

Bureaucratic Control? Institutional Competition to Direct NLRB Decision Making*

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Abstract

Scholars have paid increasing attention to bureaucratic control in recent years. This work has focused on bureaucratic control by the president, the Congress, and the courts. Of these three institutions, less attention has been paid to the power of courts to influence bureaucratic decision making. In this paper we focus on how regulatory agencies respond to sometimes conflicting directives from Congress, the president, and the courts through an analysis of National Labor Relations Board (NLRB) decisions. We argue that, in addition to the preferences of the different branches of government, the level of attention each gives to the NLRB may shape its ability to influence the decisions of the NLRB. We test this argument on 3,720 NLRB unfair labor practice decisions made between 1995 and 2004, finding only limited support for our hypotheses.

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There has been much recent work on the competition among branches over influencing federal agency decision making. Much of this work however, largely ignores the role the courts play, in particular the lower courts. While there are some notable examples of work that includes a focus on the lower courts (Canes-Wrone 2003; 2006; Howard 2001), we have just begun to understand the role of the lower courts in agency responsiveness. The role of the lower courts is particularly important to understand because the Supreme Court, with its limited docket, is unlikely to hear many cases emerging from federal agencies leaving the courts of appeals as the final arbiter of law and in the position of influence over federal agencies.

In this paper we attempt a first-cut examination of the National Labor Relations Board's (NLRB) responsiveness in a competitive environment to the Congress, courts, and president. We analyze 3,720 unfair labor practice decisions by the NLRB board between 1995 and 2004 to determine the responsiveness of the NLRB to each branch. This paper makes two primary contributions to the responsiveness literature. First, we further test the responsiveness of the NLRB to the courts by comparing decisions across regions. Does the NLRB react differently to cases coming in from different regions of the country knowing that their decisions are subject to differing levels of interest and differently composed benches across the country? The NLRB is a particularly good agency for this type of analysis because appeals of NLRB board decisions are heard by the circuit court responsible for the case's geographic location. Second, we extend the literature in a new direction by investigating how the attentiveness of each branch to the NLRB affects its decision making. Is the NLRB more responsive when the three branches are paying more attention?

We hypothesize that increased attentiveness in the form of increased congressional hearings, increased executive orders, and increased published judicial opinions, will cause increased influence over NLRB decision making. Using a logit analysis, our preliminary analysis produces only mixed support for these hypotheses. While the results are not strong, they suggest that attentiveness is a potentially important factor and that further analysis, with an expanded time horizon, may produce more definitive results.

Agency Responsiveness

Scholars have long been interested in the relationship between federal agencies and the three branches of the federal government. Mass (1951) and Freeman (1955) laid the early ground work on agency responsiveness. Much of the subsequent work on agency responsiveness has focused on the ability of one branch to control an agency. A notable example is the congressional dominance literature from the 1980s that explores how and whether the Congress is able to dominate agency decision making (Barke and Riker 1982; Calvert and Weingast; Fiorina 1981; 1982; McCubbins 1985; McCubbins and Schwartz 1984; Moran and Weingast 1982; Weingast 1981, 1984; Weingast and Moran 1982, 1983). The congressional dominance theory holds that the Congress is able, through oversight, to direct agencies in their decision making. As such, agency decision making can be understood with very little attention to agency or external factors just by analyzing the preferences of congressional oversight committees and their members (Moe 1987). While scholars have produced a great volume of work on congressional dominance, work on agency responsiveness has shown that under some circumstances the Congress exerts a good deal of influence over agency decision making (Moe 1985; Scholz 1991; Shipan 2004; Weingast and Moran 1983; Wood and Anderson 1993), but little, if any, under others (Eisner and Meier 1990; Moe 1987; Wood 1988).

There has also been much work on the relationship between the president and agencies (Hammond and Knot 1996; Miller 1982; Moe 1982; 1989; Wood and Waterman 1991; 1994). As explained by Hammond and Knot work on presidential control argues that presidents control bureaucracy through a variety of methods including control through appointments, control of budget submissions, divisions within Congress, and influence over administrative procedures (1996, 123-4). These four methods of control are successful because other branches are either not willing or able to intervene. In the case of appointments the Senate defers to the president the right to fashion his or her own administration while on budgets the president plays an agenda setting role that moves the Congress near the president's preferences. When it comes to influencing administrative procedures, the president is much more successful at controlling procedures through political appointees than the Congress through oversight.

