies as defined by the Administrative Procedures Act (APA) (Ruhlen 1982).[7] ALJs deal with issues long before the agency's appointees or the federal courts ever decide an issue. The ALJs act in a judicial capacity ruling in favor of one party or another based on facts and the law. Before an agency can impose its own "pathologies" or impose the political system's preferences, the ALJs determine the facts and define the appropriate precedents and law. Their importance extends beyond their role as the initial trial examiners and determiners of fact as ALJ decisions are often adopted, without modification, by the political appointees of the agency.[8]

Unlike federal judges appointed under Article III of the Constitution, ALJs are federal merit employees hired through competitive examinations rather than through a political process. ALJs are hired in one of two ways. The agency obtains a list of eligible candidates from the Office of Personnel Management (OPM) and chooses from candidates of the highest ranking based on examinations. Another method of hire is through transfer from another agency, often

[7] See sections §551 – 559 of the APA.
[8] 2005 data from the National Labor Relations Board reveals that about 30% of ALJ decisions are adopted by the Board without modification.

times the Social Security Administration. Both methods occur through merit hiring, based on the competence and knowledge of the applicant in the appropriate field of administrative law. Thus, the ALJs represent one group of expert bureaucratic officials.

Currently, the federal government employs roughly 1,300 ALJs across 27 different agencies that make decisions on a wide range of policy areas that directly affect the lives of the American public. For instance, ALJs in the Social Security Administration (SSA) make decisions regarding the termination or continuance of Social Security benefits for thousands of recipients each year. Similarly, ALJs at the National Labor Relations Board (NLRB) make decisions settling disputes between labor organizations (unions) and employers (management) that can have substantial repercussions on the private sector.

Because ALJs are employees hired through the merit system, they are not political appointees and therefore their tenure is not subject to electoral change. An ALJ cannot be replaced upon the election of a new administration or a change in congressional control. In this regard, they are similar to career civil servants. "The Judge is an employee of the agency, charged with the interpretation and enforcement of its policies and the achievement of its distinct mission" (Ruhlen 1982).

Unlike other civil servants, however, ALJs receive a great deal of independence from their hiring agency. The Office of Personnel Management, not the hiring agency, determines the pay scale for ALJs (§ 5372 of the APA). Most ALJs receive the highest civil service pay grades (about GS15 – GS 17) and thus do not have to worry about promotion (Tebo 2004). The ALJ "is not subject to agency efficiency ratings, promotions, or demotions, his compensation is established by the Office of Personnel Management independently of agency recommendations" (Ruhlen 1982). This practice helps to insulate the ALJ from internal influences and ensures that

members of the agency cannot influence the decisions of ALJs through threats of demotions or pay cuts, thus providing for independent and impartial decisions.

Additionally, according to §7521 of the Administrative Procedure Act, ALJs cannot be fired unless they have first been given a hearing in front of the Merit Systems Protection Board. Because the hearing process is considered to be lengthy and difficult, this makes it difficult for the agency to fire ALJs who do not produce favorable decisions and provides for seemingly permanent employment. Because of all this, while not enjoying the same lofty status of an Article III federal judge, the ALJ is "functionally comparable" to a Federal District Court judge (Linton 2004). Thus, for both positions judicial independence comes in the form of a lack of electoral accountability, as federal judges are not elected, as well as from a "virtual immunity to political accountability" in the form of removal from office (Segal and Spaeth 2002: 94). All of these factors demonstrate that ALJs represent a class of bureaucrat that has considerable independence and, thus the means by which to inject their own personal preferences into their decision making, the subject of Chapter 4.

The Hearing

ALJ trials are always conducted near the site of the employer (or charged party). This is an important fact because the location of the employer will also largely determine the appropriate court of appeals later if the case is later appealed to the federal courts. The primary purpose of the ALJ during the hearing is to determine the credibility of witnesses and establish a record of the facts upon which a decision can be made. The ALJ also applies appropriate precedent and law to the case.

During the hearing, parties may maintain their own legal counsel. However, the charging party is also represented by the General Counsel before the administrative law judge. "The

General Counsel is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases" (http://www.nlrb.gov/about_us/overview/general_counsel/index.aspx). The General Counsel is nominated by the president and confirmed by the Senate and serves a term of four years. Typically, the General Counsel is of the same political party as the nominating president.

Hearings are conducted just as any other federal district court hearing. Only one judge presides over the case and has the ability to call witnesses, examine witnesses, determine the admissibility of evidence, and make a determination on the merits of the case. "The administrative law judge may recommend that the complaint be dismissed in its entirety or sustained in whole or in part" (Garren et al. 2000, p. 537). As in other courts, the hearing is adversarial legal style, using the civil suit standard of a preponderance of evidence. When a decision is rendered, it is termed an "initial decision".

Initial Decision

As stated above, the decision of the ALJ is called an initial decision. A sample initial decision is included in Appendix B. Initial decisions are no different than any other judicial decision. To write their initial decisions, administrative law judges are assisted by a manual of style (see Ruhlen 1982 or Mullins 2001).[9] Each decision lists the litigants in the case, a description of the issues of contention, the facts of the case, the conclusions of law arrived at by the administrative law judge, and a remedy for the problem.

Between 1991 and 2006 ALJs issued 6,646 initial decisions at the NLRB. 454 of these initial decisions were supplemental decisions. While there is no official definition, supplemental decisions can involve one of several different types of cases. First, supplemental decisions might

[9] This proves to be beneficial to my study as decisions have a consistent format across cases which will enable the coding of cases in Chapter 4. For instance, when issuing a split decision, ALJs will use consistent language that says, "all other charges not specifically found herein are dismissed." This is one example of how consistent style allowed us to easily and accurately code case outcomes for Chapter 4.

occur in response to a Board decision that has remanded a case to an ALJ for further proceedings. Second, it might also involve the calculation of back pay for affected employees involved in a case. Third, supplemental decisions can also include determinations of whether a respondent is entitled to legal fees under the Equal Access to Justice Act.

Because of the nature of these decisions, supplemental decisions are excluded from this study for two reasons. First, supplemental decisions are often in response to Board decisions and would demonstrate an ex post form of control. Second, supplemental decisions often do not involve decisions on the merits of unfair labor practice charges, but rather focus on remedial aspects of a case. As such, these types of decisions are not useful for determining pro-labor and pro-management outcomes.

ALJ decisions are not considered Board precedent unless the decision is reviewed and upheld by the Board. This creates a strategic decision of whether to file exceptions when a party loses at the initial decision stage. While it might be advantageous to appeal the decision to attempt to win the case on the merits, it may mean that losing the case upon appeal will create a precedent to guide all future cases. Strategically, parties must make a decision of whether they want to lose the battle or risk losing the entire war through the potential of creating precedent.

Exceptions to initial decisions can be filed by any party involved in the case, including the General Counsel. Cross-exceptions often occur when more than one party files exceptions to the ALJ's decision. When exceptions are filed, as demonstrated in Figure 1, cases are reviewed by the political appointees of the agency (i.e. the Board members). It is this review that has been the subject of many previous studies in the literature (DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982; Moe 1985; Cooke et al. 1995). While this work is certainly important, it has

largely ignored what happens at the lower-levels of agencies and how this might shape the decisions and outcomes of the agency and beyond.

The Final Order of the Board

The decisions by ALJs, like that of trial judges, may be appealed when exceptions are filed by litigants. Unlike the decisions of federal trial judges which are reviewed by Article III appellate court judges, ALJ decisions are first reviewed by the political appointees of an agency. As Figure 1 shows, appeals of ALJ decisions are reviewed by the five-member Board which issues a "final order," so called because the Board decision represents the final administrative action by the agency. Final orders can either affirm or overrule the decision of the ALJ in part or in whole.

The board is composed of a five member panel that is appointed by the President with approval from the Senate. Each member serves a five year term, with terms staggered out over five years. This enables the president to make at least one appointment every year. Though not required by statute, appointment norms established in 1947 prohibit more than three members from the same party, creating a bare majority for the controlling party. Panels of three randomly selected members will hear a case. However, in decisions that the Board considers to be of vital importance, all five Board members can participate in the decision.

Typically, Board decisions come in two forms: "short form" and "long form" decisions. Short form decisions merely adopt the decision of the ALJ and include the text of the ALJ's decision in the text of the Board decision. Long form decisions typically involve a description of the rationale for the Board's treatment of the ALJ's decision. When the Board makes use of a short form decision, the decision of the ALJ is adopted without modifications. Long form decisions, however, while they do not preclude adoption of the ALJ decision, demonstrate that

the Board wants to make its rationale clear for why it adopted a decision, modified the decision in whole or in part, or altered the remedial portion of the ALJ's decision.

The Board uses standard language to designate the type of action that it is taking. Decisions adopting the decision of the administrative law judge state: "The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, finding, and conclusions and to adopt the recommended Order." Decisions that modify the Order of the judge are similar except they state: "…and to adopt the recommended Order as modified." Finally, decisions that reverse the judge's decisions read: "…conclusions only to the extent consistent with this Decision and Order." This consistent language allows us to quickly determine how the Board has treated an ALJ decision for the coding of Board decisions in Chapter 5.

The modification of Orders raises an important consideration that will be incorporated into this study. As Garren et al. state, "Where unfair labor practices are found, the Board is authorized to frame the order in two parts: (1) a negative part, ordering the party found guilty of the unfair labor practices to cease and desist from such practices, and (2) an affirmative part, directing that certain action be taken to remedy the violations" (2000, p. 554). In my study, I am not interested in modifications of remedial portions of an ALJ's decision. I am only interested when the Board overturns some portion of the negative part of a decision, or, said differently, the decision on the merits of the unfair labor practice charges. Thus, modifications to the affirmative part of an ALJ decision by the Board are not considered to be a modification of the outcome of the case as the failure or success of the parties does not change.

The Board can also render supplemental decisions. Supplemental decisions are typically issued in response to a rehearing after remand by an ALJ or due to rehearing by the Board

because of a remand from the federal courts of appeals. Again, when I look at Board decision making, I am only interested in the treatment of cases the first time they come before the Board. I expect that supplemental orders that review decisions by ALJs after remand from the Board are more likely to uphold the ALJs decision as that decision will be in direct response to criticisms from the Board. This would skew results for studies intending to discern the impact of ALJ decisions on Board decisions ex ante. Additionally, because Board supplemental decisions can be rendered in response to remands from the federal courts of appeals, they do not demonstrate how the Board makes decisions on the merits the first time it hears a case. The remand from the appeals courts might also lead to Board decisions that favor the policy preferences of the courts. Therefore, this study does not make use of supplemental Board decisions.

One oddity that Figure 1 does capture is that often time cases will be transferred directly to the Board without previously having a hearing before an administrative law judge. This departs from the normal flow of case process and usually occurs for two reasons. First, charged parties will often fail to respond to charges made against them in the time allowed by the Board. Under this circumstance, the Board will issue a default judgment against the party finding them guilty of the alleged charges without a decision or trial before an administrative law judge. Other times, when parties want to dispense with a trial on the facts, the General Counsel can make a motion for summary judgment before the Board. This typically occurs when there is no question of material fact, but rather the application of law is unclear. Again, under this circumstance there is no trial before an ALJ. Because these cases do not involve a decision by an ALJ, summary and default judgments are not the subject of this study and are excluded from the analysis in subsequent chapters.

While summary and default judgments exclude the involvement of the ALJ, the vast majority of the time, the ALJ makes an initial decision before a case is heard by the Board. A great deal of deference is given to the factual findings of the ALJ when cases are appealed to the Board.[10] Once a final order has been rendered by the Board, litigants reserve the right to appeal cases to the federal court system. This is because this represents the point at which all administrative remedies have been exhausted.

The Federal Court System

Turning back to Figure 1, cases from the NLRB can be appealed to one of two places depending on the type of appeal. Questions of fact, or disputes over the record of the facts, are appealed to the federal district courts. Questions of law, or disputes over how relevant precedent and law were applied to the case, are appealed to the federal courts of appeals. Typically appeals are based on questions of law rather than the development of the factual record. Therefore, most cases are appeals to the federal circuit courts of appeals rather than federal district courts.[11] Between 1991 and 2007, less than 40 cases were identified through LexisNexis as having been appealed to the federal district courts.

When the Board issues a final order, there are three possibilities that can occur. First, the guilty party may voluntarily comply with the decision of the Board. Often times, however, parties will fail to comply with the order of the Board. In these cases, it is necessary for the Board to pursue enforcement in the federal courts of appeals. This is because under the NLRA, the Board lacks enforcement power. Thus, enforcement is one means by which cases arrive at

[10] "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. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)."

[11] The NLRB does not even list U.S. District Courts as a means for resolving (the disposition of) cases in the its annual reports.

the courts of appeals. When the Board seeks enforcement, the court may grant enforcement or deny enforcement in whole or in part, or remand the case to the agency for further proceedings.

Next, aggrieved parties may appeal the decision of the Board if they so choose. Under this circumstance, the party or parties would file a petition for review with the federal courts of appeals. Again, the court may grant the petition for review or deny the petition for review in whole or in part, or remand the case for further proceedings. It is entirely possible that in a split decision, both the original charging party and respondent may file petitions for review in the courts of appeals. As the reader will see in Chapter 6, this presents a difficult scenario as the Board is no longer representing the views of the non-appealing party.[12]

Often times the courts of appeals will also face cross-petitions. This is when the Board seeks enforcement of its order while one or more litigants also file a petition for review. Under this circumstance, the court must describe its treatment of the petition for review and the petition for enforcement.

When reviewing Board decisions, the courts of appeals apply the standard established in *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951). This case established that a Board's decision should be upheld if the record contains "substantial evidence" to support the agency's decision. Typically this standard is easy for the Board to satisfy and presents a clue as to why the Board is so successful in the courts.

As is always the case, decisions by the federal courts of appeals can be appealed to the United States Supreme Court as shown in Figure 1. However, the vast majority of cases are settled in the courts of appeals. Only 4 Supreme Court decisions were issued for cases that were decided by ALJs between 1991 and 2006. Nevertheless, barring a remand to the Courts of Appeals or the agency, the Supreme Court represents the final step in the process.

[12] These types of cases will be excluded from analysis in Chapter 6.

Appendix A

Figure 1.

Disposition of Cases at the National Labor Relations Board

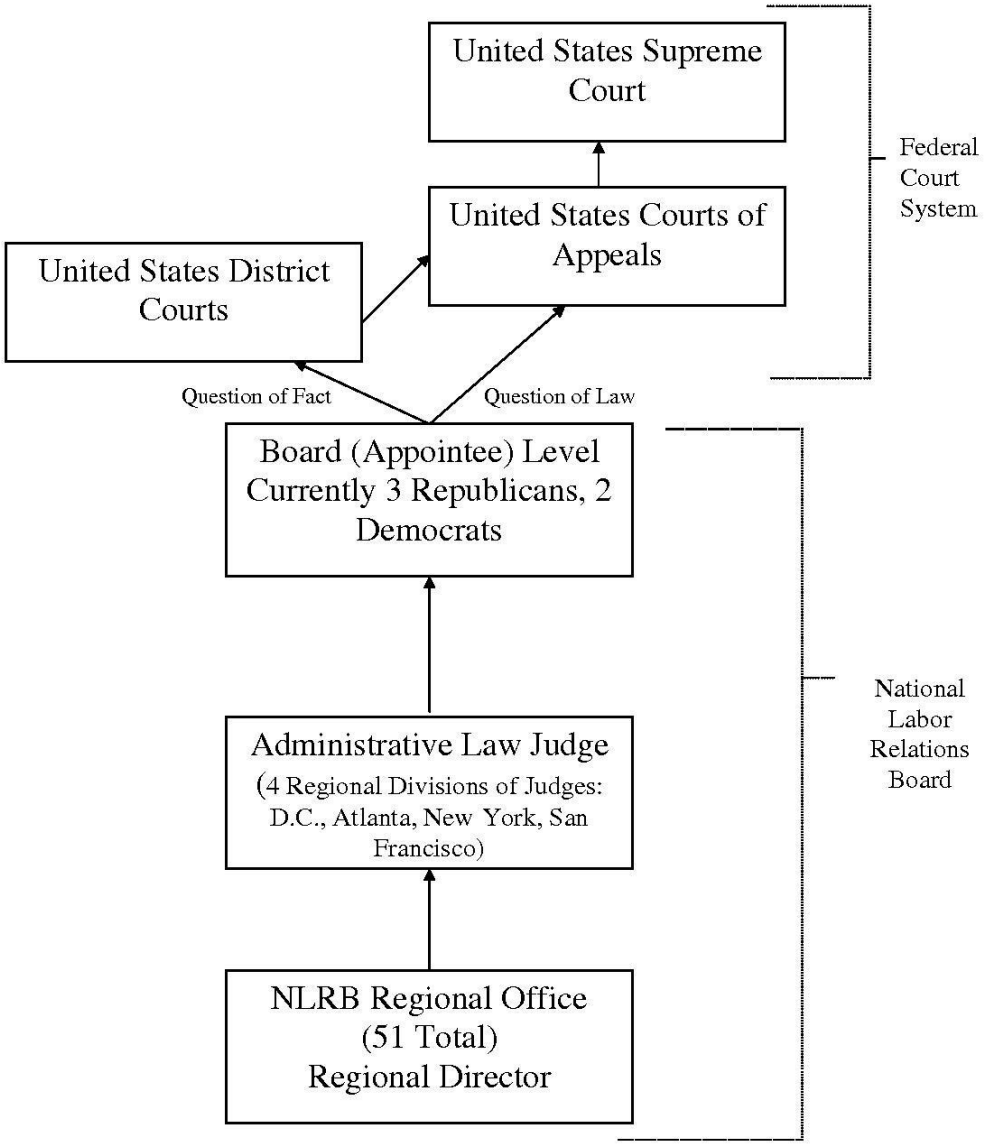

Table 1. Charges of Unfair Labor Practice Cases	
Charges Against Employer	***Charges Against Union***
Section of the Act CA	Section of the Act CB
8(a)(1) To interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 (to join or assist a labor organization or to refrain). 8(a)(2) To dominate or interfere with the formation or administration of a labor organization or contribute to financial or other support to it. 8(a)(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization 8(a)(4) To discharge or otherwise discriminate against employees because they have given testimony under the Act. 8(a)(5) To refuse to bargain collectively with representatives of its employees.	8(b)(1)(A) To restrain or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain). 8(b)(1)(B) To restrain or coerce employer in the selection of its representatives for collective bargaining or adjustment of grievances. 8(b)(2) To cause or attempt to cause an employer to discriminate against an employee. 8(b)(3) To refuse to bargain collectively with an employer. 8(b)(5) To require of employees the payment of excessive or discriminatory fees for membership. 8(b)(6) To cause or attempt to cause an employer to pay or agree to pay money or other thing of value for services which are not performed or not to be performed.
Source: "A Guide to Basic Law and Procedures Under the National Labor Relations Act," a pamphlet produced by the National Labor Relations Board.	

Appendix B.

JD-29-06

Hermitage, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

INTERSTATE CHEMICAL CO., INC.

and Cases 6-CA-34661

6-CA-34696

INTERNATIONAL CHEMICAL WORKERS

COUNCIL OF THE UNITED FOOD &

COMMERCIAL WORKERS UNION,

LOCAL 211-C

Clifford E. Spungen and Leone P. Paradise, Esqs,

for the General Counsel.

John E. Lyncheski and Floyd A. Clutter, Esqs,

(Cohen & Grigsby, PC), of Pittsburgh, Pennsylvania,

for the Respondent.

Robert W. Lowrey and Randall Vehar, Esqs,

of Akron, Ohio, for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On May 6, 2005, July 26, 2005, August 22, 2005, and October 28, 2005 the charge, first amended charge, second amended charge, and third amended charge in Case 6-CA-34661 were filed against Interstate Chemical Company, Inc., Respondent herein, by the International Chemical Workers Council of the United Food and Commercial Workers Union, Local 211-C, Union herein.

On May 24, 2005, August 22, 2005, and October 28, 2005, the charge, first amended charge and second amended charge in Case 6-CA-34696 were filed against Respondent by the Union.

On November 2, 2005 the National Labor Relations Board, by the Regional Director for Region 6, issued an Amended Consolidated Complaint, herein Complaint, alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, when on April 29, 2005 it unlawfully laid off four employees at its Hermitage, Pennsylvania, facility, when on May 17, 2005 it unlawfully laid off five employees at its Vanport, Pennsylvania, facility and when in late May 2005 Respondent, by its President, Albert Puntureri, told employees that the laid off employees had been laid off because of their union activity, that they would not be recalled, and that Respondent would not hire job applicants with prior union activity.

Respondent filed an Answer in which it denied that it violated the Act in any way.

A hearing was held before me on January 26 and 27, 2006, in Pittsburgh, Pennsylvania.

Upon the entire record in this case, to include posting hearing briefs submitted by Counsel for General Counsel, Counsel for Respondent, and Counsel for the Charging Party and giving due regard to the testimony of the witnesses and their demeanor, I make the following

I. Findings of Fact

At all material times, Respondent, a Pennsylvania corporation with its headquarters in Hermitage, Pennsylvania, and an office and place of business in Vanport, Pennsylvania, is engaged in the manufacture and nonretail sale of chemical products.

Respondent admits, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Overview

Respondent has approximately 16 facilities in various states and employs over 300 people. More specifically in 2003 it had 346 employees, in 2004 it had 363 employees and it had 337 employees in 2005.

Only three of Respondent's facilities are unionized, i.e., the two facilities in this litigation, Hermitage and Vanport, Pennsylvania and a facility in Batavia, New York. The Union is the collective bargaining representative at all three facilities and represents approximately 87 employees.

The Union was certified to represent employees at the three facilities in 2004 following an election held on January 9 and 10, 2004. Respondent and the Union reached agreement on a collective bargaining agreement which ran from December 10, 2004 to December 31, 2005. It is uncontested that Respondent told employees before and during negotiations that it was very proud that since its founding in 1968 it had never had a layoff. In addition, it is uncontested that

during negotiations for the 13 month collective bargaining agreement Respondent never once told the union that Respondent was in financial difficulty.

On April 29, 2005 Respondent laid off four employees at its Hermitage facility. All four were union represented skilled maintenance employees and one of them, Christopher Baroni, had been very active on behalf of the Union. The other three laid off skilled maintenance employees were Martin Andrusky, Mark Jenkins, and Joseph Sposito.

On May 17, 2005 Respondent laid off five union represented terminal operators at its Vanport facility.

In late May 2005, after the layoffs, one of the laid off skilled maintenance employees at Hermitage, Joseph Sposito, had a conversation with Respondent's President Albert Puntureri at Puntureri's house where Sposito had been hired to cut the lawn following his layoff. According to Sposito, Puntureri told him that the nine employees laid off had been laid off, because of the union activity of some of them and he would have laid off others who were active for the Union, but the business couldn't afford it.

Respondent claims that the layoffs were economically justified and union activity played no part in who was selected for layoff.

Puntureri denied that he ever made the statements to Sposito which Sposito attributes to him. The testimony of Puntureri and Sposito on which each said is set forth more fully below.

B. The Layoffs

As noted above Respondent laid off all four skilled maintenance employees at Hermitage, i.e., Martin Andrusky, Christopher Baroni, Mark Jenkins, and Joseph Sposito.

Chris Baroni, according to Union organizer Ron Moore and himself, was very active on behalf of the Union. Baroni solicited union authorization cards, securing about 30 signed cards.

He spoke up at captive audience meetings. Baroni also signed the certification of results of election on behalf of the Union. Baroni wore union insignia openly at work and was selected to be a Union Vice President at Hermitage. He was on the Union bargaining committee and was a union observer at the election on January 9, 2004.

At the Board representation hearing prior to the election Chris Baroni testified as a union witness.

Again, during negotiations Respondent never said it had financial problems. Respondent also never asked the Union to reduce wages or benefits rather than have the layoffs. However, there was no requirement under the collective bargaining agreement that they do so.

The evidence before me establishes that Chris Baroni was a very active union supporter and Respondent concedes it knew it prior to his layoff. There was no evidence the other three skilled maintenance employees were active on behalf of the Union.

The four skilled maintenance employees at Hermitage had simply been called maintenance employees prior to the collective bargaining agreement. Under the collective bargaining agreement their title changed to skilled maintenance employees. The job description for skilled maintenance employees was as follows:

- maintain and repair facilities/equipment
- perform welding operations and electrical system and HVAC maintenance and repairs
- operate, maintain, and repair tow motors and other material handling equipment
- operate, maintain, and repair earth moving equipment
- perform general housekeeping. See GC Exh. 14.

Of the four skilled maintenance employees who were laid off their seniority was as follows: the most senior was Joe Sposito, then Mark Jenkins, then Chris Baroni, and finally Martin Andrusky. Two maintenance helpers were not laid off.

On May 17, 2005, five of six terminal operators at Vanport were laid off, i.e., David Shetano, his brother Allen Shetano, Andy Gray, Cliff Shillingburg and Timothy Schooley. Evidence at the hearing reflects that prior to the layoff all five were active on behalf of the Union. David Shetano testified at the Board Representation Hearing on behalf of the Union and was

elected as a union vice president. Allen Shatano was selected to be a shop steward. Cliff Shillingburg was also selected for a union leadership position.

C. Respondent's reasons for the layoffs

Respondent claims it laid off the employees at Hermitage and Vanport because of economic necessity.

Respondent called two witnesses in its case - President Albert Puntureri and William McKnight, an accountant and partner in the certified public accounting firm of Magill, Power, Bell and Associates.

McKnight was a very impressive witness.

McKnight testified that in 2001 Respondent borrowed in excess of $30 million from the financial services arm of Merrill-Lynch. There were three different loans. One of the loans was a line of credit the other two had a fixed term of years.

As part of the loan package Merrill Lynch imposed seven different loan covenants that Respondent was required to meet or risk Merrill Lynch calling the loan and Respondent being forced to liquidate its assets if it could not find a replacement lender.

McKnight prepares financial reports for Merrill Lynch to show Respondent's compliance or non-compliance with the seven covenants. The covenants govern 1) the additional debt Respondent can incur, 2) the amount of capital expenditures Respondent can incur, 3) the fixed charge coverage ratio, 4) distribution limits, 5) the ratio of funded debt to EBITDA (earnings before interest, taxes, depreciation and amortization), 6) inventory days on hand, and 7) amount of net working assets. There are permissible amounts within the seven categories.

Respondent introduced into evidence along with McKnight's testimony the record of Respondent's compliance with the covenants based on quarterly reports prepared by McKnight from financial and other data supplied him.

The quarterly reports reflect whether Respondent was in compliance with the covenants or not. If in compliance this would reflect that Respondent was in a position to service its large debt with Merrill Lynch.

Respondent was in compliance as of the March 31, 2003 and June 12, 2003 reports. It was not in compliance as of the September 29, 2003 and January 25, 2004 reports. It was back in compliance as of the April 26, 2004 report but fell out of compliance as of the September 13, 2004 report. Indeed as of the January 26, 2005 report Respondent was out of compliance on 5 out of 8 covenants. An eighth covenant on minimum earnings was added to the other 7 covenants in early 2004. As of the May 12, 2005 report Respondent was out of compliance with respect to 3 of the 8 covenants. This was also true as of the June 23, 2005 report. It was in late April 2005 and mid-May 2005 when the lay offs were made.

Respondent introduced documents that reflect that with respect to the important figure of income before provision for income taxes Respondent's numbers were $4.2 million of income before taxes for the year ending October 31, 2002, which fell to $2.5 million for the year ending

October 31, 2003, then fell to $100,413 for the year ending October 31, 2004 but rebounded to $1.6 million for the year ending October 31, 2005.

Merrill Lynch could have called the loans when Respondent was out of compliance. Merrill Lynch instead urged Respondent to cut expenses. It should be noted that while out of compliance Respondent did not default on any loan payments.

The General Counsel and the Union established that Merrill Lynch was not specific on how Respondent should cut expenses and did not urge Respondent to make any layoffs at Hermitage or Vanport or anywhere else for that matter.

In late 2004 Respondent determined in an effort to cut expenses that it would monitor wages and overtime, and ensure that employees who were kept on the job were truly needed.

As a result of Respondent's financial situation no employee contributions had been made to the profit sharing plan for the last three or four years. In 2004 no trucks were purchased.

Albert Puntureri, Respondent's President and owner, also testified. Puntureri testified that it was he who selected the four skilled maintenance employees at Hermitage and the five terminal operators at Vanport for layoff.

The layoffs, according to Puntureri, were driven by the need expressed by Merrill Lynch for Respondent to cut expenses.

The four skilled maintenance employees were laid off because they did "special projects" and Respondent was cutting back on "special projects." Laid off employees Joseph Sposito and Chris Baroni testified they were not familiar with the term "special projects." In Section III, B, above the work to be done by skilled maintenance employee is spelled out (See GC Exh. 14) and "special projects" are not even mentioned. According to Puntureri "special projects" was work

that was nice to have done but not essential to the running of the business. It was cutting back on capital improvements.

Sposito went to Hermitage after his layoff and he saw supervisors doing some of the work that he and the other skilled maintenance employees had done. However, under the contract supervisors were permitted to do unit work. Two maintenance helpers were not laid off. No one was hired to fill the positions of the laid off skilled maintenance employees.

The five terminal operators at Vanport, a water terminal, who unloaded ships and loaded cargo onto trucks, were selected for layoff because Puntureri had visited Vanport and saw the terminal operators just hanging around and not working. As a result Puntureri credibly testified he studied what amount of time the loading and unloading took and determined he could get along with just one terminal operator. After they were laid off the truck drivers would unload cargo from ships and load their own trucks. Respondent also reduced the hours of operation at Vanport from 24 hours a day to 16. No one was hired to replace the terminal operators. Although Respondent contracted with a security firm to guard the facility when not in operation.

Respondent in response to its financial situation also shut down its Des Moines, Iowa, facility and eliminated six non-union jobs. Respondent also shut down its Peoria, Illinois, facility with several non union employees losing their jobs.

Again the positions at Hermitage and Vanport were not filled although employees were hired by Respondent to work at its other facilities in different capacities.

Respondent made a good case that the layoffs at Hermitage and Vanport were made for sound business or economic reasons and the employees selected at Hermitage and Vanport for lay off were not selected because of the union activity of some or all of the laid off employees.

I note that there were lay offs at non union facilities and that not all the active pro union employees were laid off. With the lay offs the bargaining unit, it appears, was reduced to 78 unit employees at the three facilities. No one at the third union facility, Batavia, NY, was laid off.

D. What did Albert Puntureri say to Joseph Sposito about the layoffs

Joseph Sposito, one of the four laid off skilled maintenance employees at Hermitage, was hired by Albert Puntureri to cut the lawn at the house where Puntureri lives. Although Puntureri lived in the house and had for years it was owned for estate planning purposes by a family corporation.

According to Sposito he spoke with Puntureri on a number of occasions after he was laid off. Sposito's testimony was as follows:

"Q. Now, after you were laid off on April 29th, did there come a time that you spoke with Al Puntureri about the layoff?

A. Yes.

Q. And when did you speak with him?

A. I'd say approximately three or four weeks after the layoff.

Q. And how did you come to speak with him?

A. I called him at his house.

Q. This is a telephone conversation?

A. Yes.

Q. And can you tell us about that – how did that conversation begin?

A. I was just asking him how long he thought I'd be laid off because I was wondering about my unemployment running out. I was worried about that.

Q. What did he say?

A. He said he wasn't sure, but he, you know, hoped to call me back soon. He says not to worry because I was most senior employee.

Q. Did he say anything else?

A. Yes, he did. I asked him – I go again 'Well, why do we have to be laid off?' And he said his lawyer thought it would be a good idea to lay the four skilled maintenance people off.

Q. Did you speak with Puntureri again after that telephone conversation?

A. Yes, I did.

Q. And about when was that?

A. I'd say approximately a week after the phone conversation.

Q. And where did that this second conversation take place?

A. That took place at his house.

Q. And what were you doing there?

A. Cutting grass.

Q. And how did you come to have this conversation with him?

A. I was cutting the grass, he came out and said he'd like to have a word with me before I left and then –

Q. Did you right away?

A. No, not right away. A little while later he came out and said that he would have to go – he needed to go someplace, so he'd like to have it now. And so we proceeded to – he has a covered patio connected to his house. That's where we went.

Q. So what happened when you got to the covered patio?

A. We sat down, he asked me if I wanted something to drink, got me a glass of water and then started our meeting.

Q. Could you describe his attitude during this conversation?

A. He started out calmly, but as the conversation went, it got a little more – he got aggravated, more aggravated.

Q. So how did the conversation start?

A. It started out him showing me charts and graphs, kind of scribblings on a tablet paper saying how much money he was saving by laying us guys off from Heritage and how much more money he was saving by laying the guys off from Vanport.

And then I asked him again, I go – or, actually, 'Why did you have to lay us guys off? You know, you didn't have the lay the whole skilled maintenance people off. You could have kept at least kept me and Mark.' And he said his lawyer said it wasn't a good idea to make the cutoff right at Chris Baroni.

Q. Did he say why?

A. No, he didn't say why at that time, no.

Q. Did he say anything about Chris Baroni at that time?

A. He said, 'Cut it off at Chris Baroni.'

Then I asked him again 'Well, why did you have to lay me off?

And he said his lawyer said that it would send a message out to the other employees if he laid all the skill maintenance people off, including the most senior, and that would be me.

Q. Okay. And then what happened?

A. I'm getting nervous now.

Q. Take your time.

A. Okay.

Q. Did you talk about what would happen if you came back to work?

A. Yes. I actually said, ‘I think if I came back to work that we’d probably end up going on strike.’

And Albert said, ‘The union let the bad contract go through.’ And he said if he had anything to do with it, it would be worse, and he guaranteed the next contract would be worse.

Q. Did he talk anymore about why he cut off the – why he didn’t cut the layoff at Baroni?

A. Like I said, as the meeting went, he got a little bit more aggravated, and he said that his lawyer told him that if they cut it off at Baroni that the union would probably bring him up on charges. And he said he didn’t understand why Chris Baroni was so strong about a union because good workers don’t need unions, and Chris Baroni was a good worker.

Q. Did you say anything to that?

A. Yeah, I asked him – I said, ‘Chris Baroni told me, though, it said right on his application that he was in unions and his resume had something about unions on it.’ And he said to that that from now on he was going to go through the applications and resumes personally to make sure that that never happened again.

Q. Did Puntureri talk about the layoff at Vanport at all?

A. Yes, he did. He said he got rid of other strong union people when he got rid of the people from Vanport, and he said that Dave Shetano and the other guys weren’t going to get called back because he hired a security firm actually to take their place as far as guarding the place and that he’d have his drivers loading and unloading that happened – that took care of it at the plant.

