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THE SEVENTH CIRCUIT GIVETH, AND THE DISTRICT OF COLUMBIA CIRCUIT TAKETH AWAY: THE NATIONAL LABOR RELATIONS BOARD'S AUTHORITY TO ACT UNDER SECTION 3(b) OF THE NATIONAL LABOR RELATIONS ACT

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INTRODUCTION

In December 2007, the National Labor Relations Board ("NLRB" or "Board") faced a novel problem: how could the Board continue operating with only two members?[1] At that time, the Board had four members; however, two members had terms expiring at the end of the year.[2] When their terms expired, the Board would lose its three-member quorum,[3] effectively stopping operations until the Board had at least three members.[4] To avoid this outcome, the Board used Section 3(b) of the National Labor Relations Act ("Section 3(b)") to

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[1] Brief of Petitioner at 8–9, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (No. 08-1162).

[2] Board Members Since 1935, http://www.nlrb.gov/about_us/overview/board/board_members_since_1935.aspx (last visited Jan. 5, 2010).

[3] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006).

[4] Brief of Petitioner at 8–9, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (No. 08-1162).

delegate its decision-making authority to a three-member panel.[5] Section 3(b) states:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.[6]

The Board believed that delegating its authority to a three-member panel would subject the panel to a smaller, two-member quorum.[7] Therefore, when the third member's term expired, the remaining two-member panel could continue deciding cases.[8] In effect, the Board thought that this delegation would allow the Board to operate as a two-member panel.[9] Based on this interpretation, the two-member panel has gone on to issue hundreds of decisions and orders.[10]

On May 1, 2009, the Seventh Circuit and the District of Columbia Circuit issued decisions on the two-member panel's legal authority to decided cases.[11] Generally, the two Circuits determined whether the two-member panel could issue decisions under Section 3(b).[12] Although the same statutory provision and relevant facts were at issue,

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[5] *Id.* at 8.

[6] National Labor Relations (Wagner) Act § 3(b).

[7] *See* Brief of Petitioner at 8–9, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (No. 08-1162).

[8] *See* New Process Steel, LP v. NLRB, 564 F.3d 840, 845 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[9] *See id.*

[10] *See id.*

[11] *Compare id.* at 848 (holding two-member panel had the authority to issue decisions), *with Laurel Baye Healthcare*, 564 F.3d at 476 (holding two-member panel did not have the authority to issue decisions).

[12] *E.g.*, *New Process Steel*, 564 F.3d at 845.

the Seventh Circuit and the D.C. Circuit reached opposite conclusions.[13]

The courts arrived at their holdings based on two separate statutory arguments.[14] Specifically, the Seventh Circuit decided whether the Board could establish a three-member panel when the third member was merely a sham member—a member who would never decide cases with the panel.[15] According to the Seventh Circuit, the Board could create such a panel, so long as the Board *initially* delegated its power to at least three active Board members.[16] Because the Board initially created a three-member panel, the Seventh Circuit upheld the two-member panel's authority to decide cases.[17] In effect, the Seventh Circuit found that the sham member did not affect the legality of Board's delegation under Section 3(b).[18]

In contrast, the D.C. Circuit determined whether a two-member panel could decide cases after the Board lost its three-member quorum.[19] The D.C. Circuit held that, under Section 3(b), neither the Board nor any delegated panel can act when the Board has less than three total members.[20] Effectively, the D.C. Circuit interpreted Section 3(b) as requiring three total Board members before *any* decision can be issued.[21] Because the Board had only two members, the two-member panel could not issue decisions.[22]

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[13] *Compare id.* at 848 (holding two-member panel had the authority to issue decisions), *with Laurel Baye Healthcare*, 564 F.3d at 476 (holding two-member panel did not have the authority to issue decisions).

[14] *Compare New Process Steel*, 564 F.3d at 848 (deciding whether the Board could delegate its authority to what is effectively a two-member panel), *with Laurel Baye Healthcare*, 564 F.3d at 476 (deciding whether the two-member panel could operate when the Board failed to satisfy its three member quorum requirement).