There is somewhat less work on the relationship between the courts and agencies (Canes-Wrone 2003; Ferejohn and Shipan 1990; Gely and Spiller 1990; Hammond and Knott 1996; Hunter and Waterman 1996; Moe 1985; Spiller and Spitzer 1992; Wood and Anderson 1993; Wood and Waterman 1996). In this vein, the work of Canes-Wrone (2003, 2006) is particularly relevant to our interests. Canes-Wrone looks at the responsiveness of the Army Corps of Engineers to the ideology of district courts, courts of appeals, and the U.S. Supreme Court, finding that "the more liberal are the lower courts in which agency decisions may be challenged, the less likely is the Corps to issue a [wetlands development] permit" and that the marginal effect of court ideology "is comparable to other, more established determinants of bureaucratic behavior"—the ideology of the relevant congressional committees and the president (2003, 211-212).

In addition to work on the institutional pairs, there has been a great deal of attention paid to the competition among branches to control agency decision making (Calvert, McCubbins and Weingast 1989; Canes-Wrone 2003; 2006; McCubbins, Noll and Weingast 1989; Shipan 2004; Snyder and Weingast 2000; Whitford 2005). This most recent work on institutional competition involves determining the conditions under which each branch is most likely to have success in controlling agency decision making rather than if each branch influences agency responsiveness.

The National Labor Relations Board

The NLRB formally consists of five members, appointed by the President and confirmed by the Senate, who each serve five-year, staggered terms. The President appoints and the Senate confirms a General Counsel of the NLRB, who serves a four-year term and is formally independent of the Board itself. The bulk of the work of the NLRB is done by 51 regional offices, which investigate unfair labor practice (ULP) claims, as well as determining whether employees have the right to organize into unions. Decisions on unfair labor practices of unions or employers, our focus here, are investigated by a regional office, which determines if a formal complaint is justified. Those charges that do lead to formal complaints are adjudicated by administrative law judges, whose decisions can be appealed to the full Board. Board decisions then can be reviewed by the U.S. courts of appeals in the regional circuit that the original complaint was filed.¹ Unlike most other administrative agencies, whose final decisions or rulings are reviewed by the D.C. Circuit, it is the requirement that judicial review of NLRB decisions be

¹ Decisions of the NLRB can actually be appealed to either the D.C. Circuit Court of Appeals or the regional court of appeals; we save this forum-shopping possibility for future research. 28 USC § 160(f) reads: “Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.”

handled by the regional courts of appeals that offers the opportunity to explore the influence of the courts on the decision-making of the NLRB.

A fair amount of previous scholarship has looked at the influences on the NLRB more generally, with somewhat less research on the influences on the decisions made by the regional offices of the NLRB, and even less work on the influence of the courts on NLRB decisions (though, as noted above, a robust literature exists as to the influence of courts on administrative agencies more generally). Empirical models of NLRB decision-making appear to date to Delorme, Hill, and Wood, who found that the political affiliation of board members voting between 1955 and 1975 affected their decisions, with independents (appointed only by Eisenhower), and Democrats more likely than Republicans to favor the union in ULP decisions, as well as the party affiliation of the appointing Administration, to influence the votes of NLRB members (1981, 216). Delorme, Hill, and Wood also found that economic conditions appeared to have some effect, with a higher unemployment rate leading to more pro-labor decisions under the Eisenhower Administration and the reverse effect under the Nixon Administration.² Cooke and Grautschi (1982) expanded the Delorme, Hill, and Wood analysis to include several other independent variables, including Board member characteristics (age, employment by management prior to NLRB appointment, urban/rural) and various measures of public support for unions (% Democrats in the Senate; % Democrats in the House; public opinion on labor issues; percentage of organizing elections won by union) and found these factors to not be significant predictors of NLRB member votes on ULP cases. They found that the nature of the