Q. Did he say anything else?

A. Well, he said that he probably shouldn’t tell me this, but –

Q. Did he say anything else about Vanport?

A. Vanport?

Q. Yes.

A. He said that he probably would have laid them off anyhow.

Q. You were about to say something –

A. Yeah. He said that he probably shouldn't tell me this, but he's going to anyhow. He'd go after Steve Coonfare and John Adams because they were big union supporters, but he couldn't get to them without laying off all of his drivers because they were, like, his most senior drivers.[1]

Q. Did he talked about any other employees?

A. He mentioned that, like, two or three other employees had come up to him mentioning that they wanted to opt out of the union, and he said something about he thought he had enough votes to get the union voted out.

Q. And do you recall anything else that he said about Chris Baroni?

A. No, not at this time.

Q. By the way, while you were working – have you been recalled to work?

A. No, I haven't.

Q. Did you receive any discipline while were you working at Interstate?

A. No.

Q. Awards?

A. Yeah, I got a few awards."

Puntureri admits he hired Sposito to cut his yard but denies he made the statements attributed to him by Sposito. His testimony was as follows:

"A. After the layoff, Mr. Sposito approached one of our people and asked if he could cut the lawn. It would be Mr. Coates.

[1] Apparently there were 54 drivers at Hermitage. Adams was 15th in seniority and Coonfare was 12th.

Q. His lawn or your lawn?

A. His lawn. He wanted to cut Mr. Coates' lawn. So Mr. Coates hired him, and then Mr. Sposito asked Mr. Coates if Mr. Coates would ask Al, meaning me, if he would be allowed to cut my lawn. Well, I had a lawn care tender.

Q. And Mr. Coates – Trey relayed this to you?

A. Trey relayed that to me, and I said, 'I'll check with my lawn care person, and if he's busy enough that he won't mind my leaving him, I'll give Joe the job.'

So when I checked with my care – my lawn care guy, he said, 'No. I'm plenty busy, go ahead, just do it.' So I gave the approval for Joe to come and cut my grass.

Q. Approximately when was this?

A. Sometime in May.

Q. And do you recall the exact date or no?

A. I do not.

Q. First half, latter half of May?

A. Probably first half.

Q. And following that, did Joe Sposito actually come to cut your lawn?

A. He came, and the first visit he made being new, he had to learn the ropes and all, so he got about half of the lawn cut, half of the duties, not just the lawn, but half of the duties.

Q. What else was there besides the lawn?

A. Well, there's some weeding to do around the flower gardens and things like that, a little raking maybe.

Q. Weedwacking?

A. Just general – weedwacking as well and – so – and his lawn mower automated, he had to take if off of the truck and get it to the proper location and bring his small mowers to places where he couldn't mow with the large mower.

In any event, he got about half the job done that first visit and – forgot the exact day, but the second day it rained. The third day there was a little bit of dew on the grass, but the fourth day it was sun shining again. And by now, because of the rain, the half that was already cut is almost needing cut again, and the half that didn't get cut was getting out of control.

So I called Joe and he – 'oh, I'll get there. I'll get there.' It was another day coming before he did that. Finally, he got the lawn cut for the first go around.

He then asked me if I would hire his youngster. CJ or AJ, I'm not sure, and I asked how old he was, and he told me that CJ was – or AJ was 17. I said, 'Okay. We'll give him a try.'

So they both came the next time. It was about a week later, I think, and AJ was totally unsatisfactory. He sort of just rested on the shovel, so to speak.

I called Joe up to discuss the matter. We always had water on the porch for him to – he and his helper that one time the helper and for he to drink whenever they wanted to. I said to Joe 'We're not getting much production out of your son.'

He says 'I know. He's ' – " unless I stand right over him all the time, I can't get him to do it.'

And I said, 'Well, Joe, then I don't think I need to have him anymore. As a matter of fact, if you're not going to come on a regular basis, I'm not going to have to have you anymore either.'

He had cut half of the grass on that second time. There may have been a third time. I'm not totally sure. He may have come three times, but either the second time or the third time he didn't complete the job. He never came back.

After I told him AJ was no longer needed, three or four days later half the yard was cut and he didn't return, I went back with tail between my legs and sort of begged my old gardener to come back and finish the job, and the old gardener said, 'What happens if Sposito shows up while I'm cutting?'

I said, 'If he does, you call me and I'll handle the matter,' but Joe never showed up. That was the extent of it.

Q. Now, you said that the first time that he mowed was in early May, but you're not sure of the date?

A. It could have been midway. I just don't know.

From the way the paycheck went, it would appear as though it was early May.

Q. From the first time that he showed up and cut until the very last time when he did the half a lawn and never showed up again, how long was that?

A. A month or less.

Q. So it was no later than mid-June?

A. Probably prior to mid-June. Probably early June. I'm guessing. But for the time frame that we're speaking of, the grass grows very quickly. He was there either two or three times, and that would have encompassed three to four weeks, at the most.

Q. And is there any –

A. He never did go finish Mr. Coates' lawn either. He quit there.

Q. And is there any way that that could have been in July?

A. I seriously doubt it. It could have stretched through June, but it's not into July.

Q. Now, Mr. Sposito testified that the first time he talked to you about doing the lawn, that it was on the telephone, and that he asked questions about the layoff and recall.

A. He did.

Q. And his testimony, and this may not be his exact words because these are just my notes, were that you said that the lawyer thought it would be a good idea to lay off the four skilled maintenance employees and something to the effect of that you couldn't stop at Chris.

A. I never made such a statement.

Q. Are you positive?

A. I am certain.

Q. Did I or any other lawyer ever offer you advice to that effect?

A. No.

Q. Are you sure?

A. Certain.

Q. Did you have a conversation with Joe Sposito on your patio?

A. I did.

Q. And would you tell us about that conversation?

A. The nature of that conversation was in reference to AJ not doing the job and Joe completing the job in a more timely fashion or we wouldn't have a job for him. In addition, he asked about the potential of recall, and I told him that until we were in covenant, I couldn't even consider recall.

Q. He said, ‘What’s the earliest time frame that you think we can be in covenant?’

I said, ‘Hopefully by the end of our fiscal year, which his October 31, and if that’s the case, I still won’t know about the covenant until late December because it takes close to 90 days to put all the work together, the final papers.’

So he said, ‘Are you telling me the earliest I can consider making it back is by the end of December?’

I said, ‘At the best, that’s true.’

So he packed up and again left. That’s the time he left it half done again. I called a couple days later and I said, ‘Where you been? What’s going on? We’ve had good sunshine. The last time it rained you couldn’t come. You could have been here.’

His response was ‘I was so depressed over the news that you gave me in regard to the potential of not having a job until later November, at the best, that I went out and got drunk last night and, quite frankly, I have trouble getting up to go do lawn work anyway because I need structure. I need to have a job where I’m required to be there every day. I just need structure.’ I mean, maybe not in those words about structure, but he said, ‘I need to have something that’s definite to do every day,’ something like that.

Q. Now, he testified that during that conversation you said something to the effect, as he said you said in a telephone call, that you – either you decided or you were advised to lay off all the skilled maintenance employees and not cut it off at Baroni. Did you make any statements to that effect?

A. No, sir.

Q. Did you make any statements that could be misconstrued to be to that effect?

A. I don’t believe so, no.

Q. Did you make a statement that your lawyer said it would send a message if you laid off all skilled maintenance employees?

A. No.

Q. Did any lawyer ever advise you to that effect, me or any other?

A. No.

Q. He testified something to the effect that he asked you something about Vanport and claims that you said you got rid of other strong union employees at Vanport and they're not coming back.

A. Never made such a statement.

Q. Anything that could be misconstrued to that effect?

A. Never made that statement to anyone, and I don't know where Joe would have such an idea.

Q. You were present for his entire testimony?

A. I was.

Q. And I'm not sure if based on my notes I've covered all the statements that he attributed to you. At any time during this conversation or any other with Joe Sposito, did you tell him, in any way, shape or form, that the elimination, be it permanent or temporary, of the skilled maintenance function had anything, in any way to do with the union or union support?

A. No, never.

Q. Any statement that could be misconstrued to that effect?

A. No. Every conversation with Mr. Sposito had centered around and focused on our inability to meet covenant, period."

In response to questions by me Puntureri denied telling Sposito that he wanted to get rid of John Adams and Steven Coonfare.

Needless to say if I credit Sposito's testimony I would conclude that the layoffs were unlawful and in retaliation for union activity even though Respondent had some financial difficulties and was trying to reduce expenses. I would conclude that the employees at Hermitage and Vanport were selected for layoff for unlawful reasons. However, I do not credit Sposito's testimony.

If Sposito is to be credited then his conversation on the patio with Puntureri had to have taken place after the lay off at Vanport on May 17, 2005 because, according to Sposito, Puntureri spoke about both lay offs. However the charge in Case 6-CA-34661 alleging the unlawful lay off at Hermitage of the four skilled maintenance employees had been filed with the Region on May 7, 2005 and a copy of that charge had been sent to Respondent's President – Owner Albert Puntureri on May 9, 2005. See GC Exh. 1(a) and 1(b).

Puntureri would have known about the charge. It is unconceivable to me that Puntureri, an elderly man who had founded this company in 1968 which employed hundreds of people in more than a half dozen states, would speak to Sposito, a man he had laid off, about the matters Sposito claimed Puntureri spoke about.

There was amble economic justification for some lay offs and I note that a number of very active pro-union supporters were not laid off, e.g., John Adams, Steven Coonfare, Tom Bobby, and Jim Blair.

I find that Sposito had a motive to fabricate. He had been laid off. There was no evidence that he would be recalled anytime soon and one other major reason. Sposito had his

teenage son help him out with Puntureri's yard. The son was to be paid by Puntureri but Puntureri fired the son because he was, according to Puntureri, not a good worker but lazy. Not only does Puntureri cost Joseph Sposito his job he also fires Sposito's son. It would be irrational for Sposito not to be mad as hell at Puntureri. This prompted Sposito, I find, to attribute statements to Puntureri that he never made in the hope that Sposito will be believed and get his job back.

In determining credibility issues one looks at many things to include the reasonableness or unreasonableness of the testimony. I just don't see Puntureri confiding in Sposito as Sposito says he did. It is possible that Puntureri could conclude that I'll tell Sposito whatever I want and deny it later because who will people believe me or Sposito. But I find it highly improbable that this occurred. I credit Puntureri over Sposito. Accordingly, I recommend that the Section 8(a)(1) violations alleged in the Complaint be dismissed as they were dependent on my crediting the testimony of Sposito.

Since I don't credit Sposito I must further conclude that Respondent having demonstrated an economic reason to cut expenses lawfully laid off the five skilled maintenance employees at Hermitage and the five terminal operators at Vanport. In reaching this conclusions I am aware that not all active union supporters were laid off and that some non union employees also lost their jobs.

I believe the General Counsel made a prima facie case under Wright Line, Inc., 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982) but Respondent established that it would have laid off the skilled maintenance employees at Hermitage and the terminal operators at Vanport even in the absence of union activity by some of

the laid off employees. If I had credited Sposito then the General Counsel would have won the case but I don't credit Sposito.

Conclusions of Law

1. Respondent, Interstate Chemical Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, International Chemical Workers Council of the United Food and Commercial Workers Union, Local 211-C, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[2]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., May 3, 2006.

Martin J. Linsky

Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Chapter 3

Applying the Attitudinal Model to Administrative Law Judge Decision Making, 1991 - 2006

"In our judicial system, 'justice must satisfy the appearance of justice' and administrative agencies, as well as administrative law judges, must avoid even the appearance of bias or partiality." – Judge John L. Coffey, United States Seventh Circuit Court of Appeals, *National Labor Relations Board v. Q-1 Motor Express, Incorporated,* 25 F.3d 473, (1994).

Introduction

Moe's (1985) study of decisions at the National Labor Relations Board introduces a complication to analysis of commission decisions, in that he presents evidence of a feedback loop whereby appeals by defendants to the Board anticipate likely reaction, at several stages in the administrative hearing process. One of the most important ideas that Moe highlights is the importance of agency decisions at stages prior to the final vote of the political appointees. Yet, years later, researchers have largely ignored the potentially political nature of lower-level bureaucrats in agency decision making even in light of Moe's research. While many studies have found evidence of political decision making at the appointee level of agencies (see Canon 1969; Gormley 1979; Moe 1985; Cohen 1986; Cooke et al. 1995), few have taken up Moe's call to look at sub-appointee level behavior. In instances where scholars have looked at lower-level agency behavior, most research treats agencies as unitary actors, aggregate decisions, and focus on outputs, rather than outcomes. This makes it difficult to derive theories and evidence regarding the behavior of individual lower-level bureaucrats.

To investigate the nature of sub-appointee agency decision making, this chapter develops a theory that the independence that is afforded to the bureaucracy is functionally comparable to that of the judiciary, thereby allowing for the insertion of individual political preferences by lower-level bureaucrats. So, while scholars have treated the issue of shirking as a one in which laziness and inefficiency are the driving forces, it is more realistic to expect that shirking, as it

exists in a political environment, more often comes in the form of ideological resistance by administrators. Drawing from the attitudinal model of judicial research, I look at whether attitudes affect the decision making of one set of bureaucrats, administrative law judges, at the National Labor Relations Board (NLRB).

The National Labor Relations Board (NLRB) is an independent regulatory agency created by Congress in 1935 to administer the National Labor Relations Act, which promotes fair labor practices between labor unions and employers. Unlike many independent agencies, the NLRB traditionally avoids rulemaking, and instead relies on the administrative hearings process to establish policy, through the accumulation of case law (Schuck and Elliott 1991). The work of the NLRB is largely adjudicative[13]; the NLRB employs the second highest number of ALJs in the federal government behind the SSA. This ensures that the sample of judges is large enough to draw accurate conclusions about the influence of political preferences on ALJ decision making.

Scholars have previously asserted that labor cases do not invoke political attitudes as much as other areas of law as there was little substantive difference in the voting patterns of Republican and Democratic judges on the federal district courts when reviewing NLRB decisions Rowland and Carp (1996). Thus, labor cases provide a more difficult test case for establishing that political attitudes influence the decision making of lower-level bureaucrats. Positive results in the area of labor decisions at the NLRB would lead us to believe that political attitudes play a role in the decision making of ALJs dealing with more politically charged issues handled by other agencies.

To determine if attitudes affect the decision making of lower-level bureaucrats, I model over 5,000 initial decisions by 101 administrative law judges between 1991 and 2006 as a

[13] The agency even describes itself in primarily adjudicative terms (the website notes that the Board "primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings" (www.nlrb.gov).

function of attitudinal, legal, economic, and regional factors. Positive results would raise normative questions about the biased nature of agency decision making and the potential need for democratic controls over bureaucratic decision making. If questions were just handed off from politicians to insulated, politically motivated bureaucrats, what would this mean for democracy? Perhaps the focus would shift away from efficiency considerations, such as caseloads and prosecution volume, to outcome considerations. It would also suggest that agencies are not unitary actors and that shirking can come in the form of ideological resistance to principals rather than mere laziness. It also extends understanding of judicial behavior and the attitudinal model by looking at a previously ignored judicial actor.

A Theory of Administrative Law Judge Decision Making

Progressive era politics gave administrators considerable independence to ensure that the corruption that plagued political decisions would not have an influence over the administration of government. As a young scholar, Woodrow Wilson (1887) argued that there should be a dichotomy between politics and administration. Wilson (1887, p. 210) states, "Politics is thus the special province of the statesman, administration of the technical official." The result of this independence was a growing concern over what tools of control would exist to hold unelected bureaucrats accountable to the public for their actions in a society built on democratic values. Wilson envisioned that "overhead democracy" would act as an indirect control from the public over the bureaucracy, but the question remains whether the cost of sacrificing the ability to hold government accountable through electoral means is worth the benefit of decisions that are rooted in expertise.

In spite of the writings by scholars such as Appleby (1945), Rohr (1991), and Wamsley (1990), who recognized that politics was indeed part of administration, the ideal of removing

certain government tasks from political influence remains as a means to ensure that decision making would be rooted in expertise, not politics. For those like Mashaw (1983), the idea is to give administrators the necessary independence from political officials in order to effectively use their expertise to make decisions without political meddling.

The bureaucracy is not the only setting where the balance between expertise and accountability poses a dilemma for American politics. In fact, political scientists have often demonstrated that governmental actors are not making decisions simply on the basis of expertise, but primarily on the personal political preferences of the actors themselves. For instance, Segal and Spaeth (2002) provide evidence that justices of the Supreme Court are not deciding cases merely on the basis of law and legal principles as many would believe, but are basing decisions largely on their own political preferences. This is particularly disconcerting to many due to the fact that the Supreme Court is politically insulated from the elected branches of the federal government as a means of ensuring that they can make impartial and fair decisions without undue political pressure. The unintended consequence, however, is that this independence provides the means by which justices can make decisions based on their own political preferences rather than the law.

I assert that the same insulation and independence from democratically elected politicians that is provided to federal civil servants, provides the means by which bureaucrats can insert their own personal preferences into their decision making. This is somewhat of a departure from prior research on lower level bureaucrats, or "street level bureaucrats" which focused on how self-serving decisions were motivated by a desire to protect their "turf" or shirk their duties rather than on how individual political preferences affected decisions (Lipsky 1980; Brehm and Gates 1997). However, because lower-level bureaucrats share a level of independence that is

comparable to the judiciary and because the decision making of their appointed superiors is politically motivated, it is reasonable to assume that political decision making might also occur at lower levels of the bureaucracy. In that sense, it is intuitive to examine bureaucracy through the same lens the literature uses for the judiciary.

Because administrative law judges possess a unique role that pits them as judges and bureaucrats simultaneously, it is useful to examine literature from both judicial and bureaucratic politics. Thus, I take a unique approach to this classic bureaucratic politics question through the introduction and application of American judicial literature and, more specifically, the attitudinal model. I supplement this discussion by examining the prior research on bureaucratic decision making. Both sets of literature demonstrate that it is reasonable to expect politically motivated decision making from lower-level bureaucrats.

Attitudinal Influences on Administrative Law Judge Decision Making

The attitudinal model of judicial behavior developed out the behavioral revolution that occurred within political science. During these early years, researchers such as Glendon Schubert and James Gibson developed theories that became the basis for the attitudinal model. Considered the founder of the attitudinal model (Maveety 2003), Schubert's work focused on decision making influenced by judges' attitudes. In his work *The Judicial Mind*, Schubert operationalized the attitudes of justices and scaled them along a continuum (1965). This research would mark the first attempt to operationalize the preference (ideology) of justices on the Supreme Court. James Gibson, another early writer of the attitudinal model, focused on the psychological influences on decision making by Supreme Court Justices.

In "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model", Gibson develops a model by which justices' behavior can be predicted through the use of an interactive

model of attitudes and role orientations (1978). Gibson tests the importance of role orientation in the sentencing outcomes in criminal cases before state trial courts. Gibson concludes that role orientation is an intervening variable between attitudes of judges and outcomes of cases.

In a later article, Gibson investigated the effects of self esteem on judicial decision making (1981). After interviewing 48 judges (all of which held prior legislative positions), Gibson measures each judge's self-esteem through the use of a Likert scale rating on questions. Gibson then tests how much influence self-esteem has on the relative restraint or activism practiced by the judge in decision making. Results show that role expectations (self-esteem) affect how a judge views his or her role as a decision maker.

This early research by Schubert and Gibson would set the stage for others to determine the relative impacts of attitude and preference in judicial decision making. In order to determine these impacts, researchers focused on ways to quantify the ideology or preference of Supreme Court justices. Most research used the individual votes of justices to determine their relative policy preference. Typically, researchers score votes as being in a liberal or conservative direction and then take the percentage of liberal votes to determine an ideological score for the justice (Segal and Spaeth 2002).

The work of Segal and Cover (1989) was one of the most innovative attempts to quantify the ideological preference of Supreme Court justices. Segal and Cover sought to create measures of ideological preference by using a method independent of justices' voting record. By using editorials from a variety of newspapers, Segal and Cover developed measures of ideology that have become widely accepted. After this study, Justices appointed to the Supreme Court were updated in a follow up work (Segal, Epstein, Cameron, and Spaeth 1995).

As mentioned above, research has also demonstrated the influence of individual attitudes at other levels of the federal court system, but scholars have failed to examine whether attitudes can influence the decisions of Administrative Law Judges. Chapter 2 demonstrated that ALJs, like other federal judges, are offered a great deal of independence from meddling by democratically elected politicians as an additional means of ensuring impartial decision making. If the livelihood of the judge is contingent on the outcomes of cases, this will result in biased decision making, rather than decisions rooted in legal expertise. In the context of the federal court system, this means independence from the elected branches of government and from public opinion.

Segal and Spaeth (2002) point out six characteristics that give Supreme Court justices the independence to vote their sincere preference. This ability to vote sincerely is the primary basis for attitudinal models of judicial decision making. The question becomes, how many similarities do Supreme Court justices and ALJs share? In other words, how closely comparable is their degree of independence? To answer this question, it is important to look at the six characteristics that provide for judicial independence developed by Segal and Spaeth (2002). First, the Supreme Court has control over its own docket, allowing it to only hear the cases the justices choose. This control allows the members of the Supreme Court to express their preferences through the grants or denials of cases. Docket control for the Supreme Court differs from the control an ALJ has over case selection. As Chapter 2 points out, ALJs must hear all cases that are filed by petitioners. In this aspect then, ALJs differ from Supreme Court justices in the form of a lack of control over their docket.

Next, Supreme Court justices are insulated from electoral accountability. Voters cannot remove justices from office as these positions are for life tenure and are political appointees not

elected officials. In this respect, ALJs and Supreme Court justices are strikingly similar. ALJs enjoy independence similar to federal judges because, as employees hired through the merit system, they are also not subject to the electoral whims of the public. However, unlike Article III judges, there is an important distinction. Unlike federal judges appointed under Article III of the Constitution, ALJs are federal merit employees hired through competitive examinations, rather than obtaining their positions through a political process. ALJs are hired in one of two ways. First, the hiring agency may obtain a list of eligible candidates from the Office of Personnel Management (OPM). Candidates, who are rank-ordered by examination scores, are then selected from the list by the hiring agency. Second, they may be hired by way of transfer from another agency, oftentimes the Social Security Administration. Both methods occur through merit hiring, which is based on the competence and knowledge of the applicant in the appropriate field of administrative law, demonstrating that ALJs represent one group of expert bureaucrats. Nevertheless, like federal judges, voters cannot remove ALJs from office when they disapprove of their decisions.

Third, because of life tenure, Supreme Court justices cannot be easily removed from office by political superiors. The only way to remove a Supreme Court justice from their position is through the impeachment process. Historically, only one justice has ever been impeached, but was ultimately not removed from office. This job security again allows Supreme Court justices to vote their sincere preferences. ALJs, while they differ in their type of employment, also have a great deal of insulation from removal for political reasons. According to §7521 of the Administrative Procedure Act, ALJs cannot be fired unless they have first been given a hearing in front of the Merit Systems Protection Board. Because the hearing process is considered to be lengthy and difficult, this makes it hard for the agency to fire ALJs who do not produce favorable

decisions and provides for seemingly permanent employment. Though insulation from internal agency pressure is in place, "the Judge is an employee of the agency, charged with the interpretation and enforcement of its policies and the achievement of its distinct mission" (Ruhlen 1982). The protection from the Merit Systems Protection Board makes the removal of an ALJ extremely difficult. In fact, it appears that no ALJ has ever been removed from their position at the NLRB. This level of protection mirrors that of Supreme Court justices, granting ALJs a great deal of freedom to vote their sincere preferences.

While direct removal of ALJs is difficult, it may also be possible to push ALJs out through demotions or pay cuts. Unlike other civil servants, however, ALJs receive a great deal of independence from their hiring agency. The Office of Personnel Management, not the hiring agency, determines the pay scale for ALJs (§ 5372 of the APA). The ALJ "is not subject to agency efficiency ratings, promotions, or demotions, his compensation is established by the Office of Personnel Management independently of agency recommendations" (Ruhlen 1982). This practice ensures that members of the agency cannot influence the decisions of ALJs through threats of demotions or pay cuts. Thus, for both positions judicial independence comes in the form of a lack of electoral accountability, as federal judges are not elected, as well as from a "virtual immunity to political accountability" in the form of removal from office (Segal and Spaeth 2002: 94).

Additionally, Segal and Spaeth point out that Supreme Court justices are able to vote their sincere preferences due to the fact that they are not seeking higher office. While members of lower courts might aspire to move to higher positions, justices on the Supreme Court are on the highest court in the land. As a result, they do not have to worry about future ramifications of their decisions and are able to vote their sincere preferences. Whether this applies to ALJs is a

difficult question. One could argue that ALJs might seek higher office, but there are questions about the validity of this claim. Most ALJs receive the highest civil service pay grades (about GS15 – GS 17) and thus do not have to worry about promotion (Tebo 2004). The question remains as to whether or not they might seek higher office. If they do, what office are they seeking? Within the NLRB there are no historical examples of cases where an ALJ became a Board member (in one instance a Board member did become an ALJ). So, it would seem that ALJs are not seeking higher office within the NLRB. The only other possibility then is seeking a more prestigious legal position such as a federal judgeship. As Tabo (2004) points out, a vast majority of ALJs are former lawyers who wanted to find steady work without the pressure of a private practice. As a result, it seems that ALJs are not seeking higher office and thus are able to vote their sincere preference.

Fifth, Supreme Court justices have more freedom than other judges because the Supreme Court is the court of last resort for the United States. Positioned as the highest court in the United States, the Supreme Court cannot be overruled by any higher court.
Some suggest, however, that Congress can reverse the Court's decisions (Segal 1997).
Though Congress has only overturned Court decisions by Constitutional amendment five times, very often Congress can reverse Court decisions by revising laws. Thus, some researchers believe that Congress can limit the ability of justices on the Court to vote their sincere policy preference. Segal (1997), however, found that while justices do take into account Congressional preference in some instances, the overwhelming majority of the time justices will vote based on their policy preference.

ALJs at the NLRB, on the other hand, can have their decisions reversed by the Board. Indeed each initial decision appealed to the Board receives an explicit approval or rejection.

However, as Chapter 4 will show, the vast majority of cases decided by ALJs become the final decision of the agency. Additionally, those cases that do reach the Board, affirm the initial decisions of the ALJs. Future research might seek to directly compare the rates of overturn by Congress to those of the Board. In this sense one could reaffirm the contention that ALJs are as free to decide cases sincerely as the Supreme Court.

Finally, Segal and Spaeth note how the Supreme Court is no longer bound by a norm of consensus. Past research on consensus in the Supreme Court (Caldeira and Zorn 1998; Epstein, Segal, and Spaeth 2001) has suggested that because norms changed over time, justices on the Supreme Court were able to dissent in cases. Though under the Marshall court justices were encouraged to vote in unanimity, this tradition disappeared over time (Epstein, Segal and Spaeth 2001). Lower courts, on the other hand, still demonstrate a great deal of consensus in their decision making. While this is the case, scholars of judicial politics still recognize the collegial game that occurs between judges on the same panel or court (Matlzman, Spriggs, and Wahlbeck 2000; Epstein and Knight 1998). Often having to obtain a majority, the opinion writer must shift his or her most preferred position in order to accommodate the preferences of other members of the court. Failure to do so can risk sacrificing votes from members who would otherwise support the written opinion. ALJs are quite different in this respect to both the Supreme Court and lower federal courts. So, while ALJs and Supreme Court justices exhibit many similarities with regard to independence, there is one major difference in the types of influences over ALJ decision making from federal judges' decision making.

Because administrative cases are assigned to a single ALJ, rather than a panel of ALJs, the ALJ does not suffer from collegial limitations on voting their true preference. Thus, the ALJ does not have to modify her true preference in order to satisfy the preferences of other ALJs in

order to gain a majority. In this sense, the ALJ is better able to vote her true preference and are most similar to federal district court judges, rather than appeals or Supreme Court judges. As Ruhlen points out, "Their powers, duties, and status have been considered on several occasions by the federal courts" themselves, where the courts declared ALJs to be "functionally comparable" to district court judges (Linton 2004). Thus, not only is the ALJ not bound by a norm of consensus, but is also not bound by many of the strategic interactions that occur between members of the Supreme Court (see Epstein and Knight 1998). In this respect, ALJs seem to actually exhibit more freedom to vote their sincere preference as they are not constrained by other participating judges.

All of these factors demonstrate that ALJs represent a class of bureaucrat that has considerable independence and, thus the means and motivation to inject their own personal political preferences into their decision making. While ALJs may not be directly comparable to Supreme Court justices, the above discussion demonstrates that ALJs exhibit many of the traits necessary for independence. If this is the case, then it seems that the use of an attitudinal model of ALJ decision making does not present itself as theoretically unsound.

Additional support for notions of political decision making can be extrapolated from prior research on bureaucratic behavior. Several key articles in bureaucratic politics examine the behavior of individual members of independent regulatory agencies (Canon 1969; Gormley 1979; and Cohen 1986) all demonstrate the partisan and ideological nature of commissioner decisions at the Federal Communications Commission. Moe (1985) also demonstrates that National Labor Relations Board decisions are determined by the ideological makeup of the Board, when examined longitudinally.

Moe's analysis of NLRB decisions introduces a complication to analysis of commission decisions, in that he presents evidence of a feedback loop whereby appeals by defendants to the Board anticipate likely reaction, at several stages in the administrative hearing process. Thus, Board voting patterns are powerfully attenuated by sample selection mechanisms. He conceptualizes three broad categories of actors: the Board, its "staff", and defendants. He provides empirical evidence that each set of actors responds to the anticipated actions by the others. In particular, NLRB "staff" (which includes but are not limited to ALJs) begin to process cases in a more labor-friendly way when they anticipate a more labor friendly board. Moe never comments on which elements of the staff (ALJs, prosecutors, investigators) are responsible for this feedback phenomenon. More close to home is Cooke et al.'s 1995 study of the NLRB. Though they build upon the work of Moe (1985), the authors highlight the importance of focusing on individual level data rather than aggregate data. The study reveals that political influences have a greater impact on important or complex cases than in less important or simpler decisions.

These studies provide evidence that decision making, at least at the appointee level, is often politically driven, even at the individual level. Therefore, it is reasonable to assume that under a principal-agent structure this type of political decision making might trickle down to lower levels of the organization.[14] It also highlights the fact that administrators are not neutral in their administration of the law.

Therefore, if ALJs at the NLRB are making decisions based on their own political attitudes, how should these attitudes manifest themselves in policy decisions? The dichotomous

[14] This raises the question of whether political decision making on the part of administrative law judges is politically motivated or politically induced by principals. This is the topic of analysis for chapter 6.

and adversarial qualities of the cases that are decided by ALJs at the NLRB assist in answering this question.

As mentioned in Chapter 2, possible case outcomes fall in line with the preferences of the two major political parties as well as along a liberal-conservative ideological continuum. Outcomes in unfair labor practice cases (ULPs) can be decided either in favor of labor or in favor of management. Even case filings are divided into two primary categories, "CA" and "CB," depending on who files the case.[15] The notation of cases using the CA/CB notation is directly linked with sections 8(a) and 8(b) of the National Labor Relations Act. Section 8(a) outlines unfair labor practices for employers. Hence CA notation represents an unfair labor practice charge against an employer, while section 8(b) outlines unfair labor practices for unions (CB notation). Thus, it seems that even the guiding statute is embedded with the recognition of a division of cases along a liberal/conservative continuum. From 1991 – 2005, CA cases represent 77.5% of all unfair labor practice complaints filed, while CB cases represent 22.5% of all complaints filed (NLRB Annual Reports 1991 – 2005).

Past research has also largely focused on CA and CB cases, or unfair labor practice cases (ULPs), rather than representation issues. For instance, Moe's (1985) study of Board outcomes is dependent on a ratio measure that is divided between 8a cases and 8b cases, or CA and CB cases respectively. Moe uses this division to create a pro-labor measure of Board decisions.

[15] CA and CB cases are not the only types of cases handled by the NLRB. For instance, the NLRB also handles "R" cases dealing with union representation as well as "CC," "CD," and other types of cases. These types of cases deal with internal union matters and jurisdictional disputes between unions rather than unfair labor practices. The reason for the exclusion of these types of cases is that they typically deal with issues that would not invoke political attitudes. CC cases, for example, deal with cases of union versus union, while representation cases often deal with internal union matters. Decisions involving identical categories of litigants would not provide the necessary cues that would normally induce political attitudes.

Cooke et al. (1995) also focus on ULP cases rather than representation cases, though they make no specific mentions of CA (8a) or CB (8b) terminology.

Determining the manifestation of political attitudes in decisions is also assisted by the fact that the two major political parties in the United States have been polarized in their support of labor organizations and businesses. Republicans, historically, tend to support employers, while labor unions such as the AFL-CIO, United Auto Workers (UAW), and Teamsters have typically had strong ties with Democratic Party. In fact, since 1940, the aforementioned labor unions have supported the Democratic presidential candidate in almost every election except the 1972 presidential election in which the Teamsters endorsed Richard Nixon over George McGovern, and the AFL-CIO did not endorse any candidate. As a result, I expect that if bureaucrats are making decisions based on their own political preferences rather than expertise, Democratic ALJs would, on average, be more supportive of labor unions, while Republican ALJs would rule more often in favor of management. The partisan and ideological directionality of these decisions also allows for comparison with other bodies, including the agency's Board members (political appointees) and the Federal Courts of Appeals, where appointments occurred along partisan lines and a liberal-conservative continuum.

To determine if political attitudes affect decision making, the model looks at whether ALJs are influenced by their partisan identification. Lloyd (1995) found that partisanship was a reasonable proxy for ideology in his study of judicial decision making. Thus, I include a measure of partisanship for each ALJ in my model.

Because Democrats tend to favor labor organizations, I expect that Democratic ALJs would rule in favor of labor unions and against management more often than Republican ALJs. Similarly, because Republicans tend to favor business and free market strategies, I expect that

Republican ALJs should rule in favor of management and against labor union more often in unfair labor practice (ULP) cases at the NLRB.

Next, I expect that Independent judges should not favor labor unions or management, but should be more inclined to be impartial decision makers. However, this is predicated on the fact that Independents are truly independent in their partisan leanings, and not partisans masking their true political attitudes. Because Independents represent political moderates, I expect Independents to favor labor more often than Republicans, but not as often as Democrats.