[15] *New Process Steel*, 564 F.3d at 845.

[16] *Id.* at 845–46.

[17] *Id.*

[18] *Id*.

[19] *Laurel Baye Healthcare*, 564 F.3d at 472.

[20] *Id.* at 472–76.

[21] *Id*. at 472–73.

[22] *Id.* at 476.

While the distinction between these two decisions is subtle, recognizing the difference is critical to understanding the recent line of cases interpreting Section 3(b). Broadly stated, the Seventh Circuit addressed the Board's initial delegation,[23] while the D.C. Circuit addressed the panel's ability to decide cases after Board lost its quorum.[24] Specifically, the Seventh Circuit decided whether the Board could delegate decision-making authority to what was effectively a two-member panel,[25] while the D.C. Circuit decided whether the two-member panel could decide cases after the Board lost its three-member quorum.[26]

Not only does each issue require a separate interpretation, but the Seventh Circuit has not even determined whether Section 3(b) allows a two-member panel to act when the Board has only two members.[27] Consequently, the Seventh Circuit has not precluded a future challenge to the two-member panel's authority based on this argument.[28] Moreover, the D.C. Circuit is not the only court that has decided whether the two-member panel could act after the Board lost its three-member quorum.[29] In fact, the Second Circuit held that, even though the Board had only two members, Section 3(b) did not preclude the two-member panel from issuing decisions.[30] The Second and D.C. Circuits' conflicting interpretations have further increased the uncertainty surrounding Section 3(b) and the two-member panel.

With a growing trend of uncertainty, one thing is clear: definitive resolution to Section 3(b)'s ambiguity is needed. Without a certain answer, the Board, the two-member panel and hundreds of NLRB

[23] New Process Steel, LP v. NLRB, 564 F.3d 840, 845–46 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[24] *Laurel Baye Healthcare*, 564 F.3d at 472.

[25] *New Process Steel*, 564 F.3d at 845–46.

[26] *Laurel Baye Healthcare*, 564 F.3d 469, 472–73.

[27] *See New Process Steel*, 564 F.3d at 845–46 (not addressing whether the panel can act when *the Board* has two total members).

[28] *See id.* at 845.

[29] *E.g.*, Snell Island SNF LLC v. NLRB, 568 F.3d 410, 419–24 (2d Cir. 2009).

[30] *Id.*

decisions remain in doubt.[31] As long as uncertainty remains, the Board appears content to avoid deciding its most contentious cases.[32] This combination of uncertainty and inaction threatens labor relations across the United States.[33]

Fortunately, the Board's uncertainty will soon be resolved, as the Supreme Court recently granted certiorari to decide whether the current Board can decide cases under Section 3(b).[34] Nevertheless, the Supreme Court must carefully review Section 3(b) to avoid reaching an incomplete or unsatisfying decision. To avoid such a result, the Supreme Court should apply *Chevron USA, Inc. v. Natural Resource Defense Council, Inc.*, which offers a legal framework that both embraces Section 3(b)'s ambiguity and establishes a satisfying outcome.[35] Under *Chevron*, the Supreme Court would first determine whether Section 3(b) precisely answers the question presented.[36] As this article argues, however, Section 3(b) does not precisely answer either argument that has been raised. Therefore, the Supreme Court would proceed to *Chevron* step-two where they defer to the Board's interpretation, as long as the interpretation is reasonable.[37] This article will also show that the Board's interpretation is reasonable, and thus that the Supreme Court should defer to the Board's interpretation. In other words, *Chevron* analysis allows the Supreme Court to uphold the two-member panel's authority to decide cases under Section 3(b).

This article begins by exploring the Board's origins, as well as the Board's subsequent legislative codification and amendments. Next, this article will discuss the recent Circuit decisions interpreting Section 3(b) by analyzing each decision's issues, legal reasoning and

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[31] Sam Hananel, *Gridlocked NLRB Puts Off Notable Labor-Law Cases*, RICHMOND TIMES-DISPATCH, Sept. 26, 2009, http://www2.timesdispatch.com/rtd/lifestyles/health_med_fit/article/I-NLRB0903_20090924-231810/295413/.