² Delorme, Hill, and Wood find, during the Kennedy and Johnson Administrations, that unemployment rate has no effect in one model, and a negative effect (higher rates lead to fewer pro-labor decisions) in a second model that does not include “strike days lost” (1981, 213). This finding, however, has a t-statistic of 1.58, and, as such is significant at a 90% confidence-level (one-tailed), which may be problematic given that there is no directional hypothesis and the sample size is 37 observations. The same level of confidence is used for the Nixon Administration finding, and the sample size there is 20 observations.

appointment (party affiliation of appointing President and of Board member, with Democratic appointees of Democratic presidents most likely to vote pro-labor) and case history (NLRB members were less likely to vote pro-labor on cases filed by employers) to be the only factors that predicted the decisions made by NLRB members.

Cooke, et al. (1995) differentiate between “important and complex” decisions made by the NLRB and “less important and simpler” decisions. On the more salient decisions made by the NLRB, they find that the political inclinations of the appointing president and the board member matter. Unemployment rates also affect decisions; higher unemployment and increases in unemployment make pro-labor votes more likely, but significant increases in unemployment (1% higher than the average for the previous three years) lead to more pro-employer votes. Finally, NLRB votes appear to be influenced by members of Congress; the higher the average COPE score of members of Congress, the more likely the board members will cast pro-labor decisions.

Against the backdrop of these models, Moe (1985) represents the first attempt to include the role of the courts in the process. Despite allusions to the role of the courts in shaping NLRB decisions in previous literature,³ no other work on NLRB decisions has included the preferences of the courts as an independent variable. Moe takes as his dependent variable the proportion of pro-labor decisions made by the Board for each quarter between 1948 and 1979. He finds that the NLRB is responsive to macroeconomic factors (unemployment, inflation), and congressional and presidential influence. More relevant to our research, he also finds that the more pro-labor decisions the courts issues, the more likely the NLRB is to make pro-labor decisions.⁴ One of

³ Cooke and Gautschi (1982, 540) claim that “because the Board’s ULP decisions are subject to review and enforcement in the courts of appeals, the Board’s discretion to interpret and apply the NLRA [National Labor Relations Act] is checked and partially shaped by court decisions.” Despite this assertion, they do not model the role of the courts, and Cooke’s later work (Cooke, et al., 1995) also does not model the impact of the courts on NLRB decisions.

⁴ To measure the courts’ responsiveness to the NLRB, Moe takes two indexes: “one compares the proportion of labor victories over the agency to the proportion of business victories. The other compares the number of labor

Moe's most notable contributions to understanding the NLRB decision-making process (and the decision-making process of independent agencies more generally) is his attention to the caseload the NLRB faces, which is shaped by economic conditions and decisions made by constituents (on what kind of cases to file) and the NLRB staff on what kind of complaints have sufficient merit to be considered by the ALJ and the Board). Unlike later work (Cooke, et al.), Moe does not explicitly include the ALJ decisions, but that approach may reflect his choice of dependent variable (quarterly "scores" of the NLRB, not votes on individual cases).

Hypotheses

One important aspect of responsiveness is how closely the principals, in this case the Congress, courts, and president, are paying attention to agencies. Other work has found that attentiveness can have important and sometimes surprising effects on agency decision making (Dodd and Schott 1979; Gailmard N.D.; Mycoff 2007). This work provides theoretical insight and empirical results suggesting that when Congress pays more attention to an agency through and increase in oversight committees the Congress has less oversight control over agency decision making. In this project we seek to examine the effect of attentiveness on control from all three branches. We develop a broader test of the notion of attentiveness to the competing principals of the NLRB, and focus on all three branches of government—Congress, the president, and the courts. We expect the NLRB to demonstrate responsiveness to each of the three branches, the preferences of which we estimate below. We expect that responsiveness to increase as oversight by each branch increases:

Hypothesis 1: As Congress holds more oversight hearings, we expect the preferences of the oversight committees to exert greater influence on the decisions of the NLRB;

victories to the number of business victories" (Moe 1985, 1107). Moe's index includes Supreme Court cases (weighted at 5) court of appeals cases (weighted at 3) and enforcement cases (weighted at 1).