Legal Influences over Administrative Law Judges

Many scholars within judicial research do not subscribe to the idea that judges make decisions simply based on their own preferences. Rather these scholars believe in the notion of *stare decisis*, or the idea that decisions are made based on precedents. Writers such as Gillman, Ackerman, and Pritchett all have criticized the work of attitudinalists like Segal and Spaeth (Pritchett 1969; Ackerman 1991; Gillman 1993). Research is not limited to these scholars, however, as Segal (1984) develops a legal model to help understand search and seizure decisions. In his work, Segal demonstrates that the Court is not only more likely to decide for the federal government, but that the expectation of privacy based on the place of the search has a large impact on Court decisions. Building on Segal's research, George and Epstein (1992) develop a model that incorporates both legal and attitudinal factors in an effort to determine which of these has the greater impact on judicial decision making. Results demonstrate that both legal and extralegal factors have a profound impact on Court decisions. In fact, the conflict between the legal model and the attitudinal model still exists today (see Segal and Spaeth 2002; Knight and Epstein 1996) with many scholars suggesting that both factors play a role in decision making.

Because there is a clear legal component to the decisions of administrative law judges, it is therefore important to consider possible legal influences over decision making. This type of influence might come in the form of fact patterns used by the judges to decide cases. As such, it is important to determine whether fact pattern analysis is appropriate for this study.

The use of fact pattern analysis first took root in the work of Kort (1957, 1958, and 1963) who sought to establish how patterns of fact influenced the decisions of judges. Here I mean that judges use consistent patterns in the facts as cues or shortcuts to issue decisions. While this work has been pointed out by some (Fisher 1958) to have possessed some methodological weaknesses, the usefulness of such studies has prevailed. Segal's (1984) work on Supreme Court search and seizure cases has had an impact beyond the pages of the study as it has been utilized in a variety of other studies (Segal and Spaeth 1993, 2002; Scherer (2001); Zorn (2006). Fact pattern analysis has become an expected part of what Ringquist and Emmert (1999) call the "comprehensive models of judicial behavior" in a number of works (e.g., George and Epstein 1992; Songer and Haire 1992).

The comprehensive models to which Ringquist and Emmert refer are part of a broader trend of the analysis of judicial behavior at multiple levels of the judicial hierarchy. These comprehensive models include fact pattern analysis as a means for ensuring fair representation of the legal model pitted against extralegal factors. For instance, Songer, Segal, and Cameron (1994) conduct a fact pattern analysis of search and seizure cases in their examination of the interaction between the Supreme Court and the circuit courts. Benesh (2002) finds an interesting use for fact pattern analysis to determine the influence of the Supreme Court over courts of appeals in confession cases. George and Epstein (1992) also make use of fact pattern analysis in their study of Supreme Court death penalty cases, while Hagle (1991) employs fact pattern

analysis to his study of Supreme Court obscenity and pornography decisions. Songer and Haire (1992) also employ fact pattern analysis in their analysis of obscenity cases, but do so in the context of the U.S. Courts of Appeals. Fact pattern analysis has also been employed at the state level on state supreme court decision making (Emmert 1992).

These studies include two important commonalities that are relevant to the current research. First, the consistent theoretical approach of these studies demonstrates that case facts and legal influences are a consistent aspect of studying judicial behavior and judicial outcomes. The exclusion of legal factors would certainly tip the balance and create a bias toward finding the influence of extralegal factors on judicial outcomes. The statistical findings of this work demonstrate that facts are not only an important theoretical consideration in the study of judicial behavior, but play a substantive and significant role in the outcomes of cases, though variations in degree may exist.

Before accepting the inclusion of fact patterns outright, one additional commonality must be examined. The second commonality of each of these studies is that the institutions analyzed were all courts of appeals. Courts of this sort are functionally different from district courts in that they are investigating questions of the proper application of law. District courts on the other hand are primarily concerned with developing a record of the facts. These institutional differences cause us to take a deeper look at whether the inclusion of fact pattern analysis is also appropriate for district courts. Lloyd (1995) provides insight that begins to illustrate the potential problem that exists with applying this same theoretical and methodological approach to fact-finding courts:

> Unfortunately for this study, and unlike Segal's study, the district courts were the first steps in the litigation of reapportionment cases. Where Segal could use case facts established in lower courts for his analysis of the Supreme Court, the facts presented in the case must be used to determine the various influences (p. 416).

Lloyd seems to be recognizing an inherent weakness that is due to an endogeneity problem that stems from the inclusion of case facts as predictors for courts whose primary function is in the establishment of a record of the facts. This is a problem that does not exist for studies of courts of appeals such as Segal's (1984). As Ringquist and Emmert point out, "factual interpretation often involves as much judicial discretion as do questions of law" (p. 14). An actual example of how Administrative Law Judges can use this type of discretion is useful to illustrate this point.

In a 1991 case decided by Administrative Law Judge William F. Jacobs (1991 NLRB LEXIS 1107), a charge was made that an employer threatened union supporters with physical violence. The judge reports the matter as follows:

> On Thursday, May 25, after work, when Husted [a union sympathizer] went to Cox's [the employer's manager] office to pick up his check, he found several employees there handing around a sheet of paper which was subsequently returned to Cox who then placed it on his desk. Husted asked what was happening and Cox replied that Husted knew. Husted pled that he did not know what Cox was talking about, at which point Cox stood up and said, "This isn't a threat, but I want to kick your ass."

The complaint issued by Sprinkler Fitters U.A. Local 821, AFL-CIO alleged that "the Respondent, through Ron Cox, threatened an employee with physical harm," specifically referring to the above quote. Judge Jacobs dismisses the charge, providing the following explanation:

> I do not consider Cox's statement to be a threat. By making this statement Cox was saying, in effect, that he was so angry, that he would like to physically hurt Husted, but, for one reason or another, would not do so. And he did not. His expression of anger, which is all it was, may have been tempered by his knowledge that to follow through with the action under contemplation would result in a charge of assault and battery, a possible civil suit and a violation of the act. On the other hand, the fact that Cox is 5 feet 7 inches tall while Husted stands 6 feet 4 inches and weighs 260 pounds may have been a consideration in his giving Husted assurances that no such assault would take place. Whatever the reason, Cox made it clear to Husted, that he was not threatening him. I find no violation.

In a 1992 case (1992 NLRB LEXIS 71), Administrative Law Judge Raymond Green was faced with a similar issue in which a union striker was accused of using threats against an employer's non-union members. Judge Green provides an account of the events:

> John Kuehn, a sales supervisor, testified that on August 11 at 7:30 a.m. he went on delivery truck with employee Fabio Fernandez and a guard when Tim Mahon and Jose Coste, two of the strikers, blocked the road leading from the warehouse on Electra Lane with their vehicles. Kuehn testified that when the truck stopped, Coste banged on the window, tried to open the door and said that he was going to **get them and kill them** [my emphasis]. According to Kuehn, Ralph Cotto, (a picket captain), jumped onto the running board on the passenger side and knocked 3 beer barrels off the truck. Despite the video surveillance, no pictures were offered into evidence by the General Counsel or the Charging Party. Kuehn states that this incident happened where Electra Lane turns into McQueston Parkway and may therefore have been too far to take pictures. The other two people in the truck were not called as witnesses. Jose Coste, a striker, testified that he was present at the picket line on August 11 and did not see any incident involving Cotto and beer barrels. Coste denied jumping on the truck's running board, banging on a window or making any threats against the truck's occupants. The Respondent did not however, call Cotto or Mahon to testify regarding these alleged incidents.

In spite of the differing positions offered through the testimony, Judge Green arrived at the following conclusion:

> I further find that striker Jose Coste on that occasion, threatened to assault the truck's passengers. In these respects I conclude that the Union violated Section 8(b)(1)(A) of the Act.

While no two situations involve precisely the same events, the two provided here are strikingly similar. Both instances involved allegations of threats of physical violence. In both instances the ALJs provided no Board citation to support their conclusions, and each ALJ made a different determination as to whether a threat existed. There is no mention by Judge Green as to whether Coste actually had the intent to kill someone or if his words were simply an expression of anger, or if the size differences between Coste and the target of Coste's alleged threats played a role in the outcome. It would not be far fetched to assert that some discretionary element in the judges' decision making is what led to the differences in the outcomes.

While one anecdote does not preclude the possibility that some pattern throughout the population of cases may exist with regard to allegations of violence, it does provide solid evidence that factual interpretation involves as much discretion as does the interpretation of law. At the fact finding level, the interpretation of the facts is where policy preferences will manifest themselves.

Therefore, if discretion and judicial policymaking are to be found in the interpretation of the facts, then including the facts as predictors creates an endogeneity problem. To treat contested facts as pieces of information settled prior to the decision, when in actuality the purpose of the case is to settle any factual disagreements between the two parties as a means for determining the outcome, would eliminate the possibility that the settlement of facts is discretionary. The settlement of case facts in this instance will be extremely good predictors of case outcomes as they are representations of the outcomes in and of themselves due to the fact that outcomes are hinged upon the "fact" finding of the judge.

A hypothetical example may help to illustrate this point further: an Administrative Law Judge faces a case in which Union A is accused of picketing the entrance to an employer's construction site that was designated for Union B, and has obstructed workers from Union B from entering the construction site. According to Section 8(b)(7) of the National Labor Relations Act, if the union had engaged in this behavior, this would constitute an unfair labor practice and a violation of the Act. Union A presents its version of the facts along with testimony from workers of Union B, stating that Union A never blocked this entrance. The employer, however, presents an alternative version of the facts in which the union did picket Union B's entrance, and supports its claim with testimony from other Union B members. If Judge Smith credits the testimony of witnesses supporting the employer's story over that of Union A's story, then the outcome of the case, based on the determination of this single fact, has already been determined. Union A is guilty of a Section (b)(7) violation. To include a variable that represents this fact would represent the aforementioned endogeneity problem as the determination of the fact was a determination of some, or all, of the outcome of the case. However, the settlement of the record

of the facts did not occur until the judge actually rendered the decision. Segal (1984) makes a very similar argument:

> The Supreme Court's decision on whether there was probable cause or whether an arrest was lawful cannot be used because, first, we do not know whether or not the Supreme Court's decision on probable cause precedes its decision on the reasonableness of the search. Thus we do not know whether the Court's decision on probable cause contributes to its decision on the reasonableness of the search or merely justifies that decision. Even if this were not a problem, the Supreme Court's decision on probable cause obviously cannot be used for prediction because its value is not known until the day the Court renders its decision (p. 894).

To use Segal's language, researchers cannot differentiate between whether the determination of fact contributes to the decision or if the determination of fact merely justifies the decision.

One alternative to looking at facts presented in the text of the decision that has been used to study courts of appeals is to look at the various precedents that guide the usage of facts within a case. Under this scenario one could look at which Board or court precedents recur most often across the universe of cases and then log these precedents to see which are most crucial to the outcome of the case. As Benesh correctly points out, "many argue that what a fact-based model really measures is the influence of Supreme Court precedent" (p. 40). While this is useful in Benesh's work, the purpose of the current study is not to determine Board influence over ALJ decision making, but rather to determine how individual ALJs make decisions. This would call into question the usefulness of such logging and pattern analysis.

The purpose of the above argument is not to establish that case facts should not be a part of decisions by judges whose primary function is fact finding. But, rather, the purpose is to call attention to the fact that certain facts have the potential to create statistical modeling problems through cyclical predictors and outcomes when modeling that has been historically used for courts of review is applied to fact-finding courts. This does not mean that fact pattern analysis has not been used in the study of district courts, but rather it has taken on a different form. Other studies have made use of some form of the inclusion of facts in their analysis of district courts

decisions. The above mentioned study by Lloyd (1995) makes use of three case facts in determining whether partisanship or ideology is guiding the outcomes of apportionment cases in order to understand whether the proxy of partisanship is a valuable proxy for policy preferences of district court judges.

Recalling Lloyd's words, however, it is apparent that the selection of case facts must be treated in a manner similar to that of analyses of courts of review whereby only facts that have been established prior to the beginning of the case are included. Segal (1984) even points this out, stating that, "The limit is that the value of all variables used must be known before the Court's decision is released" (p. 893). In fact, Segal makes it clear that his usage of facts is as reported in the lower court decision, not by the Supreme Court's decision. This may be predicated on the same type of rationale that Rowland and Carp use in their work on district court judges (1996).

Based on the above argument, I abandon the term "facts" and adopt the term "characteristics" as Ringquist and Emmert (1999) have done. The case characteristics that Ringuist and Emmert select are all pieces of information that are available to the judge at the outset of the case, creating a scenario that is more theoretically comparable to those offered by studies looking at courts of review. The former represents what *Black's Law Dictionary* would call "fact in issue", or a fact on which the parties to the case disagree. The latter can be thought of as more basic ways that judges might distinguish cases through the use of categorization.

Again, the selection of facts that are established after the outset of the case might represent the policy decisions embedded in the interpretation of facts that the current study seeks to investigate. This consideration limits the selection of case facts significantly, so choosing facts that have prior availability and are substantively relevant is quite difficult. This difficulty

may be exemplified by the existing literature, which often seems to have difficulty including case facts in district court decision making models. For instance, studies looking at the impact of presidential (Rowland and Carp 1983), senatorial (Johnson and Songer 2002), and individual judges'(Rowland and Carp 1996) preferences on the impact of district court cases all seem to ignore the possibility that legal factors may play a crucial role in these decisions.[16] However, the authors of these studies often try to alleviate the problem by dividing cases into policy areas or categories, again demonstrating the need for some measure of case characteristics.

At first glance, the existing literature on the National Labor Relations Board might lead one to believe that fact patterns are theoretically irrelevant in Board member decision making. Because the appointment of Board members is thought to be such a politically motivated and partisan process, researchers seem to forget that Board decisions might be rooted in law. One would think it is more theoretically appropriate to see if fact-patterns exist at the Board level as it is an institution of appeals, and the existence of a record of the facts is established by the deciding Administrative Law Judge. Cooke et al (1995) seems to ignore the potential for case facts to impact outcomes in their work on Board member decision making. To the authors' credit, they do include case characteristics such as whether the union has a historically negative image.

As a result, it is necessary to include a small set of variables in the model to represent case characteristics. First, the number of cases filed against the respondent is a useful measure of a case fact, established prior to the trial, which provides evidence as to whether the charged party engaged in an unfair labor practice. This is comparable to the measure used by Ringquist and

[16] In fact, Snyder and Weingast's (2000) study of Board member appointments to the NLRB does not seem to consider the possibility that this group of administrators may decide cases on legal, rather than political or partisan, factors.

Emmert (1999) to illustrate the fact that the number of violations can have an impact on the size of the total fine imposed on environmental legislation violators.

Second, the model includes a variable to measure the number of charging parties. While on the surface this may seem to be the same measure as the previous variable, the number of charging parties is not always the same as the number of charges. Having one party making ten complaints is not the same as ten parties making one complaint. The latter situation is functionally different and legally relevant in that it increases the number of potential witnesses to support the claims of the charging party. This may sway the judge's development of the record of facts, which will ultimately decide the case.

I have similar expectations for the effect of both of these variables on unfair labor practice outcomes. Trial court judges typically place a strong emphasis on case disposition (see Baum 1997; Wold 1978; Green 1965). The number of cases filed against the respondent may be an indicator to ALJs of the validity of the claims being made against the respondent and would provide a cue that would allow the ALJ to rule on the matter in a more timely fashion. Thus, on average, one would assume that the more cases filed against the respondent, the greater the chance that the ALJ will rule against them. Similarly, the number of charging parties may also be an indicator of the validity of the case against the respondent. Again, the same assumption would apply as one would assume that the more parties that are supporting the charges against the respondent, the greater the likelihood that the ALJ will rule against the respondent. However, dramatic increases in these variables might also have diminishing returns, thereby decreasing the chances of a decision decided completely in favor of the charging party. This is because having a large number of charging parties and charges against the respondent increases the likelihood of frivolous charges.

Another important case characteristic is derived from Cooke et al. (1995). In their research, the authors found that unions with historically negative images tend to be less successful in litigation before the Board. Its incorporation mirrors that of Ringquist and Emmert's "repeat offender" variable. A continued history of violations by a particular party may influence the judge's fact finding, including determinations of the credibility of testimony. As Cooke et al. state, "Some unions with a long reputation of being undemocratic and corrupt are the Teamsters, Longshoreman, Laborers, and Hotel and Restaurant Employees" (p.245). Cooke et al. derive their conclusions from the work of Taylor and Witney (1987), Glaberson (1989) and Shendon (1988) on the history of the corruption surrounding the Teamsters and the work of Levy (1989) and Ichniowski and Preston (1989) for evidence of historical corruption surrounding other unions. Because a history of corruption might provide a decision making shortcut that is based on previous behavior for an ALJ, one would expect this to decrease the likelihood of a pro-labor decision.

Last, because research has shown that litigant characteristics can play a substantial role in the outcomes of litigation (Galanter 1974; Wheeler et al. 1987; Songer and Sheehan 1992), I include a variable to measure whether the charging party is an individual. This variable is a dichotomous measure of whether the charging party is an individual. Because individuals are not considered "repeat players", or litigants that are familiar with the legal process through repetitive involvement, and often possess fewer financial resources, research has demonstrated that these litigants are often unsuccessful (Galanter 1974; Wheeler et al. 1987; Sheehan, Mishler, and Songer 1992). As Sheehan et al. (1992) state, "Repeat players are presumably better able to 'play for the rules' in the legal process. They can settle cases likely to be lost in the courts and appeal cases they have the best chance of winning—and thus maximize their success rates" (p.

464). While this is the case, Cooke et al. (1995) eliminate cases involving individuals as they say that these cases will not invoke the typical union-management sentiments of Board members. As such, models will be presented that include individuals along side models that exclude cases involving individuals.

I would reiterate that these variables are not to be confused with pure fact patterns that have been included in literature examining courts of review. Rather, these variables are intended to measure the preexisting characteristics of the cases that come before Administrative Law Judges. In this sense, they act as quasi-legal cues that provide a representation of the legal model that can then be measured against extralegal and attitudinal factors.

As a result, it is necessary to include a small set of variables in the model to represent case characteristics. First, the number of violations brought up against the respondent is a useful measure of a case fact, established prior to the trial, which provides evidence as to whether the charged party engaged in an unfair labor practice. This variable is comparable to the measure used by Ringquist and Emmert (1999) to illustrate the fact that the number of violations can have an impact on the size of the total fine imposed on environmental legislation violators.

Second, the model includes a variable to measure the number of charging parties. While on the surface this may seem to be the same measure as the previous variable, the number of charging parties is not always the same as the number of charges. Having one party making ten complaints is not the same as ten parties making one complaint. The latter situation is functionally different and legally relevant in that it increases the number of potential witnesses to support the claims of the charging party. This may sway the judge's development of the record of facts, which will ultimately decide the case.

Hypotheses for case characteristics provide a difficult challenge with regard to predicted directions. One might expect that as the number of cases and the number of charging parties rises, so too would the probability of a guilty verdict against the respondent. However, one might also expect diminishing returns after a certain number of charges. To explain, while a certain number of cases may increase the risk of a guilty verdict, it may also increase the chances of a split decision. More cases and more charging parties offer more opportunities for the judge to dismiss certain charges against the respondent as some charges may be frivolous. This tendency for this variable to move towards split decisions also suggests that ordered logit modeling may not be appropriate as this tendency may violate the parallel regression assumption.

Another important case characteristic is derived from Cooke et al. (1995). In their research, the authors found that unions with historically negative images tend to be less successful in litigation before the Board. Its incorporation mirrors that of Ringquist and Emmert's "repeat offender" variable. A continued history of violations by a particular party may influence the judge's fact finding, including determinations of the credibility of testimony. Unions with historically negative images included the Teamsters, Longshoreman, and Hotel and Restaurant Employees. Thus, a dichotomous variable is incorporated into the model and is scored 1 when any of these unions is present and 0 otherwise.

Other litigant characteristics include whether the union involved in the case has a historically negative image. Unions that have a historically negative image should decrease the chances of a pro-union decision in both CA and CB cases. Repeated offenses by the same union should bias the judge toward an anti-union decision.

Next, because research has shown that litigant characteristics can play a substantial role in the outcomes of litigation (Galanter 1974; Wheeler et al. 1987; Songer and Sheehan 1992), I

examine whether the charging party is an individual. Because individuals are not considered "repeat players" and often possess fewer financial resources, research has demonstrated that these litigants are often unsuccessful. Because individuals tend to have fewer resources than other litigants and do not enjoy repeat player status, one should expect that individuals will increase the odds of a pro-management decision when filing complaints against management, and increase the odds of a pro-union decision when filing complaints against unions.

While this is the case, Cooke et al. (1995) eliminate cases involving individuals as they say that these cases will not invoke the typical union-management sentiments of Board members. In fact, it should be noted that in the above discussion on the expected manifestation of political attitudes in unfair labor practice cases, individuals were nowhere to be found in the issue dimension. As such, models will be presented that include individuals along side models that exclude cases involving individuals.

Finally, it is entirely possible that case outcomes are not affected by attitudinal, legal, economic, and regional factors. But rather, case outcomes may be the result of who files the case. In other words, decisions are merely predicated on who the charging party in the case was rather than any other factors. This serves as an additional case characteristic that must be considered.

Moe (1985) points out that case filing follows a feedback loop according to the decisions of the NLRB. If this is the case, then case filings themselves may be the determining factor of the outcomes of cases in order to achieve the equilibrium to which Moe refers.

Because this was the case, cases were divided into two separate categories based on the charging party. Cases against employers (CA) were separated from cases where the respondent was a labor organization (CB). This adjustment is also useful for more accurate interpretations

of several of the dependent variables. For instance, because individuals do not fall along the pro-management/pro-labor continuum, the coding of cases for individuals varies according to whether the respondent is a labor organization or an employer. In CA cases, outcomes decided for the individuals were characterized as anti-employer ("3"). However, this is the same coding that was used for pro-labor. Similarly, in CB cases, outcomes decided for individuals were characterized as anti-union ("0"), or the same coding used to denote pro-management. Because my expectations are that individuals will be less successful against both parties, I expect the effect of individuals to be negative in CA case and positive in CB cases. Including CA and CB cases in the same model would then drown out some of the effects of individual status as the crosscutting effects in different case types would reduce the impact of this variable.

One can also perceive that this same phenomenon might exist for other variables as well (number of charging parties, number of charges, etc.). In order to alleviate the possibility that a bias exists toward the charging party, models will be run separately for each type of case.

I would reiterate that these variables are not to be confused with pure fact patterns that have been included in literature examining courts of review. Rather, these variables are intended to measure the preexisting characteristics of the cases that come before Administrative Law Judges. In this sense, they act as quasi-legal cues that provide a representation of the legal model that can then be measured against extralegal and attitudinal factors.

Economic Influences

Previous research on Board member decision making has demonstrated that economic conditions can have an impact on Board outcomes (DeLorme, Hill, and Wood 1981; Moe 1985; Cooke et al. 1995). Therefore, I expect that ALJs would also be sensitive to economic factors in their decision making. While some argue that the Board might be more sympathetic toward

labor during difficult economic times (Cooke et al. 1995), others argue that unions tend to be less aggressive in case filing during difficult economic times (Moe 1985). However, it seems reasonable to expect that ALJs would also be more sympathetic toward labor during difficult economic times. One must qualify difficult economic times by determining whether ALJs are more sensitive to short or long term trends of economic difficult. Thus, as Cooke et al. assert, it is necessary to consider both possibilities.

Hypotheses can also be made with regard to economic influences. Because administrative law judges might be more sympathetic toward labor during periods of high unemployment, I expect this variable to move in a positive direction. In other words, as the annual unemployment rate increases, I expect the chances of a pro-labor decision to increase as well. Additionally, if recent trends in the unemployment rate demonstrate a continued rise in unemployment, I also expect ALJs to be more sympathetic toward labor. Last, increases in the inflation rate should also cause ALJs to be more sympathetic towards labor.

Data

The full texts of ALJ decisions at the NLRB were obtained from LexisNexis Legal Research and the National Labor Relations Board website.[17] As Table 1 shows, search results yielded 6,646 administrative law judge decisions between 1991 and 2006, including supplemental and bench decisions.[18] Searches also demonstrated that data were not available electronically prior to 1990. Table 1 lists the number of decisions made

[Insert Table 1 About Here]

[17] The following search term was used under "Terms and Connectors" in LexisNexis Legal Research to identify administrative law judge decisions at the NLRB: agency (NLRB) or court (NLRB) and administrative law judge and date (geq(1/1/****) and leq (12/31/****)) and not Action (decision and order). Here "****" represents each year between 1991 – 2006 for a total of 16 separate searches.

[18] Subsequent coding of Board level decisions revealed that some ALJ decisions were missing from LexisNexis. However, this represented a very small portion of the total number of cases. I expect the exclusion of cases to be random as there appeared to be no systematic exclusion of cases by LexisNexis.

by ALJs at the NLRB per year during the sixteen-year time period. The table demonstrates that the number of cases is large enough for scientific study, with an average of just over 415 cases per year. The vast majority of cases in a given year are filed by unions and individuals against employers with an average of over 90% of the cases filed against employers (CA). As column 3 shows, there were only 605 total cases (9.1%) filed against unions during the same time period. Finally, column 4 provides a listing of cases that could not be coded. These cases included cross-listed CA/CB cases and representation (R) cases that were not filed with an unfair labor practice case.[19]

These filing trends are particularly surprising when considering Moe's assertion that case filing by labor unions and employers would gravitate toward equilibrium (50%) through internal balancing mechanisms of the agency. It is clear from Table 1 though, that there is a clear filing bias toward cases against employers, with no equilibrium seeming to be achieved over the 16 year time period.

One noticeable trend across the time period is an overall decrease in the caseload of administrative law judges for both CA and CB cases. From 1991 to 2006 the case load drops by 336 cases (62%). The average number of cases filed against employers dropped from 532 during George H.W. Bush's administration to 394 during the Clinton administration. Under George W. Bush, the average number of cases filed against employers dropped to only 305 cases filed per year. Similar trends were shown for CB cases with just under 73 cases filed per year against unions during Bush I, 37 during Clinton, and 27 under Bush II.

Variables

Table 3 provides descriptive statistics for all variables included in the model.

[19] R cases deal with disputes over union elections and how union elections were conducted. They do not deal with unfair labor practice issues, and thus represent a separate portion of labor law separate from sections 8(a) and 8 (b) of the National Labor Relations Act. For this reason, when R cases were stand alone (i.e., there were no unfair labor practice charges filed in conjunction with the R case) they were counted as indeterminable.

[Insert Table 3 About Here]

Dependent Variable

The dependent variable for this project will be the outcome of cases decided by ALJs at the NLRB during the 1991 – 2006 time period. Case outcomes were scored as an ordinal measure ranging from 0 – 2, where pro-management decisions were coded as "0", split decisions were coded as "1", and pro-labor decisions were coded as "2".

In CA cases, cases were coded 2 when the respondent employer was found guilty of all charges brought by the charging union. However, if all charges against the respondent employer were dismissed, the case was coded 0. In CB cases, cases were coded 2 when all charges were dismissed against the respondent union and 0 when the respondent union was found to be guilty of all violations.

Because cases often involve multiple charges against the same respondent, outcomes often result in "split decisions." Cases that had outcomes that were favorable to both the union and the employer were coded a "1." Because ALJs are guided by a manual for style in decision writing, split decisions could be identified through consistent language used by the ALJ. While there were often minor variations, the presence of such language as, "all other charges herein not specifically found are hereby dismissed," was used to identify split decisions.[20] This language was present in one of two sections of the initial decision: the conclusions of law or the order. While 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).[21]

[20] The presence of a split decision that did not contain language suggesting a divided outcome raised concerns that this method of identifying split decisions was not reliable. However, an examination of a sample of 150 cases demonstrated that only 2 cases (1.3%) suffered from this problem. Subsequent reading of Board decisions revealed that the exclusion of this language was typically a mistake on the part of the Administrative Law Judge.
[21] Results were also obtained for models in which split decisions were dropped.

Two coders coded separate years of the data set.[22] To assess inter-rater reliability, both coded a random sample of 150 cases. The inter-coder agreement rate of the coding was 97.3%, along with a strong kappa statistic (.955). Results were statistically significant at the .001 level ($p < .001$), demonstrating that that the inter-agreement rate did not occur by random chance. Thus, coder bias was not present, and the decision rules presented above provided clear direction for the coding of outcomes of cases.

Coding of cases in this manner resulted in 1,286 (20.4%) pro-management decisions, 1786 (28.4%) split decisions, and 3227 (51.2%) pro-labor decisions for the 1991 – 2006 time period. This provides initial evidence that there was a strong bias against employers during the period of study. However, one must consider that these cases include claims brought by individuals. So inferences of any pro-labor bias must be postponed.

Primary Independent Variables

The primary independent variables for this analysis measure the political party affiliation of each ALJ. The party identification of each judge was identified through elections data or via Federal Elections Commission (FEC) donation disclosure statements. This is the same method that Goldman and Slotnick (1997, 1999, 2001, 2003, 2005) used to identify the partisanship of Article III judges.[23]

While the scoring of party identification of judges may seem to be a straightforward task, clear decision rules had to be employed to assign party status. To code the party status of administrative law judges, I adopted the coding scheme employed by Goldman and Slotnick (1997, 1999, 2001, 2003, 2005). For states that register by party, the coding of party identification was clear and straightforward. Republicans were assigned as Republicans and

[22] This included an undergraduate assistant and me.
[23] These are federal judges appointed under Article III of the Constitution. Article III judges are nominated by the president and confirmed by the United State Senate. This is quite different than judges hired under the merit system through examinations.

Democrats were assigned as Democrats. When party identification was left blank or listed as unaffiliated, party identification was scored as Independent.

However, because many states involved in the study do not register by party it was necessary to adopt other decision rules from Goldman and Slotnick (1997, 1999, 2001, 2003, 2005). For states that do not register by party (Virginia and Georgia for example), primary voting history was used to determine party identification. When judges exhibited a clear pattern of consistently voting in one party's primary elections, the judge was assigned as a member of that particular party. For judges who only had a record of voting in one primary election, party identification was only assigned when the primary election presented a choice between both parties' primaries. In cases where primary voting history was unavailable (i.e., the judge only voted in general elections), party status could not be assigned. Similarly, if only one primary election data point was available and the primary election did not present a choice between both parties' primary elections, the judge's party identification also could not be assigned. Out of 113 judges, 16 could not be identified due the unavailable primary voting history or a single data point primary voting history that did not present a choice.

Finally, 6 judges could not be identified as registered to vote. Many of these judges were identified as deceased and party registration or voting history was no longer available at the county or state level. The inability to find the partisan identification of 21 judges resulted in the loss of 733 cases. So, while the number of judges that remained unidentified represented 18.6% of the number of judges, the loss of 733 cases only represents 11% of the total number of cases.

Table 2 presents a summary of the coding of ALJ party identification. During the period of 1991 – 2006, 113 different administrative law judges decided cases. Of these

[Insert Table 2 About Here]

113, 101 (89.4%) judges were successfully identified through voter registration records or FEC donation disclosure statements. Among these 101 judges there were 14 Republicans (13.9%), 16 Independents (15.8%), and 71 Democrats (70.3%).[24] Because the overwhelming majority of judges are Democrats, this raises serious concerns about the ability of the NLRB to be objective in its initial decision making. However, this is not entirely surprising as one would assume that there is some sort of self-selection mechanism that takes place. Recalling that the formation of the NLRB took place in a heavily pro-labor climate, it is not surprising that a self-selection bias toward Democrats would exist.

Because of the large number of Independents in the sample, it became necessary to abandon a dichotomous coding scheme (e.g., Republicans = 0, Democrats = 1), and to incorporate two party identification variables, leaving a third category as the baseline category. Therefore, dichotomous variables were included for Democrats and Independents, leaving Republicans as the baseline category.[25]

Case Characteristics

In order to examine how the number of charges affects outcomes of unfair labor practice cases, I include a continuous measure of the number of charges listed in the text of the case. Each charge is designated by a specific number found in the preface of the case. In order to determine the total number of charges in each case, one only had to tally the total number of

[24] Two judges switched party identification during the time period of study. Neither of these judges made any additional decisions after they switched parties. As a result, each judges' party identification was scored according to their partisan identification at the time of each decision.

[25] An alternative method of coding party identification is an ordinal variable where Republican = 0, Independents = 1, and Democrats = 2 is certainly possible. The problem is that this type of coding is built on an assumption that Independents are ideologically located between Republicans and Democrats, which may not be the case. However, results using this type of coding are similar to the results presented below. Party identification remains statistically significant at the .05 level or better in all CA models (b = .200 & .215) and fails to achieve statistical significance in all CB models.

charges. As Table 3 shows that the number of charges filed in a case varied from an expected minimum of 1 to a maximum of 57 with an average of 2.12.

In addition, a variable was included to measure the total number of charging parties. This was also simply a continuous count variable of the total number of parties that filed charges against the respondent as designated in the text of the decision. Between 1991 and 2006, the number of charging parties ranged from an expected minimum of 1 to a maximum of 58, with an average of 1.27.

To capture the effects of individual charging parties, cases were simply coded 1 when the text of the case reported the charging party as an individual and 0 otherwise. As stated above, I expect individual status to have a negative effect in CA cases and a positive effect in CB cases as decisions should be biased toward the respondent.

Because unions with historically negative images may perform worse in cases at the NLRB, a dichotomous variable was included. The variable was coded 1 when the union involved in the case was part of the Teamsters, Longshoreman, or Hotel and Restaurant Employees and 0 otherwise.

Economic Variables

Three variables are included in the model to measure the effects of economic conditions on ALJ decision making. The first of these variables is a measure of the annual unemployment rate at the time of the decision as supplied by the United States Bureau of Labor Statistics (USBLS). As a result, I also incorporate a measure of the annual unemployment rate as provided by the USBLS. The unemployment rate is scored based on the year in which the decision of the ALJ was issued. Additionally, to determine whether ALJs pay attention to longer term economic trends, I include a measure of the change in the annual unemployment rate from the previous

year. This is simply derived by taking the current year's unemployment rate and subtracting it from the previous year's unemployment rate.

To further measure the effects of the economic environment, I include a measure of inflation as was the case in the work of Moe (1985). To measure inflation, I use the annual consumer price index (CPI), as reported by the USBLS. The annual CPI is coded for the year in which the decision of the Board was rendered.