[32] *Id.*

[33] *Id.*

[34] New Process Steel, LP v. NLRB, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[35] 467 U.S. 837, 842–43 (1984).

[36] *Id.* at 842–43.

[37] *Id.* at 843.

outcome. Finally, this article contends that a satisfying decision cannot rest solely on Section 3(b)'s plain language and legislative history. Instead, this article will demonstrate how *Chevron* analysis provides a legal framework that embraces Section 3(b)'s ambiguity, yet provides a satisfying outcome.

I. THE HISTORY OF THE NATIONAL LABOR RELATIONS BOARD

A. The National Industrial Recovery Act: The National Labor Board

As part of the New Deal initiative, Congress enacted the National Industrial Recovery Act ("NIRA")[38] to spur economic recovery through fair trade practices and public works projects.[39] To encourage fair trade practices, Section 7(a) of the NIRA ("Section 7(a)")[40] sought to "democratize" labor by giving employees the right to collectively

[38] National Industrial Recovery Act, ch. 90, §§ 1–10, 48 Stat. 195 (1933) *declared unconstitutional by* Schechter Poultry Corp. v. United States 295 U.S. 495 (1935).

[39] National Industrial Recovery Act §1 ("A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist.").

[40] The NIRA states:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; [and] (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing[.]
> §7(a).

bargain with their employers.[41] Specifically, the NIRA prohibited employers from requiring employees to join a specific union, including employer-run unions, as a condition of employment.[42] The NIRA drafters believed that regulating collective bargaining would improve employee bargaining power, which would then result in increased purchasing power and standards of living.[43]

However, Section 7(a) failed to protect employees from employer coercion.[44] To begin, the National Recovery Administration ("NRA"), the agency that administered the NIRA, did not strictly enforce Section 7(a)'s prohibitions.[45] Additionally, employers manipulated the NIRA's vague language to circumvent Section 7(a).[46] Due to the divide between Section 7(a)'s guarantees and Section 7(a)'s actual enforcement, industrial strife spread across the country and threatened economic recovery.[47]

Consequently, President Franklin D. Roosevelt issued an executive order establishing the National Labor Board ("NLB").[48] Under the executive order, President Roosevelt gave the NLB the

[41] Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 302 (1987) ("[The drafters'] main concern was the fundamental and basic denial of the right to organize and bargain collectively.").

[42] National Industrial Recovery Act § 7(a).

[43] Casebeer, *supra* note 41, at 300–02.

[44] See 79 CONG. REC. 2368, 2371 (1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1311, 1311 (1949) (statement of Sen. Wagner).

[45] Valerie A. Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under the Wagner Act*, 20 OHIO ST. J. ON DISP. RESOL. 621, 640 (2005).

[46] *See* 79 CONG. REC. 2368, 2371 (1935) (statement of Sen. Wagner).

[47] *Id.*

[48] Exec. Order No. 6763 (1934) (creating the Original Board) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=14708; Exec. Order No. 7074 (1935) (extending Original Board for another year) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15079.

authority to resolve disputes arising under Section 7(a).[49] The NLB had seven members: a chairman, three employer representatives, and three employee representatives.[50] Although the NLB was more responsive than the NRA, the NLB had its own problems.[51] First, the NLB often resolved cases by majority preference, rather than based on Section 7(a)'s substantive requirements.[52] Second, the NLB could not control industry-specific boards, who were also interpreting Section 7(a), which often created conflicting interpretations.[53] Finally, the NLB had no enforcement power, except for the ability to refer cases to the Department of Justice.[54] Moreover, the NLB could not compel evidence or witnesses, making prosecution nearly impossible.[55] Therefore, employers frequently ignored the NLB's decisions without consequence.[56] In sum, the NLB failed to protect employees who wanted to organize under Section 7(a).[57]

B. The Wagner Act: Codifying the Board

In response to the NLB's problems, Senator Robert F. Wagner wanted legislation that would clearly define the substantive and procedural rights established in Section 7(a).[58] Accordingly, Senator Wagner proposed legislation that defined the term "unfair labor practices"—something that Section 7(a) had failed to accomplish.[59]

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[49] Exec. Order No. 6763 *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=14708.