Hypothesis 2: As the circuit courts issue more opinions reviewing NLRB ULP decisions, we expect the courts to exert greater influence on the decisions of the NLRB;

Hypothesis 3: As the president issues more executive orders dealing with labor issues, we expect the president to exert greater influence on the decisions of the NLRB.

Data and Methods

To measure responsiveness, we analyze data on 3,720 unfair labor practices decisions by the NLRB board between 1995 and 2004. All of these cases involve alleged violations of sections 8 (a), (b), (e), or (g) of the National Labor Relations Act (NLRA) by a labor union, an employer, or both. One advantage of analyzing NLRB ULP decisions is that ULP cases are very narrow in scope dealing with only a very specific section of the NLRA making for clear coding decisions. After identifying all of the ULP cases in NLRB archives on the NLRB website we coded each board decision as pro-business (1) or pro-labor (0) to serve as our dependent variable. In most cases we were able to make a clear coding decision that the employer or union had either violated the NLRA, or did not. While most of the cases were easily coded as consistent with business interests or not we did encounter split decisions. We excluded 403 cases on the basis of split decisions or other exceptions, like pre-decision settlements.

We collected data for several independent variables measuring the attentiveness of each branch to labor issues and the NLRB, the ideological preferences of each branch. We also interacted the ideological preference of each branch with its attentiveness. By interacting these variables we are able to directly test our hypotheses.

First, we created four variables to measure the attentiveness of the three branches to the NLRB and labor issues. There are two congressional variables recording the number of hearings held by the primary oversight committee in the House (*# House Hearings*) and Senate (*# Senate*

Hearings), respectively, dealing with the NLRB. We collected these variables from the Policy Agendas Project committee hearing data. These data are lagged by one year from the dependent variable and therefore represent the number of hearings held in the previous year.

To assess attentiveness of the different circuit courts of appeals to NLRB ULP cases, we used Lexis keyword searches to ascertain how many published opinions reviewed NLRB decisions on ULP cases for each year (*Published Opinions*). We then lagged that value by one year for inclusion in our statistical model, so the value reflects the number of published opinions reflecting NLRB decisions in the previous year. Strong arguments could be made to alter the measure by (a) including unpublished opinions, or (b) weighting the number of published opinions by some measure that indicates the size or workload of each of the 12 different circuits. First, any attempt to include unpublished opinions would be complicated by availability of unpublished opinions, which some circuits reported to Lexis (or West) in this time frame, while others, particularly the Third, Eighth, and Eleventh Circuits, did not make unpublished opinions available. To measure attentiveness consistently across each of the circuits, then, we focus solely on published opinions. Second, while some cognizance of the proportion of a court's docket consumed by appeals of NLRB decisions or, perhaps more appropriately, the percentage of NLRB decisions in a particular state or circuit that are appealed to the courts may be useful, the raw number of published opinions, and its variation over time, should prove sufficient to indicate the amount of attention a circuit court gives to NLRB decisions. While the workload of the circuits did not fluctuate significantly, within circuit, over the 1994-2002 period, the number of opinions that review NLRB decisions, did vary considerably across circuits and across time, and that variation sends a signal to the NLRB of the courts' attentiveness to its decisions. Ascertaining the validity of that measure represents a promising opportunity for future research

Our final measure of attentiveness is for the president. We recorded the number of executive orders in the previous year to measure the president's attentiveness to the NLRB and labor issues (*# Executive Orders*). We collected executive orders from the Policy Agendas Project executive orders dataset for 1994 through 2003. We included any executive order with the main topic of Labor, Employment, and Immigration and a subheading of Employee Relations and Labor Unions because the NLRB decisions in our dataset involve only questions over labor practices with respect to unionization. There were 18 executive orders meeting these conditions, with variability across years, and across presidencies.