Regional Influence

As stated in Chapter 2, the NLRB has divisions of judges located in Washington, D.C., Atlanta, New York, and San Francisco that handle cases. In order to determine if case outcomes were affected by the division, dummy variables were included in the model to capture regional effects. Dummy variables were scored "1" when the case was handled by that particular division and "0" otherwise.[26]

Supplemental Decisions

Administrative law judges at the NLRB often make supplemental decisions. Supplemental decisions are supplements to prior unfair labor practice decisions issued by the administrative law judge. Supplemental decisions typically involve one of three issues. First, supplemental decisions can be remedial in nature, typically calculating back pay, interest, or pension fund contributions by the employer or offering clear means by which employers can rectify current unfair labor practices. Second, supplemental decisions might involve requests by respondents for reimbursement of legal fees under the Equal Access to Justice Act. Last, supplemental decisions can occur in response to decisions by the Board members.

[26] For cases from 2003 – 2006, a notation of which judge's division handled the processing of the case was provided in the text of the case. For cases prior to 2003 this notation was not provided. Thus, the division was assigned according to where the deciding judge was initially stationed at the time of the judge's hiring. This information was derived from press releases issued by the agency regarding the hire of each judge. Coding earlier decisions this way could potentially lead to errors in early portions of the data if judges are transferred to other divisions after they are hired.

Because of the nature and content of supplemental decisions, these decisions were excluded for a variety of reasons. First, cases involving remedies are not focused on additional outcome decisions, presenting the judge with no decision between labor and management or guilty and not guilty. While one could perceive differences in the severity of remedies (e.g. the amount of back pay, interest, etc.), more often than not remedial decisions are predicated on prior findings of violations of the National Labor Relations Act rather than additional findings. Because the focus of this study is on outcomes and not remedies, remedial supplemental decisions are not useful in this regard.

Additionally, the inclusions of supplemental decisions would further bias outcomes toward labor organizations. As state above, the vast majority of decisions are already decided in a pro-labor direction. Thus, the inclusion of cases that will, more often than not, reiterate those decision outcomes, will over-represent the number of pro-labor decisions by double counting these decisions. To illustrate this point, out of 372 supplemental decisions issued between 1991 and 2006, 289 (77.7%) were pro-labor outcomes.

Next, decisions of whether to award the reimbursement of legal fees is strictly guided by the Equal Access to Justice Act. Again, this type of decisions does not present the ALJ with a choice between labor and management, but rather a choice of whether to award legal fees to the respondent or not.

Finally, supplemental decisions can involve decisions on unfair labor practice allegations when cases have been remanded by the Board for further consideration. While these cases seem closer to regular decisions, they present a problem in terms of expected influences. In these types of cases, one would expect the influence of the Board to be much stronger than in other types of decisions. This is because the Board has clearly articulated for the ALJ any errors that

were made, and any issues the judges failed to consider. While the influence of the Board is certainly a worthy consideration, measuring this influence through supplemental decisions is not the focus of the current study.

Because ALJ decisions are often remedial in nature, involve Equal Access to Justice issues, and are in response to Board decisions, these types of cases have been excluded from the analysis. This resulted in the exclusion of a total of 372 cases.

The Model

Because the dependent variable is ordinal, ordinary least squares regression is not appropriate. Rather, the appropriate type of regression when dealing with a categorical dependent variable is an ordered logit model. Ordered logit modeling can provide information on changes in probabilities of each category based on changes in the independent variables. However, one additional factor of determining whether ordered logit models are appropriate beyond the nature of the dependent variable is conditioned on the parallel regression assumption. Ordered logit models are predicated on the assumption that the effects of independent variables are equal between categories. In other words, the coefficient for a move from category 1 to category 2 is equal to the coefficient for a move from category 2 to category 3. When violations of this assumption occur, it is often necessary to use multinomial or generalized ordered logit to correct for this problem. Hypotheses with regard to the number of charges and charging parties provide initial concern for a violation of the parallel regression assumption.

Brant test results presented in Table 4 demonstrate that three of the four models

[Insert Table 4 About Here]

violate the parallel regression assumption. Additionally, Table 4 provides more detailed information about the specific variables contributing to these violations for each of the three

models found to be in violation. Partial generalized ordered logit models were run with adjustments for independent variables in violation of the parallel regression assumption as reported in Table 5. The advantage of a generalized ordered logit (GOL) regression is that it does not assume that variables conform to the parallel regression assumption. Rather, GOL relaxes the assumption and allows variables to have varying impacts between categories, thus providing a more realistic representation of variable effects. Partial generalized ordered logit allows the user to relax the assumption for only the variables that are in violation of the parallel regression assumption (i.e., $p < .05$ for Brant test results) rather than all variables in the model.

Results and Discussion

Results with Individuals

Column 1 of Table 5 presents the results for the model, including cases that involve individuals for cases filed against employers (CA), while Column 2 of Table 5 presents the results for cases filed against unions (CB).[27] Model I results for the attitudinal measures

[Insert Table 5 About Here]

meet my expectations. The positive coefficient of the Democratic ALJ variable between both categories demonstrates that Democratic ALJs are more likely than Republicans to rule in a pro-labor direction in cases against employers. However, there is a difference in effect between the two categories. While the odds ratios are provided in Table 6, it is more intuitive to interpret

[27] Results were also obtained for models in which split decisions were dropped. Logit models performed in a manner similar to the results presented below for ordered logit models. For CA cases with individuals, and setting all other variables equal to their means democrats were about 8.3% more likely than Republicans to rule in favor of labor. Using a one-tailed test of significance, the variable was significant at the .05 level. For CA cases without individuals, having a Democratic judge inccreased the probability of a pro-labor decision from 70.7% to 80.1%, an absolute increase of 9.4% and a relative increase of 13.3% when all variables are set equal to their means. As is the case below, party variables again failed to achieve statistical significance in both CB models. Results for individuals become more pronounced when split decisions are dropped. In CA cases, while holding all other variables at their mean, having an individual as a charging party decreases the probability of a pro-individual decision from 77.9% to 63%, an overall decrease of 14.9% and a relative decrease of 19%. In CB cases, also holding all other variables at their means, individual status decreased the chance of a pro-individual decision from 68.7% to 54.6% an overall decrease of 14.1% and a relative decrease of 20.5%.

[Insert Table 6 About Here]

coefficients in terms of predicted probabilities. Having a Democratic ALJs decreases the probability of a pro-labor decision from 17.5% to 14.1% over Republican judges, an overall decrease of 3.4% and a relative decrease of 19.4%, holding all other variables constant at their means. It also decreases the probability of a split decision from 39.6% to 31.3%, an overall decrease of 8.3% and a relative decrease 21% over Republican judges. Finally, having a Democratic ALJ increases the probability of a pro-labor decision from 42.9% to 54.6%, an overall increase of 11.7% and a relative increase of 27.3%. However, the while the variable achieves statistical significance a move from a split decision to a pro-labor decision ($p < .01$), it narrowly fails to achieve statistical significance for moves from a pro-management to split decision ($p = .065$ using a one tailed test). Thus it seems that having a Democratic instead of a Republican judge provides the difference between having a split decision and pro-labor decision, but not for moving from a pro-management decision to a split decision. This provides initial support for attitudinal influences over administrative law judge decision making.[28]

As Table 5 reports, attitudinal measures do not achieve statistical significance in Model II (CB cases) and move in an unexpected direction for both categories. The small coefficient for Democratic ALJs demonstrates that in cases against unions, there is little difference between Republicans and Democrats. Odds ratios demonstrate that Democrats are actually less likely than Republicans to issue both split and pro-labor decisions. As the results from models

[28] Ordered logit models were run with administrative law judges who were missing party identification data. Party identification for this subset of judges was assigned based on the party of the Chairperson at the time of hire. The logic behind this assignment is that the Chairperson has the final hiring authority over ALJs. Thus, I suspect that the Chairperson might seek to find ALJs who are like-minded politically. The effects of the Democratic party variable decrease when compared to the results below. In CA cases with individuals, and holding all other variables constant at their means, Democratic judges increase the chances of a pro-labor decision from 46.3% to 53.3% over Republican judges, an absolute increase of 7% and a relative increase of 15.1%. The chances of a pro-management decision, however, decrease by 4.2%, while the chance of split decision decreases by 2.8%. For CA cases without individuals, also holding all other variables constant at their means, Democratic judges increase the probability of a pro-labor decision from 46.3% to 54.3% over Republican judges, an absolute increase of 8% and a relative increase of 17.3%. Party variables continue to fail to achieve statistical significance in both CB models.

presented below will show, however, this may be a result of the large number of cases against unions filed by individuals.

Odds ratios for Model I presented in Table 6 also shows that although Independents increase the odds by 12% of a vote in a pro-labor direction than their Republican counterparts, they are not as labor minded as Democratic ALJs. However, the Independent variable fails to achieve statistical significance at the .05 level ($p = .589$). This provides support for the notion that Independent ALJs are actually more even-minded in their decision making. Independents also fail to achieve statistical significance in Model II, but are surprisingly more anti-labor minded in their decision making than their Republican counterparts. This may provide evidence that while Independents are not necessarily pro-labor or pro-management; they may have a vested interest in protecting individual rights.

Two out of four case characteristics, a proxy for legal influences, have an impact on cases filed against management. As predicted, the number of cases actually has substantially different impact between categories. As Table 5 shows, the number of cases actually increases the odds of a moving from a pro-management decision to a split decision while simultaneously decreasing the odds of moving from a split decision to a pro-labor decision. The direction of these effects changes in cases against labor unions, while the coefficient remains positive between pro-management and split decisions, the coefficient changes from negative to positive from Model I to Model II for moves from a split decision to a pro-labor decision. Model I coefficients show that increasing the number of cases by one additional case over the mean number of cases simultaneously decreases the probability of a pro-management decision from 14.8% to 10.1% and the probability of a pro-labor decision from 50.9% to 48.1%, holding all other variables constant at their means. Additionally, this one unit increase over the mean increases the

probability of a split decision from 34.3% to 41.7%, an overall increase of 7.4% and a relative increase of 21.6%. As such, this case characteristic plays a role in ALJ decision making for cases filed against management.

As was the case in previous studies (Cooke et al. 1995), unions with historically negative images decrease the probability of split and pro-labor decisions in cases filed against management as the variable achieves statistical significance at the .05 level for a one tailed test of significance. Unions with historically negative images increase the probability of a split decision from 33.6% to 35.3% and the probability of a pro-management decision from 14.8% to 16.7% over other unions, holding all other variables constant at their means. Additionally, the presence of a union with a historically negative image will decrease the probability of a pro-management decision from 51.6% to 47.9%, an overall decrease of 3.7% and a relative decrease of 7%. In cases against labor unions (Model II) however, the variable fails to achieve statistical significance at the .05 level. Negative images only seem to matter in cases filed against management, perhaps providing a cue to ALJs that this set of unions is more likely to file frivolous charges rather than being more likely to engage in unlawful conduct.

The third case characteristic that was included in the model was the number of charging parties. Results demonstrate that the variable for the number of charging parties does not achieve statistical significance at the .05 level in Model I or Model II. The variable does move in the expected direction in Model II with a one unit increase in the number of charging parties decreasing the odds of a pro-labor and split decision by 7%. This is logical as one would expect that as more parties file complaints against a union, the more it should decrease the odds of a pro-labor decision.

One of the most important commonalities between Models I and II are the results for the individuals variable. In both models the variable achieves statistical significance at the .01 level or greater and, as expected, the signs move in opposite directions between Model I (-) and Model II (+). Because I expect individuals to be less successful against employers, the negative coefficient in Model I moves in the expected direction. Table 6 presents the odds ratios for the individual variable, but again it is more intuitive to interpret coefficients in terms of predicted probabilities. In Model I, having an individual as a charging party against an employer increases the probability of a pro-management decision from 13.7% to 24.2%, an overall increase of 10.5% and a relative increase of 76.7%, holding all other variables constant at their means. Having an individual as a charging party also decreases the probability of a split decision from 34.4% to 29.5% and the probability of a pro-labor (individual) decision from 51.2% to 46.3%. This demonstrates that individuals are less successful than unions when filing cases against management. Similarly, because I expect individuals to be less successful against unions, the positive coefficient in Model II also moves in the expected direction as I expect CB cases involving individuals to be more pro-union. When individuals file complaints against unions the probability of an pro-individual decision decreases from 58.2% to 45.5%, an overall decrease of 12.7% and a relative decrease of 21.8%, holding all other variables constant at their means. Individuals also increase the probability of split decision from 16.6% to 18.5% and the probability of a pro-union decision from 25.2% to 36%, an overall increase of 10.8% and a relative increase of 42.9%, holding all other variable constant at their means.

These results meet expectations and demonstrate that whether the respondent is a union or an employer, individuals fare much worse in cases than do other litigants. Combined with the fact that prior research (Cooke et al. 1995) has noted that individuals do not invoke the usual pro-

labor and pro-management tendencies of decision makers, it is more sensible to look at cases that only involve disputes between labor organizations and employers. As a result, Models III and IV present regression results for each type of case (CA and CB, respectively), with cases involving individuals excluded from each model. These results are discussed below.

Two out of three economic measures in Model I also achieve statistical significance and demonstrate an impact on ALJ decision making. The annual unemployment rate has a positive impact on unfair labor practice decision outcomes as expected and achieves statistical significance at the .05 level. A one standard deviation increase over the mean unemployment rate decreases the probability of a pro-management decision from 15.1% to 13.8% and a split decision from 33.9% to 32.6%, holding all other variables constant at their mean. Additionally, a one standard deviation increase over the mean increases the probability of a pro-labor decision from 51.1% to 53.5%, an overall increase of 2.4% and a relative increase of 4.7%.

Results also demonstrate that judges are sensitive to trends in the annual unemployment rate as the variable achieves statistical significance at the .05 level. However, the direction of the coefficient moves in an unexpected direction as positive changes in the unemployment rate actually result in more pro-management and split decisions. A one standard deviation increase over the mean decreases the probability of a pro-labor decision from 50.8% to 48.8%, holding all other variables constant at their means. This change also increases the probability of a split decision from 33.9% to 34.9% and a pro-management decision from 15.2% to 16.3%, an overall increase of 1.1% and a relative increase of 7%. Results for inflation, however, fail to achieve statistical significance at the .05 level, demonstrating that inflation does not seem to influence ALJ decisions.

Columns 4 and 5 of Table 5 report the results for economic variables in cases against labor unions. In Model II, economic variables seem to be the most important influences in cases filed against labor unions. The annual unemployment rate has a positive impact on case outcomes, demonstrating that a one standard deviation increase over the mean will increase the probability of a pro-labor decision from 30.3% to 38.3%, an overall increase of 8% and a relative increase of 26.4%, holding all other variables constant at their means. This change also decreases the probability of a pro-management decision from 52.0% to 43.1%, an overall decrease of 8.9% and a relative decrease of 17.1%, holding all other variables constant at their means.

As in Model I, the change in the unemployment rate moves in an unexpected direction in cases against labor. However the variable failed to achieve statistical significance at the .05 level in Model II. Unlike Model I, however, the inflation rate achieves statistical significance between both categories at the .001 level. A one standard deviation increase over the mean inflation rate decreases the probability of a pro-management decision from 49.1% to 37%, an overall decrease of 12.1% and a relative decrease of 24.6% when all other variables are held constant at their means. This change also increases the probability of a pro-labor decision from 32.7% to 44.4%, an overall increase of 11.7% and a relative increase of 35.8% when all other variables are held constant at their means.

These results coincide with previous results on board member decision making and support the hypotheses. It seems that economic conditions have a strong impact on how ALJs decide unfair labor practice cases. However, some of these results were curious as there were differing results of which economic factors impacted decision making between Model I and Model II.

Coefficients for regional variables demonstrated differences between divisions of judges; however in both Model I and II none of these variables achieved statistical significance. This demonstrates that unlike other agencies that exhibit regional differences, the NLRB does not vary from division to division.

Models without Individuals

Because individuals do not all along the labor-management continuum, and because research has excluded these litigants from analysis, models were run without individuals. Model III and IV share many similarities with Models I and II. Results for Models III are reported in columns 6 and 7 of Table 5. Odds ratios are again reported in Table 6. Results for Model IV are reported separately in Table 7. In Model III, results show that in CA cases Democratic ALJs are

[Insert Table 7 Here]

more likely than their Republican counterparts to rule in a pro-labor direction. As Table 5 reports, the variable achieves statistical significance across both categories at the .05 level or better using a one tailed test of significance. However, the strength of the coefficient varies between categories. Having a Democratic ALJ, rather than a Republican, increases the probability of a pro-labor decision from 42.9% to 55%, an overall increase of 12.1% and a relative increase of 28.2%, holding all other variables constant at their means. Democratic also decrease the probability of pro-management decisions (16.1% → 12%) and split decision (41% → 32.9%) over Republican judges, holding all other variables constant at their means. Independents, while having an effect that falls in between Republicans and Democrats, again fail to achieve statistical significance in Model III.

Case characteristics also vary in their impact and statistical significance on ALJ decision making in Model III. The number of cases filed against the respondent has a positive impact on

the probability of a split decision, but decreases the probability of a pro-labor decision as was the case in Model I. A one standard deviation increase over the mean number of cases increases the probability of a split decision from 34.8% to 41.7%, an overall increase of 6.9% and a relative increase of 19.8% when all other variables are held constant at their means. Concurrently, this change decreases the probability of a pro-labor decision by 2.7% and a pro-management decision by 4.2% with the variable achieving statistical significance at the .001 level. Again, having multiple cases will lead to more split decisions.

While negative union image moves in the expected direction in Model III, it fails to achieve statistical significance at the .05 level (p = .055 for one tailed test of significance). The number of charging parties also fails to achieve statistical significance at the .05 level. These results should not preclude the influence of case characteristics or the legal model in general on administrative law judge decision making. It is evident that these characteristics do not play a role in ALJ decision making in CA cases.

Table 7 presents the results for CB cases, but excludes cases involving individuals. One of the first things the reader should notice is the dramatic decrease in the number of CB cases once individuals are excluded. A total of 312 cases filed by individuals against labor unions demonstrate that the vast majority of cases (60.1%) during 1991 – 2006 do not fall along the pro-labor/pro-management continuum. This might be due to the fact that most CB cases involve charges filed against unions for failures to process members' grievances.

Many economic variables that achieved statistical significance in Model I fail to achieve significance in Model III. The annual unemployment rate narrowly fails to achieve statistical significance at the .05 level (p=.075). Trends in unemployment continue to move in an unexpected direction as increases in the unemployment rate over time actually decrease the

probability of a pro-labor decision, but here the variable fails to achieve statistical significance at the .05 level (p=.130). Unlike Model I, the inflation rate achieves statistical significance for moves from pro-management to split decisions, but fails to achieve significance at the .05 level for a change from a split decision to a pro-labor decision. The sign also changes signs from positive to negative across categories.

Model IV represents cases filed against unions, but excludes cases filed by individuals. Because this model did not violate the parallel regression assumption, these decisions were modeled using ordered logit. Ordered logit results are presented in Table 7 along with absolute changes in predicted probabilities. The changes from Model III to Model IV are quite dramatic. Attitudes seem to play no role in administrative law judge decision making in cases filed against labor unions. Both the Democratic and Independent variables fail to achieve statistical significance at the .05 level. The dramatic decrease in the number of cases may be the culprit as only 30 cases were decided by Republicans as compared to 135 by Democrats. This may not be a large enough sample of CB cases for Democrats and Republicans to differentiate themselves with 207 cases decided by 101 judges.

As was the case in Model II, economic considerations seem to play the largest role in cases filed against labor unions by employers. While the annual unemployment rate and changes in the unemployment rate narrowly fail to achieve statistical significance at the .05 level (p=.078 and p=.05 respectively), inflation demonstrates a significant impact on administrative law judge decisions. A one standard deviation increase in the inflation rate decreases the probability of a pro-management decision by 11.4% while increasing the probability of a split decision by 2.3% and a pro-labor decision by 9.1% when all other variables are held constant at their means.

However, case characteristics, attitudinal and regional influences seem to play no role in ALJ decision making in cases filed against labor unions. Because these cases represent a very small portion of the combined total number of CA and CB cases (207 = < 3%), the lack of attitudinal influences does not preclude the importance of this decision making factor.

Conclusion

The above results demonstrate that while attitudes are not an overwhelming force in ALJ decision making, they are nevertheless a strong component of how these judges arrive at their decisions. Making anywhere from a 11 – 12% difference in the probability of a pro-labor decision, the party identification of the administrative law judge is an important consideration for litigants in unfair labor practice hearings. Even though one might argue these results are not overwhelming, the fact that this component not only plays a substantial role in ALJ decision making, but even exists at all raises red flags for neutral administration at the lower levels of agencies. For if labor law represents a seemingly apolitical portion of the law as Rowland and Carp (1996) suggest, then one can only imagine how politically motivated administrative law judges would behave in more areas of law that have historically been more politically divisive.

This has two major impacts on previous research. First, this demonstrates that lower level administrators are not completely neutral in their decision making, and that administrative behavior may be the result of politically motivated decision making, not just a desire to shirk duties. This causes us to not only consider the independent status of administrative law judges, but the independence of lower level administrators in general. For if the insulation from politics that is afforded to administrators is used as a means to inject personal attitudes then one might reconsider whether additional means of control are necessary. It also raises the age-old question of how to provide independence from political meddling without providing the means for

governmental actors to insert their own preferences instead of making use of their expertise. The appointment of administrative laws judges in an Article III fashion might exacerbate this phenomenon as has been the recent trend in these types of appointments. Additionally, agency control over administrative law judges might also increase the influence of meddling by the political appointees of the agency. This too might increase the chances of political decision making as ALJs might feel pressure to conform to the desires of the appointees.

Second, because administrative law judges act in a judicial capacity, the results reconfirm notions of the attitudinal influence in judicial decision making by examining a position that, up to this point, had not been explored. This means that attitudinal decision making not only extends its reach through the federal judicial hierarchy, but also extends into the bounds of adjudicatory decisions of administrative law judges and, more generally, federal agencies. For judicial scholars, this is just another in a long line of politically motivated judicial actors. Because agencies as a whole handle a larger case load than the federal judiciary, this also ups the ante with regard to the importance and dilemma of attitudinal decision making.

More narrowly, these results also raise concerns about the ability of parties, especially employers, to get a fair shake at the NLRB. For if the vast majority of cases filed within the NLRB are handled by ALJs, and the vast majority of these ALJs are Democrats, the above results would show that employers enter into the process already at a disadvantage. While this may be a continued reflection of the type of politics that existed at the construction of the NLRB, it does not represent the type of fair and even-handed administration principles that the U.S. desired when giving up a portion of our democratic principles.

The number of independent ALJs at the NLRB provides some comfort as the above results demonstrated more even handed decision making by this subset of judges. This might

provide the key to exploring means by which to alleviate political bias in administrative law judge decision making. Though the Hatch Act, also know as the Political Activities Act, precludes the federal government from asking applicants about their political party affiliations, this should not dissuade us from seeking ALJs that are more politically balanced.

Another important finding from these results has to do with the difficulty that individuals face when bringing cases before the NLRB. Results demonstrated that individuals, all else equal, were about 10% less likely than unions and employers to win cases before the Board. This substantiates prior literature that demonstrated that litigant status has an important impact on the outcome of cases in the federal judiciary (Galanter 1974; Wheeler et al. 1987; Songer and Sheehan 1992).

These results provide clear evidence of political bias on the part of administrative law judges in decision making in unfair labor practice cases. What is not clear is the extent to which these biased decisions play a role in subsequent decisions of review at higher levels of the administrative and judicial hierarchy. For if ALJ decisions are merely dismissed at higher levels of review, the extent of the phenomenon of political bias in administrative decision making is somewhat limited. On the other hand, if ALJ decisions become the basis and rationale for appellate decisions, then this demonstrates the importance of administrative law judges in our political system and how the influence of attitudes can extend beyond the immediate decision. Chapter 4 looks at the degree to which the Board and federal courts of appeals rely on administrative law judge decisions as a means for determining the scope of the phenomenon of bias in administrative decision making.

What also remains unclear is whether political bias on the part of ALJs is the result of sincere individual preferences or preferences induced by external actors such as the Board,

Congress, the president, or the courts. Therefore, Chapter 6 investigates whether political bias on the part of ALJs can be limited or induced by external actors as a means for sorting out the source of this political bias. It also provides further evidence as to whether administrative law judges can be controlled by external actors.

Appendix

Table 1. Number of Unfair Labor Practice Cases by Year and Type

Year	CA Cases	CB Cases	Indeterminable* (# of CB in parentheses)	Total
1991	543	79	37 (6)	622
1992	521	66	19 (2)	587
1993	427	53	29 (3)	480
1994	356	40	18 (1)	396
1995	313	30	8 (1)	343
1996	383	37	20 (1)	420
1997	464	38	11 (2)	502
1998	456	37	24 (2)	493
1999	381	30	2 (1)	411
2000	370	33	10 (0)	403
2001	378	31	5 (0)	409
2002	362	26	13 (3)	388
2003	340	26	9 (4)	366
2004	291	28	3 (1)	319
2005	249	31	8 (1)	280
2006	207	20	7 (0)	227
Total	6041	605	223	6646
Percentage	91.0	9.1	3.4	100.0

* Includes R cases not attached to an unfair labor practice case and cross-listed CA/CB charges.

Table 2. Administrative Law Judges and Partisanship

Status	Frequency	Percentage of Judges per Category
Identified		
Democratic	**71**	**70.3**
Republican	**14**	**13.9**
Independent	**16**	**15.8**
Unidentified		
Not Registered to Vote/Deceased	**5**	**41.7**
Ambiguous Primary Voting Record	**7**	**58.3**
Total Identified	**101**	**89.4**
Total Unidentified	**12**	**10.6**
Combined Total	**113**	**100**

Table 3. Descriptive Statistics

Variable	Mean	Std. Dev.	Min	Max
Case Outcome	**1.31**	**.788**	**0**	**2**
Democrat	**.718**	**.450**	**0**	**1**
Independent	**.134**	**.340**	**0**	**1**
Unemployment Rate	**5.59**	**1.05**	**4**	**7.5**
Δ Unemployment	**.066**	**.712**	**-.83**	**1.2**
Inflation	**162.85**	**18.56**	**136.2**	**201.4**
Number of Cases	**2.12**	**2.69**	**1**	**79**
Number of Charging Parties	**1.27**	**.373**	**1**	**58**
Individual	**.201**	**.401**	**0**	**1**
Atlanta Region	**.155**	**.362**	**0**	**1**
New York Region	**.189**	**.391**	**0**	**1**
San Francisco Region	**.253**	**.435**	**0**	**1**

Table 4. Brant Test Results for Ordered Logit Models of Unfair Labor Practice Decisions at the National Labor Relations Board

	Model I (with Individuals, CA only)	Model II (with Individuals, CB only)	Model III (without Individuals, CA only)	Model IV (without Individuals, CB only)
Democratic ALJ	7.83**	1.47	4.08*	0.19
Independent ALJ	0.98	0.25	0.70	0.01
Unemployment Rate	0.55	0.48	0.76	1.44
Δ Unemployment Rate	0.20	1.00	0.01	1.75
Inflation	14.27***	1.05	1.32***	0.50
Number of Cases	131.33***	8.16**	118.79***	0.43
Negative Union Image	0.00	0.19	0.00	0.11
Number of Charging Parties	18.95***	3.01	20.51***	1.36
Individuals	44.62***	1.27	-	-
Atlanta Region	3.31	3.14*	1.75	0.65
New York Region	6.62*	0.11	12.46***	0.00
San Francisco Region	0.95	4.87*	0.84	0.64
All	255.53***	18.99	162.16***	11.82

All reported values are chi-square statistics, significant values represent a violation of the parallel regression assumption.
* $p < .05$; ** $p < .01$; *** $p < .001$

Table 5. Partial Generalized Ordered Logit Regression Results for Unfair Labor Practice Cases at the NLRB

Dependent Variable: Case Outcome	Model I (with individuals, CA only) 0 → 1	Model I (with individuals, CA only) 1 → 2	Model II (with Individuals, CB only) 0 → 1	Model II (with individuals, CB only) 1 → 2	Model III (without individuals, CA only) 0 → 1	Model III (without individuals, CA only) 0 → 2
Democratic ALJ	**.256**	**.493****	-.096	-.096	.339*	.489**
	(.169)	**(.170)**	(.262)	(.262)	(.199)	(.178)
Independent ALJ	.116	.116	-.277	-.277	.147	.147
	(.215)	(.215)	(.322)	(.322)	(.229)	(.229)
Unemployment Rate	.098*	.098*	.341**	.341**	.083	.083
	(.041)	(.043)	(.111)	(.111)	(.047)	(.047)
Δ Unemployment Rate	-.113*	-.113*	-.254	-.254	-.079	-.079
	(.048)	(.048)	(.142)	(.142)	(.052)	(.052)
Inflation	**.008**	**-.001**	.027***	.027***	**.006***	**-.003**
	(.003)	**(.003)**	(.006)	(.006)	**(.003)**	**(.003)**
Number of Cases	**.421*****	**-.110*****	**.203****	**.001**	**.420*****	**-.106*****
	(.078)	**(.028)**	**(.068)**	**(.080)**	**(.076)**	**(.028)**
Negative Union Image	-.147*	-.147*	.175	.175	-.134	-.134
	(.082)	(.082)	(.264)	(.264)	(.084)	(.084)
Number of Charging Parties	**-.096**	**.006**	-.073	-.073	**-.116**	**-.006**
	(.062)	**(.053)**	(.124)	(.124)	**(.065)**	**(.058)**
Individuals	**-.696*****	**-.224****	.512**	.512**	-	-
	(.092)	**(.075)**	(.217)	(.217)		
Atlanta Region	-.001	-.001	-.243	-.243	-.010	-.010
	(.240)	(.240)	(.336)	(.336)	(.273)	(.273)
New York Region	**.021**	**.125**	.032	.032	**-.118**	**.173**
	(.172)	**(.192)**	(.270)	(.270)	**(.171)**	**(.202)**
San Francisco Region	-.144	-.144	**-.234**	**.002**	-.103	-.103
	(.125)	(.125)	**(.239)**	**(.229)**	(.142)	(.142)
N	5041	5041	519	519	4230	4230

* p < .05; ** p < .01 ; *** p < .001, Standard errors have been clustered around each ALJ. Variables that were adjusted to conform to the parallel regression assumption are presented in bold. Model IV is not presented as it did not violate the parallel regression assumption.

Table 6. Odds Ratios for Partial Generalized Ordered Logit Regression Results

Dependent Variable: Case Outcome	Model I 0 → 1	Model I 1 → 2	Model II 0 → 1	Model II 1 → 2	Model III 0 → 1	Model III 0 → 2
Democratic ALJ	1.29	1.60	.908	.908	1.40	1.63
Independent ALJ	1.12	1.12	.758	.758	1.16	1.16
Unemployment Rate	1.10	1.10	1.41	1.41	1.09	1.09
Δ Unemployment Rate	.893	.893	.776	.776	.924	.924
Inflation	1.01	.998	1.03	1.03	1.01	.997
Number of Cases	1.54	.897	1.23	1.00	1.52	.900
Negative Union Image	.863	.863	1.19	1.19	.874	.874
Number of Charging Parties	.908	1.01	.930	.930	.890	.994
Individuals	.496	.799	1.67	1.67	-	-
Atlanta Region	.999	.999	.784	.784	1.01	1.01
New York Region	1.02	1.13	1.03	1.03	.889	1.19
San Francisco Region	.866	.866	.791	1.00	.902	.902
N	5041	5041	519	519	4230	4230

All odds ratios are reported for a one unit change in the independent variable.

Table 7. Ordered Logit Results for Unfair Labor Practice Cases Filed Against Unions at the National Labor Relations Board

Dependent Variable: Case Outcome Model IV (no individuals)		Absolute Changes in Probabilities		
		0	1	2
Democratic ALJ	.086 (.388)	-.021	.004	.017
Independent ALJ	-.578 (.584)	.135	-.033	-.102
Unemployment Rate	.349 (.197)	-.091	.018	.073
Δ Unemployment Rate	-.419 (.214)	.072	-.015	-.058
Inflation	.023* (.009)	-.114	.023	.091
Number of Cases	.007 (.073)	-.005	.001	.004
Negative Union Image	.216 (.392)	-.053	.010	.043
Number of Charging Parties	-.020 (.098)	-.001	.002	.001
Atlanta Region	-.558 (.778)	.128	-.033	-.095
New York Region	-.628 (.503)	.148	-.035	-.113
San Francisco Region	-.411 (.395)	.099	-.021	-.077
N	207			

Chapter 4

Review of Administrative Law Judge Decisions by the Political Appointees of the NLRB, 1991 - 2007

"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. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)."

Introduction

Chapter 3 established that attitudes play a substantial role in the decision making of administrative law judges. This is normatively problematic for administrators that function as judges as they should be neutrally competent in the way that they administer the law. In this chapter I examine the amount of influence that ALJ decisions have on subsequent appeals to the political appointees of the Board. The focus of this study will be to determine the influence of the ALJ's decision on Board decision making relative to other decision making factors. This is particularly important as it demonstrates that the effects of attitudinal decision making extend beyond the immediate initial decision of the administrative law judge and into the considerations of appellate bodies.

The introductory quote to this chapter is standard language the Board uses when parties challenge the record of facts established by the administrative law judge. The quote demonstrates at least on a prima facie level, that the Board gives great deference to the judgment of the administrative law judge. But how much weight is given to the initial decision of the ALJ when compared with other Board decision making factors?

To examine this question, this chapter examines the decisions of the political appointees of the National Labor Relations Board for the period between 1991 and 2007. I examine the decisions of the Board as a function of the decision of the administrative law judge, the attitudes

of the Board members, who filed exceptions to the initial decision, economic factors, external political influence, and case characteristics.

This chapter finds that the decision of the administrative law judge is the most important determining factor of any given Board decision. Also influencing decisions of the Board are the attitudes of the deciding panel members, exceptions filed by employers and the General Counsel, the ideology of the relevant federal appeals courts, and the number of cases filed by the charging party or parties.

Results demonstrate that decisions rooted in the policy preferences of administrative law judges persist even after an opportunity has been provided for alterations by the political appointees of the Board. This heightens the importance of attitudinal decision making on the part of the administrative law judge as these decisions, more often than not, become the final decision of the agency.

Previous Research on Board Decision Making

Only a handful of scholarly studies exist that look at decision making at the appointee level of the NLRB. One of the earliest studies to look at the NLRB examined the appointment process during the Eisenhower administration and how it impacted the politics surrounding the agency (Scher 1961). While Scher's research is not focused on individual decision making, it demonstrates the political nature of the appointments that led scholars to believe that Board members were politically motivated in their decision making by showing differences in behavior among appointees. Also demonstrating the political nature of the Board was research by Gross (1981), who found historical evidence of the partisan tendencies during the early years. More recently, Snyder and Weingast (2000) developed a two stage model involving the determination of "policy targets" by the president and Senate and administrative appointments meant to fulfill

those targets. Their model, applied in the context of the NLRB, helps to explain why certain Board appointments seemed to be matters of concern for Congress and others were not.

While each of the prior studies provides evidence of the political nature of the NLRB, they do not look at the individual decision making of Board members. One of the first attempts to look at individual decision making was by Delorme and Wood (1978), who examined Board member voting during the Eisenhower, Kennedy-Johnson, and Nixon administrations. The authors demonstrated through the examination of unfair labor practice cases that outcomes were related to the partisanship of the appointing president, and that Board members continued to exhibit the same voting behavior even after the appointing president was gone. What is useful for the construction of models in the current project is that the authors only use those cases identified in the *Annual Reports of the NLRB* as involving, "novel questions or set precedents that may be of substantial importance in the future administration of the Act" (p.224 as quoted from the 1975 *Annual Report*). The authors excluded cases involving "jurisdictional disputes between unions" and "decision finding both union and management at fault" (p.224). The authors' exclusion of "split" cases is problematic as it biases the outcomes toward being more politically motivated. My research will include split decisions in order to avoid this potential problem.

Research on the Board was later expanded by DeLorme, Hill, and Wood (1981) through analysis of 1250 Board Decisions decided from 1955 – 1975. This was the first attempt to model unfair labor practice case outcomes in a multivariate model. Here the authors coded the votes of individual members as being pro-labor or pro-management, but again, the authors eliminated split decisions and union versus union cases.[29] To estimate their model, the authors use nine

[29] "A decision was classified as pro-management if the Board dismissed a union unfair practice complaint or upheld a management complaint, and as pro-labor if the Board upheld a union unfair practice complaint or dismissed a management complaint" (Delorme, Hill, and Wood 1981, p. 208).

independent variables, including reappointed members, the party of the nominating president, the party of the member (including independents), the unemployment rate, strike days lost, union membership in the U.S., GNP, and whether the member was a former NLRB member.[30] The authors ran separate models for each presidential administration as well as an overall pooled model. In the separate models strike days lost and GNP proved to be unreliable and were abandoned. In the pooled model, which only included the reappointment variable, party of the administration, party of the Board member, unemployment, and prior NLRB employee, all of the variables had a strong, statistically significant, impact on case outcomes.

The work of Cooke and Gautschi (1982)[31] also modeled Board decisions for unfair labor practice cases decided during the period of 1954 – 1977. While their dependent variable is also coded using a pro-labor/pro-management scheme, the authors begin to incorporate split decisions. In order to do so, they code votes as being cast for the plaintiff if even one unfair labor practice is found against the defendant. They justify this coding decision in three ways. First, they say the number of split decisions is very small. Second, within the sample of cases, very few cases involved more than one issue. Last, the sample of cases was evenly split between union and management plaintiffs to allow for equal chance of this decision rule to be applied, thus eliminating the chance for bias. Again the authors limit themselves to novel questions as reported by the *Annual Reports of the National Labor Relations Board*.

[30] The authors tried iterations with the Consumer Price Index (CPI) but it had little impact on the outcomes.
[31] Variables included: Demdem = 1 if member is a Democrat initially appointed by a Democratic president, 0 otherwise; Reprep = 1 if members is a Republican initially appointed by a Republican president, 0 otherwise; MANG = 1 if member was previously employed in a management position or as a management attorney, 0 otherwise; AGE = age of the member at time of decision; RURAL = 1 if member prior to appointment lived in a non-SMSA area; EMPYES = 1 if ULP was initiated by employer and supported by ALJ, 0 otherwise; EMPNO = 1 if ULP was initiated by employer and rejected by ALJ, 0 otherwise; UNIONNO; 1 if ULP was initiated by union and rejected by ALJ, 0 otherwise; DSENATE = percentage of the Senate that was Democratic in year of decision; TREND = year of decision.

Another point of interest from Cooke and Gautschi (1982) is their inclusion of the ALJ's decision as a determinant in the outcomes of Board cases. This is relevant to the purpose of the current study because it marks the first time the ALJ decision was considered as a potential factor in the decision making of the Board. However, these results are mired down by concerns of the filing behavior of the General Counsel and plaintiff/defendant bias on the part of Board members. While the authors report that it is the recommendation of the General Counsel that allows trials to proceed to the ALJ level, it is actually the recommendation of the Regional Director that actually serve this function as was described in Chapter 2.[32] Therefore, it is difficult to draw conclusions on the influence of ALJs on Board decisions due to the procedural and modeling defects of this study.

While the authors find evidence of political bias between Democrats appointed by Democratic presidents and Republicans appointed by Republican presidents, it seems that what the authors were really trying to capture is the overall effect of ideology of Board members. This is due to the fact that one would expect Republicans appointed by Democratic presidents to be more liberal, and Democrats appointed by Republican presidents to be more conservative. A simple ideology measure could alleviate this problem, making this sort of complicated analysis found here and in Cooke et al. (1995) unnecessary.[33] It would also allow us to incorporate all Board members, rather than just a subset of members.

One of the most famous pieces examining the NLRB is the work of Moe (1985). Moe actually begins to construct a measure of individual ideology by using a ratio of pro-management and pro-labor votes of Board members for cases between 1948 –1979. This measure is then used to track how individual members perform relative to the president who appointed them. Moe

[32] This point of contention may be related to a procedural change by the NLRB, however, if this was the case, it was not reported by the agency.
[33] It would also allow us to drop many of the other individual characteristics of Board members variables that were included (prior management, rural).

also improves upon prior multiple regression models to predict Board outcomes on the basis of his "feedback loop" theory. In his model, Moe includes measures for exogenous political (the president, Congressional subcommittee, and the courts)[34] and economic (unemployment, inflation, and workers on strike) factors. Additionally, a measure of the filtered caseload by staffers is included to gauge one part of Moe's "endogenous core".[35] Unlike previous studies (DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982), Moe looks at Board outcomes rather than individual voting outcomes. Moe finds evidence of presidential, Congressional, judicial, and economic influences over Board decisions.

Additionally, a 1987 article by Maranto and Fiorito examines the effect of union characteristics on Board decisions for certification elections. However, the authors largely ignore the possibility of political influences over these decisions. Also, because the current study is focused on unfair labor practices, which constitutes a separate area of decision making from election certifications, this research, while in the purview of Board activities, examines a separate function of the agency.

Finally, Cooke et al. (1995) update the work of DeLorme, Hill, and Wood (1981) and Cooke and Gautschi (1982) by expanding data to include 1978 – 1986. The authors again find evidence that individual Board member decision making in important cases is driven by their own policy preferences.[36] However, they find in less important cases that Board members were influenced by the decisions of the regional director and administrative law judge.[37] The model

[34] To measure Congressional ideology, Moe uses ADA scores as "a weighted average of the ADA scores of the chairs and members of the relevant oversight committees in the House and Senate" (p. 1107). Court ideology is represented by a measure of the ratio of the outcomes of its decisions in favor of business versus in favor of labor.
[35] It is noteworthy that Moe employs lags of three quarters to adjust for the time between when cases are filed and when the Board actually decides the case.
[36] Recall that important cases were designated in the Annual Report of the agency as described in the previous study by Delmorme, Hill and Wood (1981).
[37] The results that the authors present are based on a sample of cases rather than the entire population of cases during the time period. The current study seeks to improve upon this by including the entire population of cases during the period of 1991 – 2006.

mimics the previous literature, making use of exogenous political influences (president and Congress), yet ignores the potential influence of judicial institutions such as the federal circuit courts and the Supreme Court. Also included are traditional economic indicators (unemployment and the change in employment) and the partisanship of each Board member.

These studies reveal two commonalities in the literature. First, partisanship and ideology impact the decisions of the Board. Whether derived from the partisanship of the appointing president, differences across presidential administrations, or individual votes or aggregate outcomes of the Board, results have shown clear differences in behavior between Democrats and Republicans. Second, studies also demonstrate that lower level decision making plays an important role in the decisions of the political appointees of the Board (Moe 1985; Cooke et al. 1995). However, none of these studies specifically examined the impact of ALJ decisions on the final order of the Board. Previous literature has examined the impact of lower-level decision making on filing behavior (Moe 1985) rather than Board outcomes. When studies did examine the affects of lower-level decisions on Board outcomes they aggregated decisions of all lower-level actors together (Cooke et al. 1995). Thus, the purpose of this study is to directly examine the impact of the ALJ decision, apart from other lower-level decisions, on the final order of the Board. It also seeks to improve upon previous studies by abandoning the use of simple partisan measures as proxies for Board preferences and incorporating the use of a more detailed measure of Board ideology.

Primary Hypotheses

Based on previous studies I derive two primary hypotheses:

1) Initial decisions in favor of management should lead to Board decisions in favor of management, while initial decisions in favor of labor should lead to Board decisions in favor of labor.
2) More liberal Board members should favor labor while more conservative Board members should favor employers/management.

Data and Variables

Data

For the time period of 1991 – 2007 there were 8,297 Board decisions available from the National Labor Relations Board website (http://www.nlrb.gov/research/decisions/board_decisions/index.aspx). This body of cases includes many cases that will not be included in the final model. As was detailed in Chapter 2, summary and default judgment cases are directly appealed to the Board by the General Counsel without first having a hearing in front of an ALJ. These types of cases are excluded from final analysis for two reasons. First, because the purpose of this study is to examine the influence of the administrative law judge's decision on the decision of the Board, these types of cases prevent this type of analysis. Second, default judgments will always assume a guilty outcome as the respondent has failed to respond to the charges presented by the agency.

Next, decisions that are rendered after a court of appeals decision will be eliminated from analysis. This is because these cases, along with supplemental decisions, represent decisions on cases where a final order has already been issued. Additionally, they would be more direct reflections of ex-post judicial influence than ex-ante influence on Board decision making. Here I am only interested in the disposition of cases the first time through rather than responses to subsequent decisions by reviewing bodies.

As was the case in Chapter 3, supplemental decisions are eliminated from analysis as these decisions typically represent one of following scenarios: a response to an appeals court decision, a response to a remanded ALJ decision, or a decision on remedial matters including, but not limited to, back pay. Because this study is only concerned with the decision on the merits, not remedial matters, when cases are processed the first time, none of these decisions are included in the analysis. This exclusion represented only 153 cases, or 4.3% of all cases identified (3,588).

Finally, as was also the case in Chapter 3, only cases dealing with ULP charges are included in the analysis. Therefore, I exclude jurisdictional disputes, representation cases, and cases dealing solely with remedial matters.

Dependent Variable

The dependent variable is the aggregate outcome of each case decided by Board at the NLRB from 1991 through 2007.[38] Case outcomes were scored in the same manner as ALJ outcomes in Chapter 3. This is an ordinal measure ranging from 0 – 2, where pro-management decisions were coded as "0", split decisions were coded as "1", and pro-labor decisions were coded as "2".

[38] Previous studies focus on different units of analysis (individual, aggregate), so one primary concern is trying to determine the appropriate unit of study. Is it more appropriate to look at the influence of ALJ decisions on individual votes or aggregate outcomes? The literature has focused on both units of analysis with work focused on individual votes (DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982; Cooke et al. 1995), and aggregate outcomes (Moe 1985).

One could theorize two possibilities with regard to the influence of ALJ decision making on Board outcomes. First, a focus on aggregate outcomes is more important because it represents the final policy decision and precedent of the Board. Here one would argue that the votes of dissenting members are unimportant because they do not determine policy or precedent, but rather the majority vote is what will drive Board policy. Looking at the issue in this respect frames ALJ influence as occurring in a policy or precedent context.

Second, one could argue that ALJ impact comes in the form of individual votes. For if the individual votes are what make up the aggregate outcomes, then the more influence over individual votes, the more potential to influence outcomes. Measurement on the individual level might also help to determine if ALJs can influence all members, or only those with an ideological disposition that is close to that of the ALJ. Nevertheless, if the purpose of attitudinal decision making is for one to have their own attitudes reflected in policy decisions, one wouldn't be concerned over influencing individual outcomes, but rather with influencing aggregate policy outcomes. Therefore, this study will focus on aggregate Board outcomes, but will consider the influence of individual Board member preferences as a guiding factor.

Board decisions were coded by looking at the baseline decision of the ALJ and determining if any alterations were made. Because the Board, like administrative law judges, follows a manual of style, Board decisions contained standard language when the Board would affirm, remand, reverse, or reverse in part. Decisions that adopted the decision of the administrative law judge contained the following language:

> "The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order."

Decisions that modify the judge's recommended order:

> "The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified."[39]

Decisions that reverse the judge's decision in whole or in part:

> "The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order."

Thus, this language provided clear guidance at to whether the Board was affirming, reversing, or reversing in part the decision of the ALJ.

Decisions that were unaltered by the Board were coded identically to the ALJ decision outcome (i.e., unaltered pro-labor decisions are pro-labor, unaltered split decisions were coded as split, and unaltered pro-management decisions were coded as pro-management). In cases where

[39] Decisions that only modified the affirmative part of the ALJ decision (i.e., decisions that only modified the remedial portion of the ALJ decision) were not counted as modifying the outcome of the ALJ's decision. This is due to the fact that the focus is solely on the unfair labor practice outcomes, not the remedies offered by the ALJ.

the Board did make alterations to the ALJ decision, coders had to look at both the direction and degree of the alteration.

When the Board completely reverses the decision of the ALJ, the Board outcome is coded as the opposite of the ALJ decision. For example, if an ALJ decided the case as entirely for labor ("2") and the Board reversed that the decision, the outcome would be coded as pro-management ("0"). In order to be a complete reversal the Board must reverse all charges against the party. Because the Board uses language similar to ALJs in their orders, it was easy to identify when decisions were split. If the language, "all other charges herein not specifically found are hereby dismissed," was contained in the final order, the outcome was considered to be split as was the case in Chapter 3.

As stated previously, while 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).[40] Thus, this study incorporates split decisions as well.

When the initial decision of the ALJ was a split decision, this could lead to several outcomes upon Board review. As stated above, split initial decisions that were affirmed were coded as split outcomes for the final order. However, if a split decision contained language suggesting a reversal or reversal in part, coders had to determine the direction and magnitude of the changes. There were no instances where a split decision was completely reversed as this would have required the Board to reverse all of the pro-labor charges in favor of management and all of the pro-management charges in favor of labor. The more common scenario was that the Board reversed the ALJ's split decision in part. Here coders were again required to look for language in the order suggesting that, even after Board alterations, the case remained split. If

[40] Results were also obtained for models in which split decisions were dropped.

language indicating a split decision was not present in the final order, the case was coded as being decided entirely in favor of the original charging party. If the case was dismissed entirely in the final order, the case was coded as being entirely in favor of the original respondent.

One final scenario that presented a problem for coding was when the original ALJ decision was split, modifications were present from the Board, but the case remained split even after modifications. Thus, under the coding scheme, this would give the appearance that the ALJ decision matched that of the Board's decision. Because these types of cases would bias results toward the influence of the administrative law judge's decision, these cases were eliminated from the model.[41]

It is possible to get a sense of the number of decision in which the decision of the ALJ is the final decision of the agency by comparing the initial decision of the ALJ to the final order of the Board. Table 1 lists the decision by the Board according to whether it affirmed, reversed in

[Insert Table 1 About Here]

part, remanded, or completely reversed the decision of the ALJ. What is most staggering is that nearly 80% of initial decisions become the final order of the Board, while only 4.7% of initial decisions are reversed. Considering that out of a total of 6,646 initial decisions between 1991 and 2006, 3,423 were appealed (51.5%), this means that the other 3,222 the decision of the ALJ represented the final action of the Board. Coupled with the above statistic, this means that ALJ decision outcomes account for 5,941 (89.4%) of all NLRB decisions.[42] This provides initial

[41] Three coders were employed to code the outcomes of Board decisions. I coded data along with two undergraduate political science majors. Because multiple coders were employed to code the outcomes of Board decisions, it is important to ensure that coder bias does not play a role in coding decisions. Inter-coder reliability results demonstrated a strong kappa statistic (.854) which was statistically significant ($p < .001$). Pair-wise inter-coder agreement rates were also very strong. Coder 1 and coder 3 shared an inter-coder agreement rate of 86.67%. Coder 2 and coder 3 shared an inter-coder agreement rate of 87.33%, while coder 1 and coder 2 shared an inter-coder agreement rate of 98%. This provides evidence that clear decision rules, rather than coder bias, guided the coding of cases.

[42] It should be noted that these statistics do not include default or summary judgments made by the Board during this time period. As Chapter 3 describes, parties and the General Counsel may request that a matter be transferred to the Board without a hearing from an ALJ. These cases comprised roughly 2,142 Board decisions between 1991 – 2007.

evidence that the decision of the administrative law judge plays a crucial role not only in Board decision making, but for the agency as a whole. Nevertheless, I turn to multivariate analysis in order to more closely examine ALJ influence.

Primary Independent Variable

The primary independent variable for this study is the decision of the administrative law judge. This is the same measure that was used for outcomes in Chapter 3. It is scored on the same scale as the dependent variable where "0" represents a pro-management decision, "1" represents a split decision, and "2" represents a pro-management decision.[43] Including this measure on the same scale as the dependent variable is important as it allows for direct comparability of outcomes as indicated by Table 1.

Board Ideology

In order to represent the policy preferences of the Board members, an ideological measure derived from Nixon's (2004) bridging sample of members of Congress who worked in administrative agencies is included. Nixon's measure is a static representation of ideology that can be used in conjunction with Keith Poole's common space scores (Poole and Rosenthal 1991). This measure ranges from -1 (the most liberal) to 1 (the most conservative). The advantage of this variable is that it more accurately captures the political preferences of the Board than do generic party identification variables used in previous studies (DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982; Cooke et al. 1995).[44] It also eliminates the need to consider the differences posed in other studies between Republicans appointed by Democrats and Democrats appointed by Republicans (Cooke and Gautschi 1982; Cooke et al. 1995). To code the ideology

[43] For more information on coding decisions of this variable, please see Chapter 4.
[44] While this is the case, many argue that partisan identification is conceptually different from ideology (Lloyd 1995). Partisanship may capture the group identification that comes with identifying with a specific political party. Because this is the case, I will still code the party of each voting member in each case.

of the Board, the median ideology of the panel deciding the case was calculated for each decision.

Exceptions

Because cases at the Board level have been appealed from an ALJ initial decision, it is important to note who has filed exceptions to the initial decision. I expect case outcomes to move in certain directions based on who files exceptions. For instance, it is very unlikely for any changes to move in a pro-labor direction if only an employer files exceptions to the ALJ decision. To capture who has filed exceptions in a case, three dummy variables are used as controls. Dummies are included for employer exceptions, union exceptions, and exceptions filed by the General Counsel.[45] Each of this is coded a "1" when an exception is filed by that party and "0" otherwise. I expect that employer exceptions should move cases in a negative direction, while exceptions by unions or the General Counsel should move cases in a positive direction.[46]

Economic Influences

Previous research on Board member decision making has demonstrated that economic conditions can have an impact on Board outcomes (DeLorme, Hill, and Wood 1981; Moe 1985; Cooke et al. 1995). While the types of economic conditions that had an impact often varied from study to study, a few variables emerged as consistent indicators. The first of these variables is a measure of the annual unemployment rate at the time of the Board's decision as supplied by the United States Department of Labor Statistics (USDLS). Developing a directional hypothesis for the measure is extremely difficult as previous studies have offered different theoretical expectations. While some argue that the Board might be more sympathetic toward labor during

[45] Exceptions filed by individuals are not considered as cases involving individuals have been excluded from analysis.
[46] The primary reason I expect the General Counsel's exceptions to move cases in a positive direction is due to the fact that CB cases are excluded from the model. Therefore, the General Counsel will always be representing labor as the charging party before the Board.

difficult economic times (Cooke et al. 1995), others argue that unions tend to be less aggressive in case filing during difficult economic times (Moe 1985).

As was the case in Chapter 3, I also include a measure of the change in the unemployment rate over the previous year at the time of the Board's decisions as means for measuring more long term trends of the economic conditions. Cooke et al. (1995) found evidence that long term economic trends have the potential to influence Board decisions. Based on Cooke et al.'s hypothesis, I expect that the Board will be more sympathetic toward labor during long term economic hardship. Therefore, increases in the change in the unemployment rate should lead toward more pro-labor decisions.

To further measure the effects of the economic environment, I include a measure of inflation (see Moe 1985). To measure inflation, I use the annual consumer price index (CPI), as reported by the USDLS. The annual CPI is coded for the year in which the decision of the Board was rendered. Results can help to determine whether Moe's (1985) assertion or Cooke et al.'s (1995) assertion holds true.

External Political Influences

While internal political influence is a significant part of decision making, literature has also demonstrated that exogenous political influences can have an impact on Board decisions (Moe 1985; Cooke et al. 1995). Thus, I also included measures to capture the effects of both presidential and Congressional influence on Board outcomes. To capture presidential influence I make use of Poole and Rosenthal's presidential common space scores. These scores fall along the same -1 to 1 range as the Board ideology measures and are advantageous because they are directly comparable across institutions and time. This is an improvement over previous

approaches that only looked at Democratic Board members appointed by Democratic presidents and Republican Board members appointed by Republican presidents (Cooke and Gautschi 1982).

Past research work on the influence of Congress over administrative agencies has demonstrated that Congress can exert a significant amount of control over agencies (McCubbins and Schwartz 1984; Calvert, Moran, and Weingast 1987; McCubbins, Noll, and Weingast 1987), even if that control is conditional (Hill and Brazier 1991; Woolley 1993). To incorporate this into the model, Moe (1985) used Americans for Democratic Action scores and Cooke et al. (1995) used AFL-CIO C.O.P.E. scores, instead I make use of Poole and Rosenthal's common space scores (1991). This measure allows for comparisons between chambers, between institutions, and over time. This means direct comparisons can be made with the above common space scores used to measure Board member and presidential ideology.

Because previous studies have shown that the relevant committee acts as a gatekeeper for legislative actions against agencies (Shipan 2004), I measure congressional influence by including the common space score of median member of the relevant committees in both the House and the Senate at the time each Board decision was rendered.[47] I expect more pro-management decisions when the House and Senate move in a conservative direction, and more pro-labor decisions when the chambers move in a more liberal direction.

Scholars have also demonstrated the influence of the president over agency decision making (Moe 1985; Wood and Waterman 1994). Because Board members are appointed by the president, it is reasonable to expect the president to have an influence over Board outcomes. To capture the influence of the president, I employ Poole and Rosenthal's (1991) presidential common space scores. I expect that more conservative presidents should push for more pro-

[47] In the Senate this was the committee on Health, Education, Labor and Pensions (HELP), which was formerly the committee on Labor and Human Resources. In the House, this was the committee on Education and Labor.

management decisions while more liberal presidents should increase the probability of pro-labor decisions.

Most studies (but see Moe 1985) have ignored the influence of the judiciary over Board decisions. This is particularly striking considering that judicial control is the most likely form of control over Board decisions. As was pointed out in Chapter 2, Board decisions can be directly appealed to the federal Circuit Courts of Appeals. Once appealed, the court can uphold, reverse, or remand the Board's decisions. In order to determine whether the courts of appeals can influence Board decisions, I include judicial common space scores (Epstein et al. 2007) for each circuit court. Common space measures are scored for the median member of the relevant court of appeals at the time the case is decided by the Board as determined by the location of the case. I expect more liberal courts to pull Board decisions in a pro-labor direction, and more conservative courts to pull Board decisions in a more pro-management direction.

I also include the judicial common space measure of the Supreme Court for the year in which the Board decision is rendered (Epstein et al. 2007). However, because the proportion of decisions decided by the Supreme Court relative to the total number of Board decisions is so small, I do not expect this variable to have any influence.[48] This is due to the fact that Board members would realize that the vast majority of cases will not reach the Supreme Court and thus would not be concerned with being potentially overruled by the Court.

Case Characteristics

I employ many of the case characteristics coded for ALJ decision in Chapter 4 in the Board decision making model. These variables include whether the union in the case has a historically negative image, the number of complaints, and the number of charging parties. Previous studies have failed to recognize the possibility that Board decisions may be guided by

[48] There were only four Supreme Court cases that stemmed from Board Decisions issued between 1991 and 2007.

legal factors; to remedy this failure I now consider that the legal model may indeed play a role in Board decision making.

Litigant Characteristics

Similar to case characteristics, Chapter 3 also demonstrated that individuals are at a distinct disadvantage when it comes to winning cases at the NLRB. This was largely due to the fact that individuals possess fewer resources than unions and employers and are also not repeat players. Also, Chapter 3 demonstrated that individuals do not evoke the same ideological predispositions that unions and employers do. Thus, cases involving individuals are excluded from this analysis.

Inter-coder Reliability

Because multiple coders were employed to code several independent variables it is important to demonstrate that the coding of independent variables was guided by clear decision rules and not coder bias. Table 2 presents results from inter-coder reliability tests performed for

[Insert Table 2 About Here]

independent variables when multiple coders were employed. All variables exhibit a statistically significant ($p < .001$) and strong kappa statistic. Additionally, the pair-wise inter-coder agreement rates are all well within an acceptable range.

Summary Statistics

Descriptive statistics are presented for all variables in Table 3.

[Insert Table 3 About Here]

There is a remarkable similarity between the mean of the ALJ decision (1.30) and the mean of the Board's decision (1.31). While the average does not provide information on a case by case basis, it does appear that the average overall outcomes of both sets of decisions are extremely

close. Again, this provides some initial evidence that ALJ decisions play an important role when the Board reviews cases for which exceptions have been filed.

The Model

Because the dependent variable is a categorical measure, ordered logit would normally be the most appropriate type of model. However, Brant test results presented in Table 4 demonstrate that several variables violate the parallel regression assumption.

[Insert Table 4 About Here]

Therefore, a partial generalized ordered logit model was employed where the parallel regression assumption was relaxed for variables that were significant at the .05 level. As stated in Chapter 3, the advantage of this model is that it relaxes the assumption that the effects of a variable between the first and second category is the same as the effect between the second and third category and thus produces a more accurate representation of the impact of each variable between dependent variable categories.

Results and Discussion

The ALJ Decision

Results from the partial generalized ordered logit model are presented in Table 5.

[Insert Table 5 About Here]

Most noticeable is that the results support the two primary hypotheses. First, the decision of the administrative law judge plays an overwhelming role in helping to determine the decisions of the Board. While odds ratios are presented in Table 5, it makes more intuitive sense to speak in terms of predicted probabilities. Holding all other variables constant at their means, a pro-management decision from an ALJ will lead to a 65% probability of a pro-management decision by the Board and only a 35.3% probability of a split decision and .7% chance of a pro-labor

decision. Results are significant at the .001 level. A split decision by at the ALJ level will lead to a 70.7% probability of a split decision by the Board while only leading to a 9.6% chance of a pro-management decision and a 19.7% chance of a pro-labor decision. Thus, the one unit change leads to a 55.4% decrease in the probability of a pro-management decision, an increase in probability of 36.4% of a split decision and an increased probability of 19% of a pro-labor decision.

Finally, a pro-labor decision at the ALJ level will lead to only a .6% probability of a pro-management decision, a 10% probability of a split decision, and an 89.4% chance of a pro-labor decision, holding all other variables constant at the means. A one unit change from a split decision to a pro-labor decision leads to a 9% decrease in the probability of a pro-management decision, a 60.7% decrease in the probability of a split decision, and a 69.7% increase in the probability of a pro-labor decision. Therefore, while the impact between categories varies, a change from a pro-management decision to a pro-labor decision by the ALJ has a striking impact. This variable decreases the probability of a pro-management decision by 64.4%; decreases the probability of a split decision by 24.3%, and increases the probability of a pro-labor decision by a staggering 88.7%. These results demonstrate that the initial decisions of ALJs play a crucial role in the decision making of the Board even when considering other decision making factors. It cannot be overstated how important the role of the ALJ becomes. It also demonstrates that decisions that were shown in Chapter 3 to be politically motivated are even having an impact on subsequent decisions. This means that the Board provides little constraint over politically motivated decision making by administrative law judges.

Board Ideology

The decision of the ALJ is not the only factor that plays a role in the decision making of the Board. Table 5 also shows that the ideology of the Board plays a significant role ($p < .001$) in decision making across both categories and moves in the expected direction, though there are differing effects. A one standard deviation increase in the conservative ideology of the Board leads to a 1.7% increase in the probability of a pro-management decision, a 6.7% increase in the probability of a split decision, and an 8.3% decrease in the probability of a pro-labor decision. My expectation is that a more conservative Board will be more sympathetic towards management and the results bear this out. This result buttresses previous studies (DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982; Moe 1985; Cooke et al. 1995). Board member attitudes play a role in Board decision making. It should not be surprising that Board members are politically motivated because the appointment process is one that is politically driven.

Exception Filing

Table 5 also demonstrates that exceptions filed by management (employers) also play a significant role in Board decision making. When an employer files exceptions it actually decreases the probability of a pro-management decision by 1.5%, holding all other variables constant at their means. The variable just barely fails to achieve statistical significance at the .05 level for moves between pro-management and split decisions ($p=.052$). At the same time, the presence of an employer exception increases the chances of a split decision by 36.2% while decreasing the chance of a pro-labor decision by 34.7%. While at first glance these results may not make intuitive sense, a more careful look can provide some explanation. If cases were already decided in a pro-management direction at the ALJ level, there is going to be very little room for employer exceptions to have any chance of increasing the probability of a pro-management decision at the Board level. These employer exceptions are probably filed in

conjunction with exceptions from the General Counsel and the charging union. These additional exceptions probably move the case in a more pro-labor direction, thus giving the appearance that when employers file exceptions to cases that have already been decided for management it has a negative impact.

Results for moves between split decisions and pro-labor decisions are intuitive. When employers file exceptions to these kinds of cases it has the desired impact of at least winning some charges and decreasing the chance that the case is decided entirely in favor of labor. Results for a move between these two categories are significant at the .001 level.

Table 5 also shows that exceptions filed by the General Counsel play a role in Board decision making as results achieve significance at the .001 level. The effect of the variable moves in the expected direction as exceptions filed by the General Counsel in cases filed against management move cases in a pro-labor direction. As Chapter 2 notes, the General Counsel will represent the union before the Board in cases filed by unions against employers. When the General Counsel files exceptions to the initial decision of the ALJ, it decreases the probability of a pro-management decision by 1.6% and a split decision by 11.5% while increasing the probability of a pro-labor decision by 13.1%.[49] This demonstrates that the Board gives considerable weight to the arguments offered by the General Counsel.

Results for exceptions filed by unions move in an unexpected direction and fail to achieve statistical significance at the .05 level. It seems that exceptions filed by unions do not play a role in cases decided by the Board. This might be the case for two reasons. First, exceptions filed by the General Counsel may already cover many of the issues that unions may file exceptions over, thus reducing the need for the union to file exceptions. Second, this would reduce the need for the union to file exceptions as it would be redundant. In fact, unions filed

[49] All other variables are held constant at their means.

exception in only 581 cases filed against employers, while the General Counsel filed nearly 2.5 times that number (1,456).

External Political Influence

Moe (1985) found that the federal appeals courts play a role in influencing Board decisions. Table 5 demonstrates that the ideology of the appeals court has an impact over the decision making of the Board as the variable achieves statistical significance at the .001 level. A one standard deviation increase in the ideology of the court, a move in a more conservative direction, has the expected effect. This change increases the probability of a pro-management decision by .6% and a split decisions by 3.9% while decreasing the probability of a pro-labor decision by 4.3%. While these changes aren't dramatic, it does show that the Board is forward thinking in considering the relevant appeals court when making decisions. Although slight, it also demonstrates that the appeals courts have an ex ante form of control over the Board even prior to decisions being made. A consideration of ex post forms of control might bolster the finding of the influence of federal appeals courts even further. However, ex post controls are not the subject of this analysis.

Unlike previous studies, neither the president nor Congress was found to play a significant role in the decision making of the National Labor Relations Board. While previous studies have found these two actors to play a role in influencing agency behavior (McCubbins and Schwartz 1984; Moe 1985; Calvert, Moran, and Weingast 1987; McCubbins, Noll, and Weingast; Hill and Brazier 1991; Woolley 1993; Wood and Waterman 1993), perhaps in the context of adjudicatory decisions these actors are less likely to play a significant role. This may be due to the fact that courts rather than elected officials are likely to have more expertise on judicial matters and thus the president and Congress are more willing to defer to the courts. As

McCubbins and Schwartz (1984) point out, because members of Congress are primarily concerned with reelection (Mayhew 1974) they rely on fire alarm approaches to oversight such as outlets through the courts. Because appealing cases to the circuit courts represents a fire alarm type of control afforded under the Administrative Procedure Act, this would provide an indication that this is true when agencies primarily engage in adjudicatory actions.

Economic Influences

Also, unlike previous studies, economic factors are not found to play a role in Board decision making. Both the unemployment rate and the change in the unemployment rate fail to achieve statistical significance at the .05 level. Inflation just barely fails to achieve statistical significance at the .05 level (p=.056). The variable moves in an unexpected direction as during times of higher inflation it actually decreases the probability of a pro-labor decision. My expectation was that the Board would be more sensitive toward labor during difficult economic times, but perhaps Moe's (1985) theory bears out as unions are less likely to file during difficult economic times. A one standard deviation increase in the inflation rate seems to have a marginal impact on the probability of a pro-management decision (+.04%), increases the likelihood of a split decision by 1% while decreasing the probability of a pro-labor decision by 1.1%.

Case Characteristics

Finally, results for the number of cases files are quite similar to the results found in Chapter 3. Across categories the variable's coefficient changes signs as it moves from a positive effect to a negative effect. Thus, it seems again that having more cases filed will increase the probability of winning some part of the overall case, but at some point having so many cases will also create more issues on which the parties may lose. This would lead toward more split decisions for decisions with many cases filed. One additional case filed against the respondent,

holding all other variables constant at their means, will decrease the probability of a pro-management decision by 1.4% and a pro-labor decision by 2.3%, while increasing the probability of a split decision by 3.7%.

None of the other case characteristic variables play a significant role in Board decision making. Whereas Cooke et al. (1995) found that unions with historically negative images were more likely to lose before the Board, the results in Table 5 find that this does not play a significant role in Board decision making. Additionally, as was the case in Chapter 3, the number of charging parties does not play a role in Board decision making.

Conclusion

Several key factors played an important role in Board decision making including the decision of the administrative law judge, the attitudes of the deciding panel members, exceptions filed by employers and the General Counsel, the ideology of the relevant federal appeals courts, and the number of cases filed by the charging party or parties. These results remain fairly consistent with previous findings from studies on Board decision making.