Next, we collected variables measuring the ideological preferences of each branch. For the Congress we include the median we used the DW-NOMINATE score for the median member of each primary oversight committee to measure how conservative each primary committee was in each chamber and Congress.⁵ *House Cmte. Ideology* and *Senate Cmte. Ideology* therefore represent the conservatism of the primary oversight committee in each chamber.

Court of Appeals Ideology is measured using judicial common space (JCS) scores developed by Epstein, et al. (2007). For court of appeals judges, the JCS scores rely on the methodology developed by Giles, Hettinger, and Peppers (2001). If a judge is appointed from a state where the president and at least one senator are members of the same party, the judge takes the ideal point of the appointing senator (or the average of the two senators if both are of the president's party). If neither home-state senator is of the president's party, then the judge takes the president's ideal point estimate. Epstein, et al. then use Poole's familiar NOMINATE scores for each judge on a circuit court to calculate the median for each circuit for each year.

⁵ DW-NOMINATE scores allow for comparison across Congresses and were collected from Keith Poole's website (<http://voteview.com>). According to Poole's website, the only differences between DW-NOMINATE scores and D-NOMINATE scores is in the computation of the errors (normally distributed errors versus logit errors) and in the weight assigned to the second dimension in DW-NOMINATE scores.

Finally, we control for the president's ideology with a dichotomous variable representing the president's party id with a Republican president coded as (1) and a Democratic president coded as (0) (*Republican President*). The accepted assumption in the literature is that Republican majorities are pro-business and Democratic majorities are not, all else being equal.⁶

We decided against including a variable to control for the ratio of NLRB board members appoint by a Democratic president to those appointed by a Republican president because of the nature of NLRB appointments. During the period under investigation, several board members were appointed by both a Democratic and Republican president. President Bill Clinton reappointed a member originally appointed by President Ronald Reagan, and President George W. Bush appointed three members appointed by President Clinton. Because so many board members were appointed by presidents from both parties, controlling for this did not appear warranted.

Results

We analyze these data in our preliminary analysis using a logit model. The results are reported in Table 1. The results in Table 1 produce, at best, limited support for our hypotheses.

TABLE 1 HERE

The joint hypothesis test for the interaction terms suggests that the null hypothesis (that the interaction terms are jointly equal to zero) can be comfortably rejected in both the House and Senate models. Beyond that basic finding, interpretation of the results in both models can be somewhat complicated. Turning first to Hypothesis 1, the main effect of ideology on the Committees of jurisdiction is not a significant predictor of the decision-making of the NLRB in either the House or Senate models. In the House model, the variable is signed incorrectly, though its effect is not significant. The interaction between number of oversight hearings and ideology is

⁶ See Mycoff 2007 for empirical results that buttress this assumption.

significant, but in the opposite of the hypothesized direction, suggesting that as the House Committee becomes more conservative and conducts more aggressive oversight, the NLRB is more likely to make pro-labor decisions.⁷ No such effect is observed for the Senate—neither the main effect for ideology nor the interactive effect is a significant predictor of NLRB decision making.

Turning next to Hypothesis 2, the main effect for the president's ideology was not significant in either the model with the House or the Senate. The interaction term, however, was significant in the Senate model, suggesting that the more attention the president gives to the issue of labor relations, the more responsive to the president's ideology the NLRB will be. Specifically, the more attention a Republican president gives to labor relations, the more conservative NLRB decisions will prove (in the model which includes the Senate Committee only). Turning, finally, to Hypothesis 3, we find consistent, but unexpected results that indicate that the more conservative a particular circuit court of appeals is, the more likely the NLRB will make a pro-labor decision. The interaction effects are not statistically significant, suggesting that the level of court attention has no influence on the responsiveness of the NLRB to the courts' decisions.