The most striking finding to come out of this study is the degree of influence that administrative law judge initial decisions have over Board decision making. Thus, the Board does not provide a means of limiting attitudinal decision making at the ALJ level as these initial decisions, more often than not, become the final order of the Board. Where previous studies attributed Board outcomes to the ideology of the deciding members, these results demonstrate that while ideology does play a role, the decision of the administrative law judge seems to play a more important role. These findings seem to again realize the assertion of Moe (1985) that lower level decision making at the NLRB is an important driving factor worthy of investigation.

One potential weakness of this study is that one could argue that administrative law judge decisions are seldom overturned because ALJs are simply giving the Board the decisions they want. Chapter 6 seeks to alleviate this concern by examining whether external political and judicial actors can influence ALJ decision making ex ante. This can help us differentiate between whether ALJ decisions are politically motivated or politically induced by other actors. It can also help differentiate between whether administrative law judges are simply giving the Board the correct decision or if the Board relies on ALJ decision making to the degree that is demonstrated here.

Before proceeding to this question, however, it is important to consider the impact of administrative law judge decisions even beyond review by the Board. Because, as stated earlier, nearly 80% of Board decisions adopt the initial decision of the administrative law judge without modification, it is important to look at how these decisions play a role in federal appeals court decisions. Do the appeals courts rely more on the administrative law judge decision or the Board decision? In cases where the Board reverses the ALJ, how often will the court restore the decision of the ALJ? How often will the Board reverse the decision of the agency when the initial decision and final order are the same? In other words, how much do the courts of appeals rely on ALJ decisions and does the influence of lower level decision making grow even further? These questions are the subject of Chapter 5.

Appendix

Table 1. Board Disposition of ALJ Initial Decisions 1991 – 2007

Disposition	Frequency	Percentage
Affirmed	2719	79.4
Reversed in part or Remanded	542	15.8
Completely Reversed	162	4.7
Total	3423	100

Split initial decisions that remained split after Board alteration have been included in the Reversed in part/Remanded category.

Table 2. Inter-coder Reliability Results for Independent Variables

Variable	Overall Kappa	Pairwise Inter-coder Agreement Rates by Coder Combination		
		1 - 2	1 - 3	2 - 3
Employer Excepted	.886***	95.3%	97.33%	95.3%
Union Excepted	.868***	96.5%	96%	93.71%
General Counsel Excepted	.913***	96.67%	96.67%	94.67%

All other variables were entered manually by one coder. Case characteristic variables were reproduced from chapter 4.

Table 3. Descriptive Statistics

Variable	Mean	Std. Dev.	Min	Max
Board Decision	1.31	.748	0	2
ALJ Decision	1.30	.789	0	2
Board Ideology	.047	.240	-.242	.351
Employer Exception	.753	.431	0	1
Union Exception	.228	.420	0	1
General Counsel Exception	.445	.497	0	1
Unemployment Rate	5.46	1.07	4	7.5
Δ Unemployment Rate	-.065	.568	-.8	1.2
Inflation	160.05	20.24	136.2	207.3
Senate Committee Ideology	-.012	.218	-.336	.287
House Committee Ideology	.101	.234	-.321	.263
President Ideology	.049	.462	-.441	.525
Appeals Court Ideology	.067	.251	-.341	.538
Supreme Court Ideology	.061	.124	-.069	.603
Number of Cases	2.12	2.69	1	79
Negative Union Image	.167	.167	0	1
Number of Charging Parties	.127	1.33	1	58

Table 4. Brant Test Results for Ordered Logit Models of Final Orders at the National Labor Relations Board

Variable	Chi^2
ALJ Decision	32.34***
Board Ideology	7.69**
Employer Exceptions Filed	64.43***
Union Exceptions Filed	3.44
General Counsel Exceptions Filed	0.92
Unemployment Rate	0.54
Δ Unemployment Rate	0.65
Inflation	0.48
Senate Committee Ideology	0.47
House Committee Ideology	0.16
President Ideology	0.59
Appeals Court Ideology	2.19
Supreme Court Ideology	1.63
Number of Cases	28.03***
Negative Union Image	0.53
Number of Charging Parties	5.56*

* $p < .05$, ** $p < .01$, *** $p < .001$. Significance represents a violation of the parallel regression assumption.

Table 5. Partial Generalized Ordered Logit Results of Board Decisions of Unfair Labor Practice Cases 1991 – 2007

Variable	0 → 1	0 → 1 Odds Ratio	1→ 2	1 → 2 Odds Ratio
Constant	1.72	-	-.186	-
	(2.54)		(2.53)	
ALJ Decision	2.866***	17.57	3.54***	34.37
	(.187)		(.134)	
Board Ideology	-1.93***	.145	-1.39***	.249
	(.455)		(.374)	
Employer Exceptions Filed	.426#	1.53	-1.57***	.209
	(.219)		(.209)	
Union Exceptions Filed	-.220	.803	-.220	.803
	(.146)		(.146)	
General Counsel Exceptions	.527***	1.69	.527***	1.69
	(.125)		(.125)	
Unemployment Rate	.070	1.07	.070	1.07
	(.143)		(.143)	
Δ Unemployment Rate	-.230	.795	-.230	.795
	(.306)		(.306)	
Inflation	-.024#	.977	-.024#	.977
	(.012)		(.012)	
Senate Committee Ideology	.173	1.19	.173	1.19
	(1.45)		(1.45)	
House Committee Ideology	.057	1.06	.057	1.06
	(1.52)		(1.52)	
President Ideology	.230	1.26	.230	1.26
	(.525)		(.525)	
Appeals Court Ideology	-.686**	.504	-.686**	.504
	(.230)		(.230)	
Supreme Court Ideology	.140	1.15	.140	1.15
	(.673)		(.673)	
Number of Cases	.358***	1.43	-.095**	.910
	(.078)		(.027)	
Negative Union Image	.001	1.00	.001	1.00
	(.135)		(.135)	
Number of Charging Parties	-.036	.962	-.186#	1.17
	(.132)		(.085)	

N=2252
Pseudo R^2=.43
Chi^2=1.055.18
*** p < .001, ** p < .01, * p < .05, # p < .10

Chapter 5

U.S. Circuit Court of Appeals Review of NLRB Decisions, 1992 - 2007

"We do not require that the examiner's [administrative law judge's] findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case." - *Universal Camera Corporation v. National Labor Relations Board* (340 U.S. 474, 496)

Introduction

Chapter 4 demonstrated that administrative law judge decisions play a vital role in the decision making of the political appointees of the Board. Chapter 2 highlighted that the review process provides that decisions made by the Board can be appealed to the federal circuit courts of appeals. This is important because if the vast majority of ALJ and Board decisions are simply ignored, overturned, or do not play a major role in decision making when litigants choose to appeal, then the impact of political decision making by lower level bureaucrats is not as dramatic. However, if appeals court judges are influenced by the decisions made by ALJs, then the phenomenon of political decision making extends even farther.

Typically, appeals are based on questions of law, or how the law was applied to the case, rather than the development of the factual record. Therefore, most cases are appeals to the federal circuit courts of appeals rather than federal district courts.[50] Data from Chapter 4 also demonstrates that about 80% of final orders from the Board adopted the initial decision of the ALJ without modifications. This means that 80% of the cases entering the federal courts of

[50] The NLRB does not even list U.S. District Courts as a means for resolving (the disposition of) cases in any of the agency's annual reports available on the Board's Website. I identified just over 30 cases in the district courts involving the NLRB between 1991 and 2007. Again, this demonstrates how rare it is for cases to be appealed to the district courts.

appeals are reviewing the reasoning of the ALJ rather than the opinions of members of the Board.

As a result, this chapter is dedicated to determining the relative impact of the opinions of ALJs on the decisions made by the Courts of Appeals against other decision making factors. If results demonstrate that ALJ opinions play a strong part in the decision making of the federal circuit courts of appeals, this demonstrates that decision making rooted in the personal preferences of ALJs expands its reach beyond just the confines of the agency, but into the federal court system as well, thus demonstrating the importance of ALJ decisions.

In order to determine the effect of initial decisions on the decisions of the federal circuit courts of appeals, I examine unfair labor practice decisions made by the appeals courts in cases from 1992 and 2007. I develop a model that looks at the outcomes of unfair labor practice cases as a function of the decisions of the administrative law judge and Board members, case characteristics, ideology of the deciding appeals court panel, Supreme Court influence, and economic factors.

Results demonstrate that the decisions of the appeals courts are influenced to a great extent by the decision of the administrative law judge and the Board. However, Board influence seems to be limited to certain situations, while ALJ influence seems to play a consistent role across all decision categories. Influence is particularly strong when the ALJ and the Board are in agreement. The ideology of the court also plays a role in decision making, but ideology does not play as strong of a role as the decision of the ALJ and the Board. These results not only continue to support the notion that administrative law judges play an important role in our democracy, but that ALJ decisions that are rooted in attitudes extend all the way into the federal court system.

Literature Review

The Influence of Previous Decisions

Decision making by the federal circuit courts of appeals has received no shortage of attention in the literature. However, most studies that involve appeals court review of administrative agency decisions focus on how courts impact agencies rather than how agency decisions might have the potential to impact the decisions of the courts. This type of research has been conducted at the Supreme Court level (Spriggs 1996, 1997), the appeals court level (Humphries and Songer 1999; Howard and Nixon 2002, 2003; Canes-Wrone 2003), the district court level (Ringquist and Emmert 1999), and even the state level (Johnson 1979). Nevertheless, as courts face burgeoning case loads, judges may seek cues to help speed up the decision making process. Two potential cues are the decision of the administrative law judge and the decision of the political appointees of the Board.

The case of *Chevron v. Natural Resources Defense Council,* 46 U.S. 837, (1984) purports that courts must defer to the decision of the agency when Congressional intent is unclear. Because the National Labor Relations Act is vague, most of the accepted doctrine surrounding the NLRB has been established through case law rather than through ascertaining Congressional intent. This means that more often than not, the decision of the agency should be upheld by the courts of appeals. Schuck and Elliot (1990), however, note that the number of remands from the D.C. Circuit Court of Appeals actually rose over *Chevron* rather than an expected rise in the number of times the court would affirm agency actions. Regardless, I expect that the rationale and decisions of the agency should play an important role in the decision making of the agency at least to some degree. In fact, Songer and Sheehan (1992) demonstrate that the U.S. government is one of the most successful litigants before the courts, which as Humphries and

Songer (1999) note is "a category including but not limited to administrative agencies" (p. 210). A reasonable expectation remains that decisions by administrative agencies should play an important role in the decisions of the circuit courts of appeals.

The question then arises of whose decision should play a greater role, the administrative law judge's decision or the Board's decision? The quote provided at the beginning of this chapter from *Universal Camera Corporation v. the National Labor Relations Board* (340 U.S. 474, 496) suggests that when disagreements between the Board and administrative law judge [trial examiner] exist over facts, the administrative law judge's decision should be given more deference. The language of the 8th Circuit Court of Appeals articulates the accepted standards of review clearly in the case of *GSX Corporation of Missouri v. NLRB,* 918 F.2d. 1351, (1990):

> "Where, as here, the Board's findings are contrary to the ALJ's, the court will review the Board's findings more critically. Colson Equip., Inc. v. NLRB, 673 F.2d 221, 223 (8th Cir. 1982). Although the substantial evidence standard still applies, Paintsmiths, Inc. v. NLRB, 620 F.2d 1326, 1329 (8th Cir. 1980), the Board's evidence must be stronger than would be required in a case where it had accepted the ALJ's findings, Colson, 673 F.2d at 223-24, since the ALJ's opinion is part of the record against which the substantiality of the evidence must be measured, Paintsmiths, 620 F.2d at 1329."

Therefore it seems that when conflict exists over facts, precedent guides the appeals courts to give more deference to the ALJ's decision than the Board's decision. Thus, not only should the decision of the agency play some role in the decision of the appeals courts, but the administrative law judge's decision should play a more substantial role than that of the Board.

Appeals Court Ideology

Since the work of Segal and Spaeth (1993, 2002) on Supreme Court decision making, the prominence and presence of the attitudinal model has grown to a point that it is almost accepted as a given that judges are affected by their attitudes when making decisions. The attitudinal model has been extended to other levels of the federal judiciary as well. Songer and Haire

(1992) found that differences in attitudes played a role in appeals court decision making of obscenity cases. The authors operationalized attitudes by examining differences between appointing presidents and found differences between presidencies. Songer, Segal and Cameron (1994) also find that appeals court judges are able to insert their own policy preferences into their decision making in spite of the preferences of the Supreme Court.

Other studies have focused on the role of attitudes when the federal circuit courts review agency decisions. Humphries and Songer (1999) found that attitudes play a role in whether agency decisions are upheld by the courts of appeals. Here the authors found that decisions are more likely to be upheld when agency decisions are closer to the policy preferences of the judges. This provides evidence that not only does the ideology of appeals court judges play a role in their decision making, but that ideology can have an impact on the outcomes of cases involving federal agencies.

It should be noted, however, that this study included a sample of decisions by all administrative agencies, whereas the focus of this study is solely on the decision of the NLRB. This is a crucial point as Rowland and Carp (1996) demonstrate that there was little substantive difference in the voting patterns of Republican and Democratic judges on the federal district courts when reviewing NLRB decisions. At the appeals court level, Songer (1987) does find statistically significant evidence of differences in voting patterns of Democratic and Republican judges in labor cases. So, while some inconsistencies exist in the literature, the vast majority of studies show that preferences are a crucial consideration in appeals court decision making.

Previous literature has used a variety of methods to measure the ideology of the appeals courts. Since these studies, the development of judicial ideology scores based on Poole and Rosenthal's (1991) common space scores by Giles, Hettinger, and Pepper (1998) and more

recently as adapted by Epstein et al. (2007) have provided researchers with more accurate measures of judicial ideology than simple partisan or appointing president measures. These measures are advantageous and have been proven to be advantageous in a variety of studies.

Case Characteristics

Because the work of Songer and Haire (1992) is one of the few studies to generate an "integrated" model of appeals court decision making, it is important to look to this study for crucial factors that could influence appeals court decisions. The authors note the importance of both fact patterns and case characteristics. In fact, Humphries and Songer (1999) criticize previous work on appeals court review of agency decision making for failing to include the potential influence of the legal model. As a result, the authors include two variables to operationalize the potential impact of the legal model. First, the authors include a dichotomous measure of whether the agencies decision was reviewed under the substantial evidence doctrine. While it would be ideal to adopt this measure here, because all NLRB decisions, as required by the National Labor Relations Act (NLRA), are reviewed under this standard, it does not provide any differentiation between cases.[51] Second, the authors include a dichotomous measure when the court is deciding a case that involves the interpretation of a federal statute. Because the NLRB operates primarily through adjudication, and because language of the NLRA is vague, most interpretation of the statute has occurred through the accumulation of case law rather than through rulemaking.

The result is that the difficulty of developing a method for incorporating the legal model into appeals court review of agency decisions persists. As an alternative to a pure legal model, many studies have relied on case characteristics as a quasi-legal influence over court decision

[51] A small portion of NLRB cases are reviewed *de novo* by the court, which is a different standard than the substantial evidence doctrine. However, during the time period of study less than 5% of cases were reviewed *de novo*.

making (e.g., Songer and Haire 1992; Ringquist and Emmert 1999). Others argue that the inclusion of measures of the legal model provide nothing more than legal justifications as a mask for attitudinal decisions (Segal and Spaeth 1993). Nevertheless, case characteristics should be incorporated into an appeals court decision making model.

Third Party Participation

Previous studies have considered the impact of the filing of amicus curiae briefs by third parties over court decision making. Caldeira and Wright (1988) found that the filing of amicus briefs increases the likelihood that the Supreme Court will grant certiorari. However, other studies have since found that interest groups were no more successful than non-groups (Epstein and Rowland 1991) and that amicus briefs did play a role in the outcomes of Court decisions (Songer and Sheehan 1993). While these studies seem to indicate only a limited impact for amicus curiae briefs in court decision making, it is still important to consider the role that third parties can play in the circuit courts of appeals. This is due to the fact that, as many scholars suggest, the filing of amicus briefs is becoming more prevalent (O'Connor and Epstein 1982; Bradley and Gardner 1985; Epstein and Rowland 1991).

To this point, most studies have limited themselves to incorporating the role of third parties by examining the impact of amicus curiae briefs. Olson (1990) points out that third parties can also enjoy some level of participation through the role of an intervenor. Signing on to a case as an intervenor is actually more significant than participating through amicus briefs as intervenors actually have a stake in the case outcome. Therefore, it is possible that this type of participation may also influence circuit court decision making as the court might place more emphasis on this type of third party participation

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The Supreme Court as a Principal

Appeals courts do not make decisions in a vacuum. Rather, the appeals courts exist in a judicial hierarchy that places the Supreme Court as the final arbiter of federal cases. A great deal of scholarship has focused on this hierarchy in the context of a principal-agent model in hopes of discovering whether the Supreme Court can actually influence the decisions of lower courts. For instance, Songer, Segal and Cameron (1994) find that changes in Supreme Court doctrine of search and seizure issues can influence the circuit courts. Songer (1987) finds that changes in Supreme Court precedent on anti-trust and labor matters have a profound impact on lower court behavior.

Other scholars have questioned why the circuit court judges would be concerned about the ideology or policy preferences of the Supreme Court. One explanation is that judges on circuit courts may fear reversal by the Supreme Court and thus modify their behavior to avoid having their decisions reversed. However, studies have found that the fear of reversal does not provide an adequate explanation of why appeals court judges would be concerned with the policy preferences of the Court (Klein 2002; Klein and Hume 2003).

Because this question remains a focal point of discussion within the literature, it is important that an appeals court decision making model consider the potential influence of the Supreme Court over appeals court review of unfair labor practices cases decided by the National Labor Relations Board.

Economic Influence

Labor relations is a policy area that is clearly connected to the economy. Chapters 3 and 4 demonstrated that economic factors had the potential to play a role in the decision making of administrative law judges and the National Labor Relations Board. Studies have also

demonstrated that appeals court judges are sensitive to economic issues. Humphries and Songer (1999) developed a measure of the economic liberalism of judges by examining their votes in economic cases. This measure proved to be useful for predicting how the Internal Revenue Service adjusted the rates of audits between the wealthy and the poor across federal circuits (Howard and Nixon 2002). Additionally, scholars have recognized a difference in the treatment of cases in the Supreme Court between economic and social agencies (Crowley 1987). Finally, the work Giles and Walker (1975) suggest that judges may be sensitive of and responsive to economic conditions. While their work was focused on trial judges, it still suggests that judges consider economic factors in their decision making.

While much of this implies that economic factors play a role in the attitudes of the judges themselves, it also indicates that judges are aware of and pay attention to economic issues and conditions. Therefore, because labor-management relations is one type of economic policy, it is reasonable to expect that economic conditions should play a role in appeals court decision making.

Primary Hypotheses

The above discussion leads us to draw several hypotheses regarding appellate court review of NLRB decisions:

1) Administrative law judge decisions should be a strong predictor of appeals court decision making. As initial decisions move in a pro-labor directions, so too should the decisions of the appeals courts. I expect the ALJ's decision to play a larger role than Board decisions in appeals court outcomes.
2) Board decisions should be a strong predictor of appeals court decision making. As Board decisions move in a pro-labor direction, so too should the decisions of the

appeals courts. However, Board decisions should not play as large of a role as administrative law judge decisions.

3) The ideology of the appeals court should help determine appeals court decision outcomes. More conservative courts should be more likely to overturn pro-labor decisions and support pro-management decisions while more liberal courts should overturn pro-management decisions and support pro-labor decisions.

Data and Variables

LexisNexis searches for appeals court decisions between 1991 and 2007 identified 3,503 cases involving the National Labor Relations Board. Table 1 provides a breakdown of cases by category as a means for helping the reader to ascertain how the sample size was derived. Identified cases contained many cases that were not used in the final analysis.

[Insert Table 1 About Here]

First, unpublished decisions, which made up about 56% of the total population of cases, were not used in analysis. While there is much debate in the literature concerning the use of published versus unpublished decisions (see Fra 1977; Reynolds and Richman 1978; Shuchman and Gelfand 1980; Rowland and Carp 1983, 1996; Songer 1988; Songer, Smith, and Sheehan 1989; Atkins 1992; Olson 1992; Songer and Sheehan 1992; Ringquist and Emmert 1999), these cases were ultimately dropped because it was impossible to determine many variables.[52]

Second, as Chapter 2 details, summary and default judgment cases do not involve a decision by an administrative law judge. Default judgment cases assume a guilty verdict against the respondent due to a failure on the part of the respondent to respond to charges filed at the

[52] Future work should seek to include unpublished decisions in the analysis to determine if there are differences between published and unpublished decisions.

NLRB. Thus, cases of this sort that are appealed to the circuit courts are not a part of the final sample of cases.

Third, a very small percentage of cases (< .01%) are appealed from federal district courts. Because these cases involve an additional step that is not typical of the normal appeals process, these cases are also abandoned.

Fourth, another very small portion of cases were cases that were being reviewed for a second time after remands from the appeals courts in prior cases. As was the case in Chapters 3 and 4, I am only interested in cases that are being heard by the reviewing body for the first time. This establishes that controls are happening ex ante and not ex post. Said differently, it is more likely that cases that are being reheard after remand would be affirmed by the court as the court has already had the opportunity to make its preferences clear to the Board or ALJ. Thus, the inclusion of these cases could bias results toward finding congruence between appeals court decisions and Board and ALJ decisions.

Fifth, many cases identified during the time period of study stemmed from initial decision that were issued prior to 1991 (13.3%). Because ALJ initial decisions are not included prior to 1991, these cases were omitted. Finally, search results included cases that did not include decisions on the merits. These cases were also omitted.[53]

Further data loss occurred as a result of several additional factors. Attempts to code 101 (2.9% of published of all cases) cases revealed missing cases at the ALJ level. Other cases were

[53] Search results included several types of motions made by parties involved in unfair labor practice cases. Motions ranged from requests for rehearing, request for en banc hearings, motions to reschedule, and many others. Because these types of decisions are not decisions on the merits of the unfair labor practice charges, these types of cases are excluded from the sample.

unable to be used for a variety of other reasons.[54] This left a total of 297 cases for the time period of study.

Dependent Variable

The dependent variable is in an ordinal measure ranging from 0 to 2 where "0" represents a pro-management decision, "1" represents a split decision, and "2" represents a pro-labor decision by the Federal Court of Appeals. To determine the directionality of the outcome of cases, the decision of the Board was used as a baseline in a manner similar to the coding of Board decisions in Chapter 4.

Cases can be appealed to the Courts of Appeals in several different ways. First, litigants may file a petition for review to have the Court review the decision of the Board. It is possible that the union or the employer may file exceptions to the decision of the Board. Second, because the Board has no enforcement power, the Board itself may file a petition for enforcement in order to have the court enforce the decision. Third, cross-petitions may be filed where one or more litigants seek review, while the Board concurrently seeks to have its decision enforced.

When petitions for enforcement are filed and the decision of the Board is enforced or affirmed, the outcome of the case at the appeals court level is coded the same as the outcome of the case at the appeals court level. When the court fails to enforce the decision of the Board, the case is coded in the opposite direction of the Board's decision. For example, if the Board is attempting to have a pro-labor decision that was filed against an employer enforced and the court denies the petition, this is coded as a pro-management decision. The logic here is that without

[54] Other cases were unable to be used for the following reasons: Stemmed from cross-listed charges that were excluded at the ALJ level (7 cases); Stemmed from a representation only case with no ULP charges (5 cases); Case stemmed from an ALJ or Board supplemental decision (15) and did not involve unfair labor practice charges or were cases being heard for the second time; Case was a split decision that was altered by the court but remained a split decision (46 cases); Case stemmed from a case that split before the decision of the Board and split after alterations by the Board making it appear as if there were no alterations when it came before the Courts of Appeals (20 cases); Case involved an individual (54 cases); Case was filed against labor (27 cases); Both parties sued over the NLRB decision (7 cases).; Cases remanded without Appeals Court rendering a decision (9cases).

the authority for the NLRB to enforce the decision, the decision lacks any real consequences for the guilty party. Cases that were remanded to the Board from enforcement petitions were not scored as there is no decision on the merits. In instances where the original Board decision was split and the petition for enforcement is denied, the case is coded as a partial reversal in favor of the respondent.

When litigants file petitions for review, decisions are coded the same as the Board decision in instances where the petition for review is denied. However, in instances where the petition for review is granted, the decision is coded in favor of the litigant. If the petitioner is a union, the case is coded pro-labor, and if the litigant is an employer, the case is coded as pro-management.

When cross-petitions occur, the same decision rules apply as described above for petitions of review and petitions for enforcement. The only additional scenario that will arise is when the court grants a petition for review in part and grants the petition for enforcement in part. In this situation, the Court is saying that each party has won a portion of the case, and these represent split decisions. As was the case in Chapter 4, sometimes cases that were split prior to a decision by a reviewing body remain split even after alterations to the decision occur. These types of decisions were removed from analysis.[55]

One additional scenario that led to data loss was when both the charging party and the respondent involved in the Board decision file petition for review of the Board's final order. Under this scenario, the Board cannot be seen as representing the position of one of the litigants, but rather its own unique position. This represents a problem for the coding of the typical pro-labor/pro-management continuum. As such, cases where both parties challenged the decision of

[55] There were 46 cases (~10%) of cases that satisfied met this criteria.

the NLRB were excluded from analysis. However, this represented a very small portion of cases (7, <.01%).

Case outcomes could easily be identified in one of two places within an appeals court decision. First, case outcomes could be identified in the "Disposition" section in the heading of each decision. When this information was absent, case outcomes could be identified in the "Conclusion" section of the decision.

Multiple coders were employed to code appeals court decision outcomes.[56] A sample of 65 cases, which represented 10% of all available cases, was coded by both coders. Inter-coder reliability tests demonstrated a strong inter-coder agreement rate between both coders (98.41%) for appeals court decision outcomes. Additionally, the kappa statistic was quite strong (.957) and was significant at the .001 level.

This left the analysis with 97 pro-management (23.32%), 172 split (41.35%), and 147 pro-labor decisions (35.34%). Table 2 lists the outcome agreement between reviewing bodies of unfair labor practice cases.[57]

[Insert Table 2 About Here]

Interestingly enough, there were 190 cases reviewed by the appeals court level where the ALJ, the Board, and the court all agreed on the outcome of the case.[58] The ALJ and the appeals court agreed on 33 cases when the Board disagreed with the ALJ decision. In other words, in 33 instances the appeals court relied on the opinion of the ALJ over that of the Board. However, in 32 cases the appeals court relied on the Board's decision when there was disagreement between

[56] Two coders were used to code appeals court variables. I coded data with assistance from an undergraduate assistant.
[57] This table excludes cases that were split decisions issued by the ALJ that were altered by the Board, but remained split. It also excludes split decisions issued by the Board that were altered by the appeals court, but remained split even with alterations.
[58] Again, it should be noted that remedial alterations were not considered changes to outcomes. Only changes to the decisions on the merits of the ULP charges were considered alterations of outcomes.

the ALJ and the Board. Finally, the appeals court reversed the decision of the agency 94 times when the ALJ and Board were in agreement.

This provides compelling evidence about the influence of the ALJ even at the appeals court level. For if the Board adopted the decision of the ALJ without modification in 190 of the cases appealed to the circuit courts, and these decisions were adopted by the appeals court without modification, then the ALJ's decision was the final decision of the appeals court 56.2% of the time. However, there were also 33 (9.5%) instances where the courts adopted the decision of the ALJ even after by altering the decision of the Board. Therefore, in total, the ALJ decision accounted for 63.9% of all appeals court decisions or 87.5% of all decisions in which the agency prevailed before the court.

By combining these numbers with the figures provided in Table 1 from Chapter 4, one can see that ALJs play a crucial role in establishing policy. Consider that from the total number of cases (6,646) decided by ALJs between 1991 and 2006, the ALJ's action was the final action in 3,222 (48.5%). Out of the total number appealed to the Board (3,423), the ALJ's decision was affirmed in 2,719 cases (79.4%). Combining these two statistics, ALJ decisions accounted for 89.4% of all decisions. Considering that among the 349 decisions appealed to the circuit courts, the ALJ's decision was upheld in 223 (63.9%), as stated above, one can see that ALJ decisions accounted for 5,814 of the total number of decisions (6,646). This means even after potential alterations by the Board and the courts of appeals, ALJ decisions accounted for 87.5% of all outcomes between 1991 and 2007.

Thus Moe's (1985) assertion that lower-level decision making plays an important role in the American political and bureaucratic system cannot be overstated. ALJ decisions guide the majority of decisions. But, scholars have largely ignored the role of this judicial and

bureaucratic actor. While the above statistics are compelling, it is important to ensure that ALJ decisions play an important role relative to other factors. To test this assertion, multivariate analysis is employed below.

Primary Independent Variables

Because the primary question is determining how lower level decisions affect the decisions of the appeals court, both the decision of the Board and the decision of the ALJ are included as predictors of the appeals court's decision. Because of the potential for multicollinearity, a tested the two variables through a one to one correlation. The results show a strong, but not problematic, correlation between the two variables (.731). Both variables are scaled in the same metric as the dependent variable allowing for direct comparability. Pro-management decisions are coded "0", split decisions are coded as "1", and pro-labor decisions are coded "2" for both the decision of the ALJ and the decision of the Board.

As stated above, I expect that as the ALJ's decision moves in a pro-labor direction, so too should the appeals court's decision. Additionally, as the Board's decision moves in a pro-labor direction, so too should the appeal's court decisions. However, I also expect that in cases where there is disagreement between the Board and the ALJ, that the ALJ's decision should be more influential in the decision of the court. Additionally, I expect the influence of the ALJ's decision to be more influential overall.

Because the literature has demonstrated that the ideology of individual members of the appeals courts plays a role in decision making, I include the Epstein et al. (2007) appeals court common space ideology measure previously used in Chapter 4. The ideology of the median member of the deciding panel was coded for each case decided by the courts of appeals during the time period of study. For en banc cases, the ideology of that circuit was used to measure the

ideology of the deciding members. As stated above, I expect more conservative panels to rule more often in favor of management, while more liberal panels should rule more often in favor of labor.

Case Characteristics

In order to measure the impact of legal considerations upon appeals court decision making, case characteristics developed in Chapter 3 are adopted here. Thus, three variables are included in the model to determine the influence of case characteristics. First, a simple count of the number of charging parties is included. The results from models on ALJ and Board decision making both demonstrated that an increase in the number of charging parties had no substantive impact on the outcomes of cases. However, I expect that more charging parties should lend more credence to the charges being levied against the respondent and thus increase the likelihood of a decision against the respondent.

Similar to the number of charging parties is the number of cases filed against the respondent. While this variable seems similar to the number of charging parties it differentiates between when one charging party files multiple complaints and when several charging parties each file a single complaint. The measure is simply a count of the number of cases filed against a particular respondent. Of course, each case must have at least one case filed. In Chapters 3 and 4, results demonstrated that an increase in the number of cases had a differential effect between categories that lead toward more split decisions. It was theorized that the number of cases would increase the chance of winning some portion of the case, but that as the number of cases continued to increase it would also increase the chances of losing some portion of the case, thereby leading to more split decisions. Thus, I hypothesize that the number of cases should have the same effect when appeals courts review Board decisions.

Third, Chapter 3 found that individuals were more likely to lose cases as a result of having fewer resources at their disposal and by not being "repeat players". Therefore, one additional case characteristic that is included in the model is whether the case involves an individual as the charging party. This is a dichotomous measure that is adopted from the case characteristics established in Chapter 3 and is simply coded "1" when the charging party is an individual and "0" otherwise.

Next, for consistency throughout the analyses, I include Cooke et al.'s (1995) dichotomous measure of whether a union has a historically negative image. Cooke et al. (1995) found that unions with historically negative images were more likely to lose cases before the Board. Thus, I hypothesize that union's with historically negative images would be more likely to lose cases before the courts of appeals. Here the courts would use this as a decision making cue as a means for shortening decision times in the face of a burgeoning case load.

Following previous studies that have looked at the role of the filing of amicus briefs and the impact on decision outcomes, I included a variable to determine amicus influence.[59] While amicus briefs represent a fairly infrequent occurrence, it is important to consider the impact of this variable. Amicus briefs were coded in a pro-labor (+1) or pro-management (-1) direction. The total of all pro-labor and pro-management amicus briefs was then added together for each case. For example, if a case included an amicus brief filed by a pro-management supporter and a pro-labor supporter the result would be a scoring of "0" for that case. If amicus briefs were filed by multiple supporters of the same party, these would be tallied together. I expect that increases in the amicus score should lead to more pro-labor decisions, while decreases in the amicus score should lead to more pro-management decisions.

[59] Amicus briefs were filed in 32 out of 347 cases used in the final sample of cases including individuals (9.2%), and 32 out of 297 cases when cases involving individuals are excluded (10.8%).

Finally, a dichotomous measure was included to capture the presence of an intervenor in the case. An intervenor might be thought of as a more moderate form of support when compared to amicus curiae briefs. An intervenor is a party that has a stake in the outcome of the case. For unfair labor practice cases, the intervenor was typically the party that had won the case at the Board level and was therefore supporting the decision of the Board. In other words, the intervenor wants to ensure that the decision of the Board remains in their favor. I expect that when intervenors are present, they should lead to increased support of the Board's decision when compared to the absence of an intervenor. Intervenors were present in 33.3% of all cases filed during the time period of study.

Supreme Court Influence

In the judicial hierarchy, the Supreme Court can review decisions of the appeals courts at its discretion when parties appeal. In this regard, the policy preferences of the Court may play a role in the decisions of the appeals courts. To capture the ideology of the Supreme Court, I make use of Epstein et al.'s (2007) common space measure for the ideology of the Supreme Court at the time of the appeals court decision. Common space measures, as stated before, are useful in that they allow comparisons across institutions and across time. As a result, the ideological measures of the Supreme Court are directly comparable with the ideology of the deciding appeals court panel. My expectation is that as the Supreme Court becomes more conservative, decisions should move in a pro-management direction and that as the Supreme Court becomes more liberal, decisions should move in a pro-labor direction.

Economic Influence

Because previous studies on Board decision making revealed that economic factors can play a role in Board decision making (DeLorme, Hill, and Wood 1981; Moe 1985; Cooke et al.