Discussion

In this paper we sought to undertake a preliminary examination of the responsiveness of the NLRB to the Congress, courts, and president. While there has been work on the role of the courts in agency responsiveness, the lower courts have been largely ignored outside of a few studies. The role of the lower courts, however, is particularly important to understand because

⁷ The interpretation of interactive terms, particularly in MLE models, should be done with care and with awareness of the covariance between the interaction and component terms (Brambor, Clark, and Golder 2006). Jaccard and Turrasi (2003) note, however, that statistical significance on an interaction term indicates the presence of an interactive effect, but tells little about for what values of the constituent terms the interactive effect is observed. As a preliminary matter, we focus on whether or not an interactive effect exists.

appeals are unlikely to make their way to the Supreme Court, making the court of appeals the last judicial word. We hypothesized that increased attentiveness from the three branches in the form of increased congressional hearings, increased executive orders, and increased published judicial opinions, when interacted with the ideological preferences of each respective branch would cause increased influence over NLRB decision making. We analyzed 3,720 NLRB unfair labor practices decisions using an logit model, controlling for the ideological preferences of each branch, the attentiveness of each branch, and an interaction of preference and attentiveness. While these findings were not strong, they suggest that continued work on the attentiveness of the Congress, courts, and president may lead to more important results.

Future research should take us in several directions. Most importantly, we anticipate extending the time horizon of these data to gain more leverage on the role of attentiveness of the different branches of government; working with a ten-year time period may not have captured important evolution in the attentiveness and ideological orientation of the three branches of government. Our time frame covers a period of Republican control of the House and, with the exception of two years (2001-2002), Republican control of the Senate, as well as only two presidential administrations. A longer time horizon may allow us to more thoroughly evaluate the ebb and flow of interest in labor issues by the three branches of government.

Further research may further evaluate the role of the judiciary by including the U.S. Supreme Court as a potential influence on the courts of appeals and the NLRB (both directly and indirectly through the courts of appeals). Though the Supreme Court decides relatively few cases, and its caseload has declined over the past several years, its influence on the courts of appeals may serve to mitigate the direct influence of the ideology of court of appeals judges on the NLRB. If liberal court of appeals judges face the prospect of review of a conservative

Supreme Court, the court of appeals judges may (or may not, given their incentives) curtail sincere, policy-oriented behavior in favor of strategic behavior. Strategic behavior by litigants, including forum-shopping, also forms an important component of our future research agenda.

Existing models of influence on bureaucratic behavior generally assume a mechanism for that influence—the president appoints members and may control the budget of an agency; Congress appropriates funds, confirms appointees, and is attentive to interest groups, and courts are responsible for review of agency decisions and may or may not prove deferential to the agency decisions. We argue that the attentiveness of these principals can vary over time and, in the case of the judiciary, the attentiveness can vary regionally. That variation suggests that agency responsiveness to its principals may also vary across those dimensions, and understanding this variation is an important component of understanding agency behavior.

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Table 1: Predictors of Pro-Business NLRB Decisions in Unfair Labor Practice Cases, 1995-2004

Variable	House Model Coeff. (s.e.)	Senate Model Coeff. (s.e.)
House Cmte. Ideology	-1.5594 (2.9849)	--
#/House hearings	0.4852* (0.2439)	--
House Cmte. Ideology*#/House hearings	-1.4205** (0.6883)	--
Senate Cmte. Ideology	--	0.4555 (0.3822)
#/Senate Hearings	--	-0.1671** (0.0570)
Senate Cmte. Ideology*#/Senate Hearings	--	0.2245 (0.2169)
Republican President	-0.0933 (0.2318)	0.0022 (0.1535)
#/Executive Orders	-0.0141 (0.0461)	0.0543 (0.0443)
Republican President*#/Executive Orders	0.1671 (0.1058)	0.3157** (0.0909)
Court of Appeals Ideology	-0.9412** (0.3015)	-0.9370** (0.3024)
Published Opinions	-0.0238 (0.0128)	-0.0241 (0.0127)
Court of Appeals Ideology*Published Opinions	0.0619 (0.0468)	0.0577 (0.0470)
Constant	-1.1284 (1.1691)	-1.6756*** (0.1471)
χ^2 (10 d.f.)	65.51	77.08
Pr> χ^2	0.0000	0.0000
Wald χ^2 for interaction terms (3 d.f.)	15.00	14.96
Pr> χ^2	0.0018	0.0019

Cell entries are logit coefficients. *.<.05, **<.01, ***<.001, two-tailed tests.