1995), it is also entirely possible that economic factors could play a role in appeals court decision making. Appeals courts might be sensitive to the economic trends of the time and use economic indicators as cues for decision making. Three economic indicators are adopted to measure this influence. First, the unemployment rate at the time of the appeals court decision, as reported by the United States Bureau of Labor Statistics (USBLS), is included in the model. Second, as was the case in Chapter 3, longer term trends in the economy are measured by including the change in the unemployment rate from the previous year (Cooke et al. 1995). Last, the inflation rate at the time of the appeals court decision, as measured by the Consumer Price Index (CPI), is included in the model.

While theorists offered differing hypotheses regarding the impact of economic conditions on unfair labor practice decisions (Moe 1985; Cooke et al. 1995), I theorize that appeals courts should be more sensitive toward labor during difficult economic times. However, when the economy is more stable and prosperity is enjoyed, cases should move in a pro-management direction.

Summary Statistics

Table 3 presents descriptive statistics for the dependent variable and all

[Insert Table 3 About Here]

independent variables for the appeals court decision making model.[60] The similarity of the means of the Board's decision (1.51) and the ALJ's decision (1.42) is quite noticable. While the means don't show us the similarities between individual cases, in aggregate the similarities in outcomes are still useful. What is surprising, however, is the difference between the Board and ALJ average outcome and that of the appeals courts (1.12). Appeals court outcomes are slightly

[60] Reported descriptive statistics are reported for only appeals court cases rather than all available data. This is to demonstrate the difference between all available data and data for variables in the context of appeals court decisions.

more favorable toward management, though there is still a pro-labor lean. Considering this in the context of the mean ideology of the deciding courts of appeals (.124), this may not be unexpected due to the conservative leaning of the courts of appeals.

The means also demonstrate that very few cases involved individuals and that very few amicus briefs were filed in any given case. In fact, the total of pro-management or pro-labor amicus briefs never exceeded a single brief in any case. The small number of individuals appealing cases at this level may be an indicator that few individuals possess the amount of resources necessary to take their case this far.

While descriptive statistics can provide useful information, it is important to analyze cases in a multivariate model in order to determine the impact of each variable on the appeals court's decision. Thus, multivariate modeling is conducted below.

The Model

When the dependent variable is categorical it is appropriate to use an ordered logit model. However, Brant test results presented in Table 4 demonstrate that two independent variables violate the parallel regression assumption. Violations were found for the Board decisions and the number of cases filed.

[Insert Table 4 About Here]

In order to allow for the relaxation of the parallel regression assumption with regard to these two variables, I used a partial generalized ordered logit model.[61] This model allows allow me to show variables impact the dependent variable between categories when the impact of the independent variable is unequal between categories.

[61] In order to be able to make use of Long and Freese's post-estimation tools, gologit rather than gologit2 was employed in Stata.

Results and Discussion

I present results from the partial generalized ordered logit model in Table 5 along with odds ratios.[62] Even though odds ratios are presented in the table, it is more intuitive to interpret partial generalized ordered logit results in terms of predicted probabilities. Therefore, discussion of results is presented in these terms.

[Insert Table 5 About Here]

The Influence of ALJ and Board Decisions

The primary purpose of this study was to determine the impact of the ALJ's initial decision on the subsequent review of Board decisions by the federal appeals courts. Results from Table 5 show that the decision of the ALJ has a strong impact across both categories and achieves statistical significance at the .001 level. Holding all other variables constant at their means, a pro-management ALJ decision will lead to a 39.5% probability of an appeals court outcome in the same direction, a 49.6% chance of a split decision, and only a 10.9% chance of a pro-labor decision.

A split decision by the ALJ leads to a 19.7% probability of a pro-management decision, an overall decrease of 19.8% and a relative decrease of 50.1%. A split decision by the ALJ will also lead to a 55.8% probability of a split decision at the appeals court level.[63] This is a 6.2% overall increase over a pro-management decision and a 12.5% relative increase. The probability of a pro-labor decision moves from 10.9% to 24.5% when ALJs issue a split decision. This is an overall increase of 13.6% and a relative increase of 55.5%.

[62] Results exclude cases filed against unions (CB). Chapter 4 explains how the inclusion of both types of cases can interfere with the interpretation of results. Cases filed against unions represented 25 cases for the time period of study. Results that included these cases had little substantive difference from the results presented in Table 5. Both the decision of the ALJ and the decision of the Board play roles similar to those presented here.

[63] All further results are interpreted by holding all other variables constant at their means.

Finally, when ALJs issue an initial decision that is in a pro-labor direction, the probability of a pro-labor decision will increase to 46.3%. This represents an overall increase of 21.8% and a relative increase of 47.1%. The chance of a split decision will decrease from 55.8% to 45.2%, an overall decrease of 10.6% and a relative decrease of 18.9% as an ALJ decision moves from a split decision to a pro-labor decision. Pro-management decisions also become much less probable as a pro-labor decision at the ALJ level will decrease the probability of a pro-management decision from 19.7% to 8.5% when moving from a split decision to a pro-labor decision. This represents an overall change of 11.2% and a relative change of 57%.

The overall impact of the ALJ's initial decision becomes even more profound for the change in probabilities when moving from a pro-management to a pro-labor decision. This change represents an overall decrease of 31% and a relative decrease of 78.5% in the probability of a pro-management decision. Similarly, a change from a pro-management to a pro-labor decision increases the probability of a pro-labor decision from 10.9% to 46.3%, an overall increase of 35.4% and a relative increase of 76.5%. Split decisions on the other hand do not see as much movement. A move from a pro-management decision to a pro-labor decision only decreases the probability of a split decision by 4.4%.

These results demonstrate the profound impact that ALJ decisions can have over decisions by the courts of appeals. However, before deriving specific conclusions regarding ALJ impact, the impact of the decisions made by the Board on the outcomes of cases at the appeals court level must also be considered.

Board decisions are statistically significant when moving between split decision and pro-labor decisions, but fail to be distinguishable from zero otherwise. The small coefficient and the reported odds ratio demonstrate that the variable's coefficient has little impact on appeals court

decisions when moving between pro-management and split decisions. Thus, it seems that the decision of the ALJ has considerably more impact when moving between these to categories. However, results also demonstrate that the Board's decision can have a large impact when moving from split decisions to pro-labor decisions and is statistically significant at the .001 level. Predicted probabilities demonstrated that a change from a split decision to a pro-labor decision by the Board can decrease the odds of a split decision from 73.9% to 35.1%, an overall decrease of 38.8% and a relative decrease of 52.5% holding all other variables constant at their means. A move in this direction will also increase the odds of a pro-labor decision from 12.9% to 51.9%, an overall increase of 39% and a relative increase of 75%. These results demonstrate that Board decisions can have a very large impact of making the difference between a split decision and having a decision decided totally in favor of labor. The impact of the ALJ decision, on the other hand, seems more consistent across categories.

Long and Freese's (2006) post-estimation techniques can allow us to use predicted probabilities to further investigate the impact of ALJ and Board decisions on appeals court decisions by looking at different scenarios of outcomes by both levels of decision making. For instance, results demonstrate that when the ALJ decides in a pro-labor direction and the Board decides in a pro-management direction, pro-management decisions by the appeals courts will occur only 3.4% of the time, pro-labor decisions only 8.2% of the time, and split decisions 88.5% of the time. Not only does this highlight that the ALJ decision will be adopted slightly more often under this scenario, but it also highlights that split decisions are most often the result when there is disagreement between the Board and the ALJ. The propensity for split decisions makes intuitive sense as my expectation is that disagreement would lead the courts of appeals to adopt some parts of each of the previous decisions.

Also of interest, is that when the Board and the ALJ are in agreement, the impact on appeals court decisions is tremendous. Having both the Board and the ALJ move from a pro-management to a pro-labor decision will decrease the probability of a pro-management decision from 39.6% to 3.4% an overall decrease of 36.2% and a relative decrease of 91.4% holding all other variables constant at their means. A move in this direction will also increase the probability of a pro-labor decision from .5% to 97.1% an overall increase of 96.6% and a relative increase of 99.5%. One would be hard pressed to find results that were more convincing of the importance of agreement within the agency and the impact that has on subsequent decisions by the appeals courts. Furthermore, because Table 1 of Chapter 4 shows that the decision of the ALJ is affirmed nearly 80% of the time by the Board, this again presents undeniable evidence of the importance of the administrative law judge, even when decisions are being reviewed by a body that is two steps removed from the ALJ. Thus, the quote at the beginning of the chapter proves to be true in light of these results.

Appeals Court Ideology

Not surprisingly, the results presented in Table 5 also demonstrate that the ideology of the appeals court plays a role in the outcomes of unfair labor practice cases. The ideology of the court moves in the expected direction and is statistically significant at the .01 level. A one standard deviation increase (.346) in the ideology of the appeals court increases the probability of a pro-management decision from 11.7% to 15.9%, an overall increase of 4.2% and a relative increase of 35.9%. A one standard deviation change also increases the probability of a split decision from 50.7% to 54.4%, an overall increase of 3.7% and a relative increase of 7.3%. Finally, a one standard deviation increase in the common space score decreases the probability of

a pro-labor decision from 37.7% to 29.7% an overall decrease of 8% and a relative decrease of 21.2%.

While ideology seems to play an important role, it does not play as large of a role as the decision by the ALJ and the Board. In fact, a change from the minimum ideology (-.543) to the maximum ideology (.581) increases the probability of a pro-management decision from 6.9% to 19.4%, an overall increase of 12.5% and a relative increase of 64.4%. This same change also increases the probability of a split decision from 41.5% to 55.7% an overall increase of 14.7% and a relative increase of 26.4%. Finally, a change from the most liberal court to the most conservative court results in a decrease in probability of a pro-labor decision from 51.5% to 24.9% an overall decrease of 26.6% and a relative decrease of 51.7%. These results, while showing that ideology can play a clear role in decision making, demonstrate that ideology does not play as large of a role as do the decisions by the agency in the initial decision and the final order. This may be due to the fact that, as Rowland and Carp (1996) suggest, labor cases do invoke political attitudes to the degree that other policy areas do. However, unlike Rowland and Carp (1996), I find clear evidence that attitudes do play a role in the decision making of labor cases.

Case Characteristics

Two case characteristics had a statistically significant impact on appeals court decision making of unfair labor practice cases. The number of cases was found to have a statistically significant impact ($p < .001$) in moving from a pro-management to a split decision, but failed to achieve statistical significance in moving a case from a split decision to a pro-labor decision. Having one additional case filed against a respondent can increase the probability of a split decision from 34.3% to 48.9%, an overall increase of 14.6% and a relative increase of 42.6%,

holding all other variables constant at their means. A one case increase will also decrease the change of a pro-management decision from 33.4% to 16.9% for an overall decrease of 16.5% and a relative decrease of 49.4%. The results demonstrate that having multiple cases filed against the respondent will increase the probability of winning at least some of the alleged charges. Unlike Chapter 3 and Chapter 4,the negative coefficient for the effect of the variable between split and pro-labor decisions disappears. Therefore, it seems that having multiple cases filed against the same respondent lend at least some credence to the charges that are being alleged.

The filing of amicus briefs also affects the outcomes of appeals court decisions with an interpretation of the p value under a one-tailed test (p=.097). Having an amicus brief filed on the behalf of the union or individual increases the likelihood of a pro-labor decision from 34.2% to 61.2%, an overall increase of 27% and a relative increase of 78.9%, holding all other variables constant at their means. The presence of a pro-labor amicus brief also decreases the probability of a pro-management decision from 13.3% to 4.8% for an overall decrease of 8.5% and the probability of a split decision from 52.5% to 33.9% a change of 18.6%. Having one amicus curiae brief filed on a party's behalf can have a substantial impact due to the fact that no more than one amicus brief was filed on the behalf of any one litigant.

Supreme Court Influence

As Klein and Hume (2003) found, the fear of reversal by the Supreme Court, or ex ante control, does not seem to play a role in appeals court decision making of unfair labor practice cases. While the Supreme Court ideology measure moved in the expected direction and had a large coefficient, it failed to achieve statistical significance at the .05 level (p=.691). Thus, as hypothesized Supreme Court ideology fails to influence appeals court decisions. This is

probably due to the small number of cases where certiorari is granted by the Court. In fact, only four cases were heard by the Supreme Court from cases that stemmed from initial decisions issued by administrative law judges between 1991 and 2006. This represents about 1% of all appeals court cases heard during the same time period. The potential for reversal remains relatively low for this sixteen year time period.

Economic Influences

Long term trends in the economy play a significant role in appeals court decision making of unfair labor practice cases. The change in the national unemployment rate from the previous year moves in the expected direction and achieves statistical significance at the .05 level. Results show that a positive increase in the change in the unemployment rate increases the probability of a pro-labor decision. In fact, holding all other variables constant at their means, a one standard deviation change increases the probability of a pro-labor decision by 8.2% while decreasing the probability of a split decision by 4.9% and a pro-management decision by 3.2%. These results are consistent with Cooke et al.'s (1995) findings that changes in the unemployment rate were a consideration in important Board decisions.[64] The failure of other short term economic indicators demonstrates that economic factors only seem to play a role when long term trends are present rather than short term fluctuations.

Conclusion

While the Board's decision played an important role in the decision making of the appeals courts, influence was limited to changes in probabilities between pro-management and split decisions. On the other hand, results revealed that the initial decision of the administrative law judge played a role across all outcome categories. Additionally, results demonstrated that

[64] It should be noted that the authors found differential effects between periods of change with high unemployment and periods of change with low unemployment. Nevertheless, the finding of a statistically significant effect is consistent between the current study and the former.

agreement between the ALJ and the Board has a profound impact on appeals court decisions. Chapter 4 demonstrated that this agreement stems from the Board's tendency to affirm ALJ decisions. As a result, agreement between the ALJ and the Board becomes the norm, not the exception, thus leading to a great deal of influence over outcomes when decisions are review by the federal circuit courts of appeals. While the attitudes of decision making panels of the appeals courts played a role in decision making, it paled in comparison to the impact of previous decisions by the agency, especially those by the ALJ.

These results demonstrate two important points. First, the decisions of administrative law judges have an affect that reaches beyond the immediate initial decision. ALJ decisions not only influence the decisions of the political appointees of the Board as shown in Chapter 4, but also the decisions of the federal circuit courts of appeals.

Second, the political attitudes of administrative law judges are extremely important as they will determine the directionality of the outcome of the initial decision, which, more often then not, is adopted by reviewing bodies. The scope of the phenomenon of attitudinal decision making then grows by impacting cases well beyond the initial decision. This means that decisions rooted in administrative law judges' attitudes account for the vast majority of cases that are adjudicated. I then return to the overall focus of this study. As unelected judges/bureaucrats in a democratic society, how can our system of government strike the proper balance between independence and democratic control?

Before answering this question, one problem remains. It is still possible to argue that administrative law judges simply made the correct decision, or that inclusion of attitudes as decision making factor of initial decisions is politically induced by hierarchical superiors. This gives the appearance that decisions by ALJs are influential when, in fact, they merely reflect the

desires of their political or judicial superiors. Chapter 6 seeks to address this concern by examining whether external political and judicial actors can influence the decisions of administrative law judges ex ante. Doing so will allow us to arrive at two major conclusions regarding previous analyses. First, that the discovery of attitudinal influences in initial decision making in Chapter 3 were as a result of individual political motivation on the part of the ALJs and not because political attitudes were induced by outside actors. Second, I am able to conclude that the results of Chapters 4 and 5 are due to the influence of administrative law judges rather than the result of decisions that were tailored to the preferences of reviewing bodies. In the process of answering these two important concerns, I am also able to address the question posed above regarding the ability to exert control over administrative law judges.

Appendix

Table 1. Federal Circuit Court of Appeals Cases Involving the NLRB, 1991- 2007

Category	Frequency	Percent
Unpublished	1,970	56.2%
Published	1,533	43.8%
Summary/Default Judgment	205	5.9%
From District Court	41	1.2%
Rehearing	12	< .01%
Motions (Rehearing, Enbanc, etc.)	199	5.7%
Original ALJ Case Prior to 1991	468	13.7%
All Others	608	17.8%
Total Published and Unpublished	3,503	100%

Table 2. Unfair Labor Practice Case Outcome Agreement Between Reviewing Bodies

Reviewing Body Combination	Frequency	Percent
ALJ, Board, and Appeals Court Agree	190	54.4
ALJ and Appeals Court Agree	33	9.5
Board and Appeals Court Agree	32	9.2
ALJ and Board Agree	94	26.9
Total	349	100

Table 3. Descriptive Statistics of Appeals Court Unfair Labor Practice Cases, 1992 – 2007

Variable	Mean	Std. Dev.	Min	Max
Appeals Court Decision	1.12	.757	0	2
Board Decision	1.51	.625	0	2
ALJ Decision	1.42	.696	0	2
Appeals Court Ideology	.124	.346	-.543	.581
Number of Cases	2.63	3.45	1	37
Individual	.130	.336	0	1
Negative Union Image	.192	.395	0	1
Number of Charging Parties	1.34	1.62	1	25
Amicus Briefs	.019	.219	-1	1
Intervenor	.317	.466	0	1
Supreme Court Ideology	.034	.067	-.063	.112
Unemployment Rate	5.16	.750	4	7.5
Δ Unemployment Rate	-.085	.552	-.8	1.1
Inflation	171.89	16.16	140.3	207.3

Table 4. Brant Test Results for Ordered Logit Model of Unfair Labor Practice Decisions by the Federal Courts of Appeals

Variable	Chi^2
Board Decision	22.18***
ALJ Decision	1.80
Appeals Court Ideology	1.26
Number of Cases	13.77***
Individual	1.91
Negative Union Image	0.50
Number of Charging Parties	0.50
Amicus Briefs	1.97
Intervenor	0.00
Supreme Court Ideology	0.44
Unemployment Rate	1.15
Δ Unemployment Rate	0.04
Inflation	0.36

* $p < .05$, ** $p < .01$, *** $p < .001$. Significance represents a violation of the parallel regression assumption.

Table 5. Partial Generalized Ordered Logit Results for Federal Appeals Court Decisions of Unfair Labor Practice Cases 1992 – 2007

Variable	0 → 1	0 → 1 Odds Ratio	1→ 2	1 → 2 Odds Ratio
Constant	.887	-	.887	-
	(7.11)		(7.11)	
Board Decision	.001	1.00	1.98***	7.23
	(.296)		(.296)	
ALJ Decision	.978***	2.66	.978***	2.66
	(.125)		(.125)	
Appeals Court Ideology	-1.04**	.355	-1.04**	.355
	(.359)		(.359)	
Number of Cases	.897***	2.45	.082	1.08
	(.200)		(.072)	
Individual	.515	1.67	.515	1.67
	(.412)		(.412)	
Negative Union Image	.240	1.27	.240	1.27
	(.319)		(.319)	
Number of Charging Parties	-.133	.876	-.133	.876
	(.146)		(.146)	
Amicus Curiae Briefs	1.11#	3.04	1.11#	3.04
	(.670)		(.670)	
Intervenor	.043	1.04	.043	1.04
	(.273)		(.273)	
Supreme Court Ideology	-2.94	.053	-2.94	.053
	(7.38)		(7.38)	
Unemployment Rate	-.053	.948	-.053	.948
	(.333)		(.333)	
Δ Unemployment Rate	.617*	1.85	.617*	1.85
	(.258)		(.258)	
Inflation	-.012	.989	-.012	.989
	(.031)		(.031)	

N=322
Pseudo R^2=.234
Chi^2=90.60***
*** p < .001, ** p < .01, * p < .05, # p < .10

Chapter 6

Administrative Law Judge Decision Making in a Political Environment, 1991 - 2006

"It cannot be in the best interests of the government and the public to permit administrative law judges in any agency to continue to enjoy an exemption from effective administration." – Edward B. Miller, Former Chairman of the National Labor Relations Board (1970 - 1974).

Introduction

The above quote from former Chairman Miller comes from a larger work in which he assesses the various problems with the National Labor Relations Board. One problem he outlines has to do with the agency's inability to maintain effective controls over administrative law judges (1980). While Chairman Miller's focus is on productivity and timeliness of administrative law judge decisions, his overall point is the difficult the agency has in finding ways to check ALJ actions through the usual means of the "carrot and the stick" used by most federal agencies. Miller seems to forget, as Chapter 2 points out, that judges require a great deal of independence in order to render decisions free from external influences and biases. Yet, at the same time, the results from Chapter 3 demonstrate that ALJs rely on their own political attitudes when making unfair labor practice decisions. Coupled with the results from Chapters 4 and 5, which demonstrated that ALJ decisions were one of the primary influences over Board and federal circuit court of appeals decisions, Miller's calls for effective controls over administrative law judges may not be without merit and may overshadow the value of judicial independence. Therefore, the focus of this chapter is centered on possible controls that may exist over administrative law judge decision making as a means for limiting attitudinal influences and increasing democratic controls.

The primary question this chapter seeks to answer is whether tools exist to control ALJ decision making and limit the degree to which ALJs rely on their own political attitudes when

issuing initial decisions. The primary focus of this chapter is on ex ante and not ex post forms of control. While ex post control is certainly a valid method of control over bureaucratic behavior (Johnson 1979; Spriggs 1996, 1997), it is not the focus of this study.[65]

By answering examining whether control over ALJ decision making exists, I am also able to address concerns that remained from Chapters 3, 4, and 5. While the results of Chapters 4 and 5 pointed to the influence of administrative law judge decisions over the decisions of subsequent reviewing bodies, the possibility remained that this was simply the result of the fact that administrative law judges were providing these bodies with decisions that were already tailored toward their policy preferences. In addition, it remained unclear whether the use of political attitudes by ALJs discovered in Chapter 3 were induced by these reviewing bodies rather than as a result of the political motivations of the judges themselves. This chapter will allow us to sort out these questions and definitively assess the degree of influence administrative law judges possess in our democracy.

In order to approach these questions, I revisit the initial decisions issued by administrative law judges between 1991 and 2006 that were analyzed in Chapter 3. I expand the model to include potential controls from the Board, the federal circuit courts of appeals, the Supreme Court, the president, and Congress. Findings indicate that in spite of the inclusion of controls, ALJ attitudes still play a strong role in decision making. Controls from the courts,

[65] Ex post forms of control over judicial actions can be thought of in two ways. First, remanded cases might force the judge to alter his or her original decision to comply with the preferences of the reviewing body after the initial decision has been rendered. A second form of ex post control would come from the setting of precedent by a higher court alters the behavior of the lower courts (ALJs) in all subsequent decisions.

Data from the 1991 – 2007 time period present few opportunities to examine the former type of ex post control over ALJ decision making. Only 454 out of 6,646 ALJ decisions (6.8%) were supplemental decisions. Many of these supplemental decisions include back pay decisions as well as determinations of reimbursement or attorney's fees under the Equal Access to Justice Act. In addition, examination of Board decisions shows that only 88 of 3,546 cases (2.5%) decided between 1991 and 2007 were remanded to the ALJ. Thus, even without examining this small set of decisions, it is clear that more opportunities exist for ex ante control than ex post control.

Yet, a second form of ex post control remains in that the setting of precedent in important decisions by reviewing bodies might alter the behavior of the ALJ. As the end of this chapter points out, this remains the subject of future studies.

Board members, president, and Senate are absent; however, the House seems to play a role in influencing ALJ decisions. These results, while demonstrating the goal of judicial independence is achieved, leave a great deal of concern surrounding the ability to influence unelected bureaucratic judges who play a pivotal role in the establishment of policy in a democratic system of government.

Literature Review

Researchers originally believed that the bureaucracy was free from external oversight (Bibby 1966; Huitt 1973; Ogul 1976, 1977; Ripley and Franklin 1976) and labeled it the "headless fourth branch of government (Rosenbloom 1983). More recently, scholars have demonstrated that the bureaucracy is subject to numerous constraints through the use of the principal-agent model. Factions in the field developed over whether Congress, the president, or the courts were the primary source of control over the bureaucracy. In order to develop a model of control over administrative law judge decision making, it is necessary to explore each of these avenues as a potential control as researchers suggest that each has the potential to influence the bureaucracy (Hammond and Knott 1996).

The Political Appointees of the Board

The process of filing appeals or exceptions to administrative law judge decisions outlined in Chapter 2 demonstrates that appeals of initial decisions are reviewed by the political appointees of the Board. While the review of ALJ decisions most often results in short form decisions that are unaltered by the Board[66], the Board remains a potential control over ALJ decision making based on the hierarchical structure of the agency. But why is this the case?

Previous studies have demonstrated that agency appointees are politically motivated in their decision making (Canon 1969; Gormley 1979; Moe 1985; Cohen 1986; Cooke et al. 1995).

[66] See Chapter 6.

This politically motivated thinking may also lead Board members to seek to influence policy by applying pressure to administrative law judges to issue initial decisions that satisfy their policy preferences. Under this scenario, Board members would not only be able to exert their policy preferences over final order, but initial decisions as well, thereby expanding the scope of their influence. This type of influence is not unheard of as studies have demonstrated the impact changes in leadership can have over agency outputs (Wood and Waterman 1991; 1994). It should be noted that I am focusing here on ex ante Board influence rather than ex post forms of control. Chapter 4 focuses on the treatment of ALJ decisions after they are rendered and largely answers questions surrounding ex post methods of control.

In order to achieve such control it would be necessary to have the means by which the Board could sanction administrative law judges who fail to issue decisions that satisfy Board member preferences. Chapter 2 demonstrates that administrative law judges enjoy a great deal of independence from the agency at which they are employed as a means for providing for impartial and non-biased decision making. Thus, the usual means of control (salary, firing, demotion, etc.) that typically exist in agencies are not found with regard to administrative law judges.[67]

One remaining tool of control is that the fear of reversal may provide incentives for judges to issue decisions as the reviewing body would. While scholars have found some evidence of this phenomenon (Songer 1987; Songer, Segal and Cameron 1994), other studies revealed that the fear of reversal does not provide and adequate explanation of decision making behavior (Klein 2002; Klein and Hume 2003).

Though the literature lacks any study which examines the ability of political appointees of agencies to control administrative law judge decision making, a number of studies actually

[67] For a full description of the independence of administrative law judges, please see Chapter 2.

demonstrate the opposite. Both Schroeder (1987) and Cooke et al. (1995) show that administrative law judge's decisions actually influence the decisions of the Board. The results of these studies are consistent with the results presented in Chapter 4.

Judicial Control of Administrative Law Judges

Starting with Melnick (1983), scholars have demonstrated in a number of studies that courts can have an impact on agencies. Studies have provided evidence of judicial influence over agencies at the state level (Johnson 1979), federal district court level (Rowland and Carp 1986; Ringquist and Emmert 1999; Canes-Wrone 2002), the circuit courts of appeals (Humphries and Songer 1999; Canes-Wrone 2002; Howard and Nixon 2002, 2003), and even at the Supreme Court level (Spriggs 1996; 1997).[68] When these results are considered along with the nature of the appeals process described in Chapter 2, it is reasonable to assume that the appeals courts and the Supreme Court are potential controls over administrative law judge decision making.

One difference between the current study and previous studies is that I focus solely on adjudicatory actions. The significance of this is that it establishes a direct judicial link between the agency actions and the court, whereas other types of actions (rulemaking for example) do not possess this unique characteristic. This creates two theoretical possibilities regarding the nature of court control. First, it may result in the courts being more deferential to an expert judge who possesses more detailed knowledge about a particular policy area. Second, because it is a quasi-judicial function of the agency, it may lead the court toward a more active role in the review of adjudicatory decisions. Either way, because of the nature of the appeals process outlined in

[68] These studies vary in whether court control is ex post (see Spriggs 1996; 1997) or ex ante (see Howard and Nixon 2002; 2003). In the current study, I am only concerned with ex ante controls over administrative law judge decision making. In other words, can courts influence the decisions of administrative law judges before the fact, and without having to actually overrule decisions after they have been rendered? Questions surrounding ex post controls are largely answered by Chapter 6.

Chapter 2, it is reasonable to expect that the appeals courts may play a role in controlling administrative law judges.

Congressional Controls

Scholarship has demonstrated that Congress plays an important role in controlling federal agencies (Calvert, Moran, and Weigast 1987; McCubbins, Noll, and Weingast 1989). McCubbins and Schwartz (1984) were among the first to posit that Congress play a role in the oversight of agencies through the use of fire alarm controls. In fact, fire alarm controls, as designated by the Administrative Procedure Act, provide the means for parties to challenge agency actions in court as is the case with the NLRB. When fire alarms are pulled, this may lead Congress to make use of other forms of control such as through the power of the purse (Fenno 1966). Previous studies of congressional influence have not examined the potential impact of Congress when agency actions are limited to adjudicatory decisions, so this study provides an opportunity to examine this phenomenon in this context.

Presidential Control

In addition to judicial and congressional controls, the literature has also demonstrated that the president can play a role in influencing agency behavior through his appointment power. Wood and Waterman (1994) examine eight different federal agencies and find that presidential appointments played a major role in influencing agency behavior and outputs. Moe (1982) found similar results for the Federal Trade Commission, National Labor Relations Board, and the Securities and Exchange Commission. The impact of presidents over the National Labor Relations Board was further substantiated by Moe (1985) and others (Delorme and Wood 1978; DeLorme, Hill, and Wood 1981; Cooke and Gautschi 1982; Cooke et al. 1995).

Although work on presidential influence over the National Labor Relations Board has largely focused on the impact on Board decision making, principal-agent theory would suggest that this influence would be carried down throughout the agency (Wood and Waterman 1994).

Individual Decision Making Variables

As was the case in Chapter 3, I posit that ALJs function in similar ways to Federal District Court judges. That is, the decision of the ALJ should in fact be a function of the attitudes of the ALJ, case characteristics, and economic considerations. In order to capture these aspects of decision making, I reintroduce these influences that were tested in Chapter 3.[69]

Theoretical Expectations

Because of the nature of the position of ALJ, as I described in Chapter 2, my expectation is that there should be little political influence. Thus, the makeup of the NLRB should not be a factor in the decisions of the ALJ, nor should current Congressional or Presidential influence. Given their tenure and freedom from political interference and thus subsequent lack of the ability of the political actors to control the actions of the ALJ, I do not expect to see such influence. I expect these independent ALJs to show little influence from political constraints. There should not be a realistic threat of retaliation from a NLRB board whose ideological composition is constantly changing nor from a Congress that has oversight over the NLRB but little realistic ability to constrain or overrule individual ALJ decisions.

That is not to say, however, that politics do not matter. The political viewpoints of the ALJs should matter very much as it did in Chapter 3. There is a strong correlation between judicial attitudes and judicial voting. This is particularly true at the Supreme Court level (Segal and Spaeth 1993; Baum 1997), but scholars examining lower court decision making present

[69] Because regional variation between judge's divisions was shown to have no impact on decision outcomes, these variables are not reintroduced here.

similar conclusions, to the extent that attitudinal voting is considered a "scholarly given" (Rowland and Carp 1996). Of course, the hierarchical structure of the federal judiciary constrains lower court judges from always imposing ideological preferences (Songer, Segal and Cameron 1994, 1995; Rowland and Carp 1996). These constraints are particularly true for trial judges, both because they are located at the bottom of the judicial hierarchy, and therefore have to deal with precedent, and because overcrowded dockets and lack of resources (Green 1965) prevent trial judges from giving full attention to every case and thus can lead to decisions inconsistent with preferences. The same should be true of ALJ decisions.

I do expect the ALJ to show constraint from hierarchically superior courts and in particular the regional court of appeals in a similar manner that trial judges are constrained by hierarchically superior courts. In a personal discussion with one of the authors, an NLRB judge flatly stated that ALJs are very aware of, and try to follow, relevant appeals court rulings leading us to believe that the strong judicial connection between the actors would affect the decisions of ALJs.

In contrast, I do not expect the same influence from the Supreme Court. While the United States Supreme Court is undoubtedly important for labor law, the probability of an adverse administrative law judge decision being appealed all the way to the Supreme Court is virtually non existent. On average per year fewer then one half of one percent of cases initiated from 1991 through 2006 resulted in any sort of Supreme Court action and in more than 70 percent of those cases the Supreme Court upheld the initial ALJ decision.[70] Because of this, I do not expect the Supreme Court to play a role in altering ALJ decisions.

Primary Hypotheses

[70] These statistics are based off of the Annual Reports of the National Labor Relations Board and include cases that were initiated prior to 1991.

Given the similarities to federal judges in independence and legal constraints, I posit the following hypotheses:

1) Because Democrats tend to favor labor organizations, Democratic ALJs will rule in favor of labor unions and against management more often than Republican ALJs. Similarly, because Republicans tend to favor business and free market strategies, I expect that Republican ALJs should rule in favor of management and against labor union more often in unfair labor practice (ULP) cases at the NLRB.
2) Because ALJ decisions are often appealed to an appellate court, the ALJ decision will show the influence of the appellate courts. This constraint will have a similar influence on Democratic, Independent, and Republican ALJs.
3) Because so few cases are appealed to the United States Supreme Court the Supreme Court will show no influence on ALJ decisions.
4) Political institutions, such as Congress and the president, should not play a role in influencing ALJ decisions.

Data and Variables

To examine whether controls exist over administrative law judge decision making, I make use of all CA cases decided between 1991 and 2006. This set of cases represents the exact same set of cases utilized in Chapter 3.[71]

Dependent Variable

To remind the reader, the dependent variable was derived by coding the decision in three parts – whether the ALJ decided in favor of labor, in favor of business, or mixed the decision with both pro-labor and pro-business elements. Two coders divided the years of the data and

[71] For a detailed description of this data, please see Chapter 4.

analyzed separate portions.[72] Both coders coded a random sample of 150 cases to ensure inter-coder reliability. The results of the inter-coder reliability sample demonstrated an inter-coder agreement rate of 97.33%, along with a strong and significant kappa statistic (.955) that was statistically significant at the .001 level. This provides clear evidence that coder bias was not problematic, and that the decision rules presented above provided clear direction for the coding of outcomes of cases. Using these data, I modeled the probability of a pro labor decision case outcomes scoring outcomes as an ordinal measure ranging from 0 – 2, where pro-management decisions were coded as "0", split decisions were coded as "1", and pro-labor decisions were coded as "2."

Primary Independent Variable

As was the case in Chapter 3, I use the partisanship of the ALJ based on the political party affiliation of each ALJ as identified through voter registry data or via Federal Elections Commission donation disclosure statements. This is the same method that Goldman and Slotnick (1997, 1999, 2001, 2003, 2005) use to identify the partisanship of Article III judges. For this coding scheme I incorporated two party identification variables, leaving a third category as the baseline category. Democratic judges were scored "1," "0" otherwise, while Independent judges were scored "1," "0" otherwise, leaving Republican judges as the baseline category.

Judicial Influence

To demonstrate the influence of legal hierarchy I create two different measures of court influence. First, because Board decision are subject to review by the federal circuits courts of appeals, I used judicial common space scores from Epstein et al. (2007) to calculate the median

[72] An undergraduate assistant and I coded the data.

NOMINATE score of the appropriate appellate court based not only on the location of the ALJ hearing, but the year in which the decision was rendered. Second, although only a small portion of cases are heard by the Supreme Court, I also used the median judicial common space score for the United States Supreme Court for the year in which the ALJ decision was rendered to determine if the Court can have an influence over administrative law judge decisions.[73]

Political Influences

Because the purpose is to test political and legal influences on these decisions, I created other measures in addition to the partisan measure for the ALJs. Since ALJ decisions can be appealed to the NLRB board, an ALJ must account for the rulings of the board and therefore the ideological makeup of the board. To measure the influence of the political appointees of the agency, I calculated the median ideology of the Board at the time of the ALJ's decision. Board ideology scores were taken from Nixon's Independent Regulatory Commissioner Database (NSF# SES-0095962). Nixon (2004) derived common space ideology scores for Board members by using a bridging sample of commissioners and board members who had previously served in Congress to calculate scores for all commissioners and board members since 1887.

For other political constraints I considered the influence of Congress and the president. To measure this influence, I used Poole and Rosenthal's (1991) common space score of the median member of the relevant oversight committee in each chamber.[74] I also included the Poole and Rosenthal common space scores for each of the presidents holding office during the time period of our dataset: George H.W. Bush, Bill Clinton and George W. Bush.

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[73] I certainly recognize that coding the ideology of each court for the year in which the decision of the administrative law judge is issued fails to recognize the gap in time that would occur between the initial decision and review by the courts. However, in light of the ideological consistency across the circuit courts and the Supreme Court during the time period of study, this seems less problematic. The inclusion of a lagged variable would lack theoretical justification as it would be unreasonable to expect that ALJ's could predict changes in court personnel.

[74] In the Senate this was the committee on Health, Education, Labor and Pensions (HELP), which was formerly the committee on Labor and Human Resources. In the House, this was the committee on Education and Labor

The advantage of using common space scores for the appeals courts, the Supreme Court, the Board, Congress, and the president is that common space scores can be compared across institutions and across time. This allows us to gauge the relative impact of each of these actors against one another in the context of administrative law judge decision making. It also ensures that temporal differences in ideology do not interfere with results.

Other Independent Variables from Chapter 3

Much of the model that is presented here is identical to what was presented in Chapter 3 with the exception of the variables that were discussed above. Therefore, I reexamine the effects case characteristics including the number of charges filed, the number of charging parties, and whether the union has a negative image, but exclude cases involving individuals as results from Chapter 3 demonstrated that individuals did not invoke political attitudes and were more likely to lose cases than other parties. I also reexamine the effects of economic conditions such as the unemployment rate, both short term and long term, as well as inflation as measure by the Consumer Price Index (CPI). None of our theoretical expectations have change since Chapter 3 with respect to these variables. I will include a brief description of the results with respect to these variables, but it will largely focus on differences between the original and new models.

Descriptive Statistics

Descriptive statistics for all variables are presented below in Table 1:

[Insert Table 1 About Here]

As noted previously the vast majority of ALJ decisions are pro labor. The mean score in our dataset falls between a split decision and a pro labor decision. When I coded the dataset as simply pro labor or pro business, I found that 78% of the ALJ rulings were pro labor.[75] In

[75] To arrive at a dichotomous coding, cases were coded as being pro-charging party if the charging party won any portion of the case. The logic behind this coding is that the respondent, though having not lost the entire case, is worse off as a result of the outcome of the case. Thus, split decisions could be pushed into a pro-labor or pro-management direction.

addition, most identified ALJs are partisan Democrats (.70), in contrast to Independents (.15) and Republicans (.15). While the vast majority of ALJs are Democrats, and thus presumably more liberal, the major institutions of government used in this study with the exception of the Clinton presidency, have been dominated by more moderate or conservative ideology. The NLRB board has been moderately conservative during the time period of study with an average common space score of (.039). The means for common space scores of the president (.007), House (.08), the Senate (-.04), the appellate courts (.07) and the United States Supreme Court (.06) were fairly moderate over this time period as well. All had slightly conservative leanings with the exception of the Senate which was slightly liberal.

The standard deviations and the minimum and maximums showed significant ideological movement for the political institutions, reflecting both the Republican takeover of the House and Senate in 1994 and the Clinton presidency sandwiched between the Bush presidencies. For example the ideological range of the presidency swung from a -.44 for Clinton to .53 for George W. Bush, while the House moved from a moderately liberal -.32 to a conservative .26. Although the mean for the appellate courts was almost dead center, the regional variation showed significant differences. The median ideology for the circuit courts ranged from a very liberal -.341 to a very conservative .528. The Supreme Court, on the other hand, exhibited a much smaller deviation. Finally, most cases had only one charging party (1.27), and usually there were only two cases dealing with the issue and facts (2.12).

The Model

Given these variables and the ordinal nature of the dependent variable, my model then takes on the following form:

Decision = $_{0}$ + $_{1}$ **Democratic ALJ +** $_{2}$ **Independent ALJ +** $_{3}$ **NLRB Ideology +** $_{4}$ **Appellate Court Ideology +** $_{5}$ **Supreme Court Ideology +** $_{6}$ **Senate Committee Ideology +** $_{7}$ **House Committee Ideology +** $_{8}$ **Presidential Ideology** $_{9}$ **Number of Cases +** $_{10}$ **Number of Charging Parties +** $_{11}$ **Negative Union Image +** $_{12}$ **Unemployment Rate Ideology +** $_{13}$ **Change in Unemployment Rate +** $_{14}$ **Inflation Rate +**

I clustered the results on the judge because I do not expect a decision of a judge in the same location to be independent of the same judge's previous decisions and this eliminates the potential of one judge who rules more than others biasing the results to ensure that one or more politically motivated ALJs were not driving the results of our analysis. By clustering on the ALJs it ensures that the results are due to the behavior of all ALJs. As was the case in previous chapters, I also excluded supplemental decisions and CB cases. Supplemental decisions are often rendered in response to decisions by the Board and the federal courts of appeals. For instance, many supplemental decisions involve the calculation of back-pay for employees, or the reimbursement of legal fees for respondents under the Equal Access to Justice Act, rather than a decision on the record of facts. Because there were so few charges filed against labor unions, I eliminated these cases as they were insufficient to draw any conclusions through analysis.

Since my dependent variable is an ordinal measure of pro business (0), then a split between pro business and pro labor (1) and pro labor (2), I first tested the model using an ordered logit regression. However, Brant test results presented in Table 2 demonstrate that both the

[Insert Table 2 About Here]

model and several independent variables suffered from statistically significant violations of the parallel regression assumption. Based on the results of the Brant test, I could not assume that the affects of the independent variables were equal between categories. Accordingly, I reran the model using a partial generalized ordered logit model which presents different results for each pair of outcomes. The advantage of a generalized ordered logit (GOL) regression is that it does not assume that variables conform to the parallel regression assumption. Rather, GOL relaxes the assumption and allows variables to have varying impacts between categories, thus providing a more realistic representation of variable effects. Partial generalized ordered logit allows the user to relax the assumption for only the variables that are in violation of the parallel regression assumption (i.e., $p < .05$ for Brant test results) rather than all variables in the model.

Results and Discussion

The coefficients from the partial generalized ordered logit model are presented in Table 3.

[Insert Table 3 About Here]

The first column after the variables presents the coefficient of each independent variable as the dependent variable changes from pro business to a split decision, or 0 to 1, while the second column after the variables presents the odds ratios of each independent variable for the same change. The third column presents coefficients for changes between a split decision (1) and a pro-labor decision (2), while the fourth column presents the odds ratios for these categories. While odds ratios are provided for the benefit of the reader, changes in predicted probabilities are more intuitive for interpreting coefficients. To further assist with the interpretation of these results, results from Model III of Chapter 3 are reproduced in Table 4, which did not include external political controls.

[Insert Table 4 About Here]

Table 3 shows that several variables have varying effects on the dependent variable between categories. However, the model contains many surprises in terms of external controls over ALJ decision making.

Attitudinal Results

To begin with, Democratic ALJs, in spite of political controls, continue to exhibit the presence of attitudes in their decision making. While the effect of the variables varies across categories, the effect remains relatively consistent with the results from Chapter 3. In Table 3, Democratic ALJs increase the probability of moving from a pro-management decision to a split decision as well as increasing the probability of moving from a split decision to a pro-labor decision. Holding all other variables constant at their means, having a Democratic ALJ decide a case decreases the probability of a pro-management decision from 16% to 12.1%, an overall change of 3.9% and a relative change of nearly 25% over that of a Republican ALJ. Additionally, having a Democratic ALJ decreases the probability of a split decision from 42.1% to 32.3%, an overall chance of 9.8% and a relative change of 23.3% over a Republican ALJ. Finally, having a Democratic ALJ increases the probability of a pro-labor outcome from 41.8% to 55.6%, an overall change of 13.8% and a relative change of 33% over that of a Republican judge. Using a one-tailed test, these results were statistically significant at the .05 level for a move from a pro-management decision to a split decision, and statistically significant at the .01 level for a move from a split decision to a pro-labor decision.

These results are particularly important because they show that ALJs make decisions that are influenced by their own policy preferences even in spite of potential influences from other actors. The important conclusion to draw from this is that ALJs are clearly politically motivated actors rather than having the influence of politics induced from external actors. In fact, when

comparing results from Chapter 3, although the size of the coefficient dips slightly (.339 to .327) from Table 4 to Table 3 for a 0 to 1 change, the coefficient actually increases in size (.488 to .556) from Table 4 to Table 3 for a 1 to 2 change. This provides compelling results that even in spite of the inclusion of potential controls the attitudes of the ALJs remains a significant predictor of case outcomes.

As was the case in Chapter 3, Independent ALJs continue to exhibit voting behavior that falls between that of Republican and Democratic ALJs. The magnitude of the coefficients shows a pro-labor propensity that is stronger than Republicans, but not quite as strong as Democratic administrative law judges. The results, however, continue to fail to achieve statistical significance at the .05 level.

Board Influence Results

Not only do the coefficients for Board ideology move in an unexpected direction, but they also fail to achieve statistical significance at the .05 level (p=.627). Thus, as expected the political pressure from the Board does not seem to influence administrative law judge decisions. This is particularly important because it demonstrates that the fear of reversal is not playing a role in the decision making of administrative law judges as previous studies found (Klein 2002; Klein and Hume 2003). More importantly, these results help to confirm that Board decision making results from Chapter 4 were the result of the influence of ALJ decisions over the decisions of the Board and not a result of the fact that ALJ decisions were preconditioned to match the policy preferences of the Board. This rules out the fact that the policy preferences of the Board act as an ex ante control that preconditions decisions or that induces the policy preferences of administrative law judges.

Judicial Control Results

Contrary to our expectations the ideology of the courts of appeals fails to demonstrate a significant influence of ALJ decisions. However, there may be several explanations that may explain why this is the case.

First, Estreicher and Revesz (1989) argue that agencies "shop" for favorable courts and parties to ALJ proceedings can do the same. According to the National Labor Relations Act, appealing parties have the right to choose to appeal to any court where the party has a physical location. Businesses with multiple corporate offices located across the country thus have more options and enable them to "shop" for the most favorable court. Complicating matters further is that in cases where both parties want to appeal, it is the party that files first that reserves the right to choose the location of the trial. Because of this it does not always follow that the location of the ALJ hearing will be appealed to the regionally appropriate Federal Court of Appeals. As such, this might decrease the influence of the Appeals Courts over ALJ decision making. While early research (University of Chicago Law Review 1961) found only limited evidence of forum shopping, a quick analysis here provides evidence that forum shopping is widely practiced.

In order to examine whether forum shopping exists, I compared the predicted appeals court, based on the location of the case, to the actual locations of cases that were appealed to the federal circuit courts of appeals.[76] Out of the 434 published decisions between 1992 and 2007 that were appealed to the circuit courts, 268 (61.8%) went to the expected circuit court of appeals, while 166 (38.2%) went to a different circuit court of appeals. This demonstrates a very high degree of uncertainty for the administrative law judge of the appropriate circuit court precedents and preferences.

[76] To examine this, I simply subtracted the predicted appeals court circuit number from the actual appeals court circuit number. When results were equal to zero this signified that it went to the predicted court, and that it went to a different court when the result was not equal to zero.

Second, this might simply provide evidence that administrative law judges simply don't have a fear of reversal. Again, this would bolster previous studies (Klein 2002; Klein and Hume 2003) that demonstrated that fear of reversal was not a good explanation for lower court behavior. In the context of administrative law judge decision making this seems even more reasonable. As stated in Chapter 2, administrative law judges' pay is determined by the Office of Personnel Management, have little aspiration to attain higher judicial office, and are largely independent of the agency they work for. Therefore, even a large number of reversals would not lead to repercussions that an ALJ might suffer.

The importance of these results is that they confirm that the findings of the influence of ALJ decisions over court of appeals decisions outlined in Chapter 5 are not a result of preconditioned decisions, but a clear result of the importance of the decisions issued by administrative law judges. The combination of these results along with the results of Board control variable put the final pieces in place to solidify the importance of the position of administrative law judge in our democracy. It also makes us reconsider previous studies that failed to account for the administrative law judge decision at the Board and appeals court level.

Results for Supreme Court ex ante control failed to achieve statistical significance at the .05 level, although the direction of the coefficient was in the expected direction and was quite large in magnitude.[77] Nevertheless, as expected the ideology of the Supreme Court does not

[77] The strength of the coefficient coupled with its failure to achieve statistical significance raised concerns that the failure to achieve statistical significance was caused by multicollinearity with other variables. Multicollinearity might inflate the standard errors and cause the variable to fail to achieve statistical significance in spite of a strong coefficient. Because much of the results of this chapter are predicated on null findings, it is important to ensure that the failure to find significant results for various controls over ALJ decision making are not caused by multicollinearity. For example, we might expect that the ideology of the Senate and the House would be highly correlated during the time period of study.

In order to determine the extent of this problem, I used variance inflation factors (VIFs) to determine whether multicollinearity is present. Because VIFs are designed to be used with linear regressions, I had to run the analysis in linear regression format even though PGOL was appropriate. Table 5 of the Appendix presents the results for the VIF. Even using a conservative threshold of 30 (most use 10), results demonstrated that many of the independent variables were collinear. In addition, the mean VIF was greater than 1 providing additional evidence of collinearity. As a result, I ran several permutations of the model presented in Table 3 dropping various independent

seem to play a role in the decision making of administrative law judge decision making. Because only 4 of the cases decided by administrative law judges between 1991 and 2006 were appealed to the United States Supreme Court, this is to be expected as the chance of having any given case reach the Court is extremely small.

Political Controls of ALJ Decision Making

Another one of the major surprises of the results are with respect to Congressional committee influence over administrative law judge decisions. The results for the Senate committee move in an unexpected direction and fail to achieve statistical significance at the .05 level. However, contrary to theoretical expectations, the House committee exhibits considerable influence over administrative law judge decisions. A one standard deviation increase above the mean of the ideology of the House committee, a move in a conservative direction, increases the probability of a pro-management decision from 12.9% to 21.3%, an overall increase of 8.4% and a relative increase of 65%, holding all other variables constant at their means. A one standard deviation increase over the mean also increases the chance of a split decision from 35% to 41.3%, an overall increase of 6.3% and a relative increase of 18%. Finally, this change decreases the chance of a pro-labor decision from 52% to 37.4%, an overall decrease of 14.6% and a relative decrease of 28.1%. Coefficient results are statistically significant at the .01 level and are consistent across dependent variable categories.

The influence of the House is surprising and contrary to my hypothesis. It is possible that the overwhelming ideological change of the Republican takeover of the House of

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variables in order to determine the effect of model specification. In no instance did the exclusion or inclusion of any independent variable alter the statistical significance of any of the other variables in any permutation of the model. This provides evidence that although multicollinearity exists, it is not posing a problem for the standard errors or having an impact on the statistical significance. Evidence is also provided by the fact that although the Senate committee and House committee were highly collinear, one was able to achieve statistical significance (House), while the other did not (Senate), in spite of my expectation of these two variables being highly collinear. This ensures that the null findings presented here can be accepted with confidence.

Representatives was such a dramatic shift in policy and preference that at least when an ALJ was deciding whether to issue a split decision or a pro business decision, the ALJ was more likely to issue a pro business decision when the House of Representatives was more conservative.

Revisiting the work of former Chairman Edward Miller (1981), he notes:

> "The judges also are quite influential beyond the bounds of the NLRB itself. They were very active and eventually effective in securing the title change from 'Trial Examiner' to 'Judge'. They maintain good relationships with a number of senators and representative on the Hill. There are both official and unofficial relationships between the Board's judges and administrative law judges in other agencies. Their joint efforts seem bent on preserving the status quo insofar as work demands are concerned, but the lobby incessantly for greater technical and clerical assistance, better salaries, and better 'working conditions' – such as hearing rooms which, according to the judges, ought to look more like courtrooms and to provide luxuries as 'chambers' for the judges and other accoutrements enjoyed by members of the federal bench" (p. 55).

This gives rise to several explanations of why the House committee would influence the decisions of administrative law judges. First, judges seem to be concerned with how budgetary factors affecting the agency will affect their place within the agency. This might include their chambers, hearing rooms, and other amenities. Previous studies have certainly shown that agencies are sensitive to budgetary controls from Congress. In turn, budgetary threats may then influence the agency, or in this case the administrative law judge, to alter his or her decisions or behavior (Krause 1996, 1999). Because spending bills originate in the House, this would provide an explanation as to why administrative law judges might be sensitive to the House committee, but not the Senate committee. Budget cuts might range in effect all the way from a less pampered life for the ALJ to actually needing to cut the number of ALJs the agency employs.

Second, it seems that administrative law judges, as a profession, often find themselves in the position of lobbying in front of Congress. Therefore, perhaps in exchange for better working conditions, salary, titles, etc., administrative law judges are willing to exchange benefits for

House members in the form of decisions that are favorable to their constituents. Decisions that are favorable to the House committee member would increase the likelihood of the judges achieving their political and professional goals. This would be reminiscent of the iron triangle proposed by McConnell (1966) where interest groups (labor/management), the congressional committee (Education and Labor) and an agency (ALJs), are involved in a mutually beneficial relationship. While this is the case for the House, the president seems to play no role in influencing ALJ decisions.

Results demonstrate that presidents fail to play a role in influencing the decisions of administrative law judges as the variable fails to achieve statistical significance at the .05 level. This matches our theoretical expectations. However, the variable moves in the expected direction and narrowly fails to achieve statistical significance at the .10 level (p=.109). Perhaps variation across a greater number of presidents would demonstrate that presidents can play a role, albeit indirect, in influencing the decisions of ALJs.

Results for Previously Tested Variables

Very few changes can be seen in other variables from the reproduction of Chapter 3 to the results of the current chapter. The number of cases remains statistically significant across both categories with same changes in the sign of the coefficient across categories. The number of charging parties remains statistically significant however, unions with historically negative images narrowly fail to achieve statistical significance for a one-tailed test in the new model (p=.055).

The national unemployment rate and changes in the unemployment rate continue to fail to achieve statistical significance in the control model, but the effect of the inflation rate drops

out and actually demonstrates a change in the sign of the coefficient from category 1 to category 2. Overall, the model seems to perform in a manner that was very similar to Chapter 3.

Conclusion

The results of this chapter are particularly important for several reasons. First, these results provide evidence that the results from the previous two chapters were the result of administrative law judge influence over Board decisions and appeals court decisions and not because ALJ decisions were preconditioned by the policy preferences of these appellate actors. This means that the vast majority of decisions were rooted in the preferences of the ALJ and not conditioned by a higher reviewing body. As a result, this places the position of administrative law judge as one of the most important judicial actors in our democracy.

Second, in spite of the inclusion of ex ante controls by external actors, administrative law judges continued to exhibit politically motivated decision making. Regression results demonstrated that Democratic ALJs were more likely than Republic ALJs to rule in a pro-labor direction. This shifts the focus from the balance between bureaucratic independence and self-serving bureaucratic behavior to the tension between independence and intrusion of individual political preferences. If attitudes do affect decision making, then how is it possible to hold these actors responsible for their decisions? Stated differently, this creates a tension between the independence necessary for judges (bureaucrats) to render decisions free from political influence and the need for democratic controls over these actors.

The third important finding relates to the need for democratic controls. Results demonstrated that the United States House of Representatives committee on Education and Labor seems to influence the behavior of administrative law judges. This is particularly important because it provides a democratic link between voters and the decisions of

administrative law judges. The very forms of indirect democratic control that Wilson (1887) and others envisioned over the bureaucracy.

Finally, this manuscript contributes to literature investigating ex ante controls over the bureaucracy by focusing solely on adjudicatory decisions. Most studies have focused on ex-post forms of control, or controls that occur after the agency has acted (see Spriggs 1996, 1997 and others). Evidence from this study demonstrates that courts, the president, and the Senate lack the ability to limit agency (ALJ) behavior ex-ante, or before the fact. This would detract from studies by Howard and Nixon (2002, 2003) and Canes-Wrone (2003) who found evidence of this form of ex-ante control in other non-adjudicatory types of agency actions. However, as was mentioned in the introductory section of this chapter, this project did not examine ex post forms of control. The use of ex post forms of control by the Board, appeals courts, and Supreme Court remains a valid source of inquiry for future studies examining controls over ALJ decision making.

Appendix

Table 1. Descriptive Statistics

Variable	Mean	Std. Dev.	Min	Max
ALJ Decision	1.30	.789	0	2
Democratic ALJ	.695	.460	0	1
Independent ALJ	.147	.355	0	1
Board Ideology	.039	.232	-.278	.330
Appeals Court Ideology	.068	.248	-.341	.528
Supreme Court Ideology	.061	.072	-.069	.181
Senate Committee Ideology	-.038	.215	-.336	.287
House Committee Ideology	.076	.246	-.321	.263
President Ideology	.007	.466	-.441	.525
Number of Cases	2.12	2.69	1	79
Number of Charging Parties	1.27	1.33	1	58
Negative Union Image	.167	.373	0	1
Inflation	162.85	18.57	136.2	201.4
Unemployment Rate	5.59	1.05	4	7.5
Δ Unemployment Rate	.007	.653	-.8	1.2

Table 2. Brant Test Results for Ordered Logit Model of Unfair Labor Practice Decisions by Administrative Law Judges

Variable	Chi^2
Democratic ALJ	7.29**
Independent ALJ	1.31
Board Ideology	0.58
Appeals Court Ideology	5.03*
Supreme Court Ideology	0.82
Senate Committee Ideology	0.56
House Committee Ideology	0.28
Presidential Ideology	0.03
Number of Cases	117.87***
Number of Charging Parties	20.90***
Negative Union Image	0.02
Unemployment Rate	0.35
Δ Unemployment Rate	0.00
Inflation	2.87

* $p < .05$, ** $p < .01$, *** $p < .001$. Significance represents a violation of the parallel regression assumption.

Table 3. Partial Generalized Ordered Logit Results of Administrative Law Judge Decisions in Unfair Labor Practice Cases 1991 – 2007 (w/ External Controls)

Variable	Coefficient 0 → 1	0 → 1 Odds Ratio	Coefficient 1→ 2	1 → 2 Odds Ratio
Constant	2.78	-	1.84	-
	(2.33)		(2.35)	
Democratic ALJ	.327*	1.39	.556**	1.74
	(.196)		(.168)	
Independent ALJ	.188	1.21	.188	1.21
	(.226)		(.226)	
Board Ideology	.137	1.15	.137	1.15
	(.282)		(.282)	
Appeals Court Ideology	-.002	.998	-.186	.830
	(.235)		(.290)	
Supreme Court Ideology	-2.54	.079	-2.54	.079
	(1.86)		(.226)	
Senate Committee Ideology	1.31	3.69	1.31	3.69
	(.749)		(.749)	
House Committee Ideology	-2.42**	.089	-2.42**	.089
	(.895)		(.895)	
Presidential Ideology	-.399	.671	-.399	.671
	(.249)		(.249)	
Number of Cases	.418***	1.52	-.102***	.903
	(.075)		(.028)	
Number of Charging Parties	-.096	.908	-.007	.993
	(.065)		(.056)	
Negative Union Image	-.151*	.860	-.151*	.860
	(.075)		(.075)	
Unemployment Rate	-.192	.826	-.192	.826
	(.143)		(.143)	
Δ Unemployment Rate	.164	1.18	.164	1.18
	(.149)		(.149)	
Inflation	-.003	.997	-.003	.997
	(.010)		(.010)	

* p < .05, ** p < .01, *** p < .001
N = 4212
Pseudo R^2 = .042
Chi^2 = 205.26

Table 4. Partial Generalized Ordered Logit Results of Administrative Law Judge Decisions in Unfair Labor Practice Cases 1991 – 2007 (Reproduction of Model III from Chapter 3)

Variable	Coefficient 0 → 1	0 → 1 Odds Ratio	Coefficient 1→ 2	1 → 2 Odds Ratio
Democratic ALJ	.339*	1.40	.488**	1.63
	(.200)		(.171)	
Independent ALJ	.147	1.16	.147	1.16
	(.229)		(.229)	
Unemployment Rate	.083	1.09	.083	1.09
	(.047)		(.049)	
Δ Unemployment Rate	-.079	.924	-.079	.924
	(.052)		(.052)	
Inflation	.006*	1.01	-.003	.997
	(.003)		(.003)	
Number of Cases	.420***	1.52	-.106***	.900
	(.076)		(.028)	
Negative Union Image	-.134	.874	-.134	.874
	(.084)		(.084)	
Number of Charging Parties	-.116	.890	-.006	.994
	(.065)		(.058)	
Atlanta Region	.010	1.01	.010	1.01
	(.273)		(.273)	
New York Region	-.118	.889	.173	1.19
	(.171)		(.202)	
San Francisco Region	-.103	.902	-.103	.902
	(.142)		(.142)	
Constant	-.517	-	-.014	-
	(.632)		(.692)	

* $p < .05$, ** $p < .01$, *** $p < .001$
N = 4212
Pseudo R^2 = .042
Chi^2 = 205.26

Table 5. Variance Inflation Factors (VIF) for Independent Variables

Variable	VIF
House Committee Ideology	52.89
Inflation	32.96
Senate Committee Ideology	28.06
Unemployment Rate	22.50
Supreme Court Ideology	21.78
President Ideology	17.44
Δ in Unemployment Rate	10.91
Board Ideology	4.00
Democratic ALJ	1.67
Independent ALJ	1.66
Number of Charging Parties	1.30
Number of Cases	1.29
Appeals Court Ideology	1.19
Negative Union Image	1.02
Mean VIF	14.19

Chapter 7

Conclusion

Even today, one of the greatest challenges for democracy remains the difficulty of determining the place of unelected officials, both bureaucratic and judicial, in a society based on electoral connections. In the bureaucracy and the judiciary, the challenge remains of finding the means to provide independence while still maintaining the means to provide for democratic control. In this work, I examined a bureaucratic and quasi-judicial actor that has been largely ignored in political science, the administrative law judge, a position that is both bureaucratic and judicial in nature.

Summary of Findings

In Chapter 3, I examined over 5,000 initial decisions decided by administrative law judges at the National Labor Relations Board between 1991 and 2006. Analysis of these decisions revealed that Democratic ALJs had a greater probability than Republican ALJs to rule in favor of labor unions in unfair labor practice cases. I then proceeded to examine the extent of ALJ influence by examining subsequent appeals to the Board (Chapter 4) and the United States Circuit Courts of Appeals (Chapter 5). Analysis of over 2,000 final orders issued by the Board between 1992 and 2007 demonstrated the initial decision plays a crucial role in the outcomes of Board decisions. In fact, although attitudes played a role in Board decision making, as was the case with previous studies, the initial decision was shown to be a more important influence over final orders. Chapter 5 then demonstrated that ALJ decisions play a crucial role in the decision making of the federal circuits courts of appeals as well by examining over nearly 400 appeals court cases between 1992 and 2007. Initial decisions were found to be the most influential over the appeals courts when the ALJ and the Board were in agreement, which is the most common

scenario. While reversals did take place, the ALJ's initial decision nevertheless remained an important influence over appeals court decisions, even trumping the influence of the ideology of the circuit courts. Overall, Chapters 4 and 5 established that ALJs play an important role in our democracy. ALJ decisions accounted for the vast majority of all outcomes all the way through the Supreme Court level.

Finally, Chapter 6 demonstrated that few controls existed over ALJ decision making. Only the House of Representatives was shown to have any influence over the initial decisions issued by ALJs. The Board, the appeals courts, the Supreme Court, the president, and the Senate all failed to demonstrate an ability to influence ALJ decisions. Not only that, but in spite of the inclusion of controls, attitudinal influences persisted. In turn, these results also demonstrated that ALJs were politically motivated in their decision making, rather than employing some sort of forward thinking strategic decision making

The final result was that not only did ALJs attitudes play a role in their decision making, but that ALJs were an extremely influential actor in the bureaucratic and judicial system. As ALJs have moved away from their bureaucratic role and more toward their judicial role as some suggest (Burger 1985), it should come as no surprise that ALJs behave similarly to other judicial actors. Thus, the influence of attitudes should also not come as any surprise. Questions remain, however, about the potential means to control the influence of attitudes over the initial decision making of administrative law judges. While the purpose of this work is not to provide suggestions on how to change the behavior of ALJs through modifications of hiring practices, disciplinary procedures, or control mechanisms, it is still possible to derive some important policy implications from this study.

Policy Implications

The results from the previous chapters have several important policy implications. First, on the most practical level, it seems that the tools put in place to create independence for ALJs have generated their intended affect. Like other members of the judiciary, ALJs decisions are independent of the agency for which they make decisions and from external political and legal controls. The only instance of influence, the Education and Labor Committee in the U.S. House of Representatives, seems to be the result of a desire on the part of ALJs as a means to create professional benefits rather than unwelcome control by an outside actor. In a way, it is comforting to know that these judicial decisions are free from external influence, paving the way for ALJs to make decisions free from external political meddling.

Second, the makeup of lower levels of bureaucracy can have a profound impact on policy outputs. While some scholars might argue that the vast majority of cases that ALJs decide are routine and unimportant, and that the Board is making the most important policy decisions only in certain key cases, the fact remains that this is the bulk of what the NLRB does. Each initial decision has an impact on labor policy and the economy by affecting not only the parties involved in the case, but through broader precedent established when ALJ decisions are adopted by the Board. ALJ decisions impact the decisions of the Board, leading to more pro-labor outcomes even in spite of the partisan or ideological makeup of the Board. When considering that the vast majority of the time period of study was dominated by Republican presidents, this provides limitations to previous studies that have asserted the influence of presidential selection over agency activity (Moe 1982; Wood and Waterman 1991, 1994). Because this study allowed us to shift from examining outputs to examining actual outcomes, the effects of presidential influence are nominal.

The accumulation of these decisions has an even more profound impact. The large number of Democratic ALJs employed, combined with the pro-union tendencies of the agency established at its creation, result in what has become a forum that is very favorable toward labor. Statistical evidence demonstrated the pro-labor tendencies of both ALJs and the Board as the average outcome of unfair labor practice cases filed against employers was very partial toward labor.

Third, it also demonstrates that previous models of Board and appeals court decision making, as well as other types of agency decision making that have ignored the role of the ALJ, may be incomplete. Future studies should consider the impact of the ALJ on decision making when appropriate. The results of this work demonstrated that decision outcomes at the Board and appeals court level could be explained by the decision of the ALJ. The ability of the ALJ to shape the facts seems to frame the case for reviewing bodies, which ultimately has the effect of increasing the importance of the initial decision. Thus, as Moe (1985) asserted, lower-level decision making is an important aspect of agency behavior and modern governance. It also raises questions about the appropriateness of the principal-agent model and the top-down assumptions that have been attributed to agencies and the judicial hierarchy. ALJs not only evidenced a great deal of independence from their superiors, they also confirmed that decision making could flow from the bottom up. In spite of the inclusion of control mechanisms from superiors in Chapter 6, ALJ decisions remained rooted in attitudes and continued to influence the decisions of reviewing bodies.

Last, judicial scholars are often concerned with the how the means of judicial selection affect responsiveness and judicial behavior. These have included looks at partisan elections, non-partisan elections, retention elections, and merit appointments. These results demonstrate

that even under the purest form of merit selection (i.e. merit examinations, etc.), politics still plays a role in judicial decision making. This may lead us to believe that the affect of attitudes is inevitable regardless of the selection method. It may also lead us to believe that merit selection provides the most insulation for judges from outside interference.

Future Directions

The NLRB provided a more difficult test case for the assertion that attitudes would affect the decision making of administrative law judges in the area of labor policy. Since Rowland and Carp (1996) found that labor issues did not invoke attitudes to the degree that other policy areas did for district court judges, this research should be generalizable. The study of more politically charged agencies might provide evidence of attitudes playing a greater role in the decision making of administrative law judges. It would also allow us to test the extent of ALJ influence in other agencies to see if the phenomenon is limited to the NLRB.

As such, studies of multiple agencies will lead to the establishment of an Administrative Law Judge database, constructed in a manner similar to the Supreme Court database (NSF Grant #SES-8313773), which would incorporate all ALJs and decisions available electronically for all federal agencies. Information in the database would include biographic and political information on the ALJs, case facts, information and data, variables on external political factors such as Congressional control, presidential control, the makeup of the Board, and finally information on subsequent reviewing cases. This would allow other researchers access to information that could expand the scope of research on ALJ decision making.

Final Remarks

Judge Coffey said it best when he said, "In our judicial system, 'justice must satisfy the appearance of justice' and administrative agencies, as well as administrative law judges, must

avoid even the appearance of bias or partiality," *National Labor Relations Board v. Q-1 Motor Express, Incorporated* 25 F.3d 473, (1994). Therefore, the question is not the degree to which political attitudes affect the decision making of administrative law judges, but rather, whether attitudes play any role at all in decision making. The results of this work clearly show that political attitudes affect how ALJs rule in unfair labor practice cases at the NLRB.

The use of expertise is the primary reason that independence was afforded to the bureaucracy and the judiciary. As Wilson (1887) suggested, public administration should strive to keep political meddling out of decisions that required expertise and knowledge. As experts in labor law, NLRB ALJs are trusted to rely on their expertise and not their own political predispositions. Because this work demonstrates that ALJs not only have considerable discretion in their decision making, but have a significant impact on policy, the delicate balance of providing independence to bureaucrats and judges while still maintaining democratic controls in our system of government is something that requires careful balance. How this balance is properly struck is a question that remains.

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