[50] Casebeer, *supra* note 41, at 302.

[51] *See* 79 CONG. REC. 2368, 2371 (1935) (statement of Sen. Wagner).

[52] Casebeer, *supra* note 41, at 302.

[53] 79 CONG. REC. 2368, 2371 (1935) (statement of Sen. Wagner).

[54] *Id.*

[55] *Id.*

[56] *See* Casebeer, *supra* note 41, at 302.

[57] *See id.*

[58] S. REP. No. 79-1184, at 2–3 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1099, 1101 (1949).

[59] *Id.* at 2.

The legislation would also create a new Board with defined powers and procedures.[60] Senator Wagner believed that more detailed legislation would resolve industrial strife by solidifying employee and employer expectations.[61]

After two years of debate, Congress enacted the National Labor Relations Act ("Wagner Act"), which codified the NLB.[62] The new Board ("Wagner Board") would have three non-partisan members.[63] Congress envisioned the Wagner Board as a primarily adjudicative body, rather than a prosecutorial body.[64] Consequently, the Wagner Board would not conciliate negotiations between industry and labor.[65] Instead, the Wagner Board would: (1) make final administrative interpretations in unfair labor practices cases; and (2) resolve disputes over union representation.[66] Unlike the NLB, the Wagner Board would have binding authority over the parties, and its decisions would be subject to judicial review.[67]

Despite the Wagner Act's intentions, the Wagner Board struggled to gain legitimacy.[68] Board opponents were concerned that unions exercised too much control over the Wagner Board.[69] They also alleged that the Wagner Board—acting as prosecutor, judge and jury—possessed too much power.[70] They argued that the Wagner Board's

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[60] *Id.* at 3.

[61] 79 CONG. REC. 2368, 2371 (1935) (statement of Sen. Wagner).

[62] National Labor Relations (Wagner) Act, ch. 372, §§ 3–16, 49 Stat. 449, 451–57 (1935) *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 3270, 3272–79 (1949).

[63] *Id.* at § 3.

[64] S. REP. No. 79-1184, at 3 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1099, 1101–02 (1949).

[65] S. REP. No. 74-573, at 8 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 2300, 2307 (1949).

[66] S. REP. No. 79-1184, at 3.

[67] S. REP. No. 74-573, at 15.

[68] H.R. REP. No. 80-245, at 25 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 316 (1949).

[69] *Id.* at 6.

[70] *Id.* at 25.

nearly unchecked power to make factual determinations had caused the Board to act "arrogant, arbitrary, and unfair."[71] Additionally, the Wagner Board could not maintain its growing docket.[72] By 1947, the Wagner Board was over a year behind schedule, which forced the Wagner Board to delegate decision-making authority to subordinate officers.[73] Specifically, the Wagner Board had trial examiners create initial reports and advisory opinions.[74] If no member disagreed with the trial examiner, the Wagner Board would adopt the trial examiner's determination.[75] In effect, the Wagner Board was ignoring its adjudicative functions, contrary to congressional intent.[76]

C. The Taft-Hartley Act: Amending the Board

Initially, the Senate and the House proposed different solutions to the Wagner Board's problems.[77] Under the Senate's legislation, the Board would expand to seven members, but the Board could delegate its power to smaller panels.[78] With seven members, the Board could hear and decide twice as many cases, and thus relieve its crowded docket.[79] Additionally, the legislation emphasized the Board's independent adjudicative purpose, and attempted to remove

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[71] *Id.*

[72] S. REP. No. 80-105, at 8 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 414 (1949).

[73] *Id.* at 8–9.

[74] *Id.*

[75] *Id.*

[76] Rather than adjudicating cases like an appellate court, like Congress intended, the Wagner Board was "disposing of cases in an institutional fashion." *Id.* at 9.

[77] *Compare* S. 1126, 80th Cong. § 3 (1st Sess. 1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 99, 106–07 (1949), *with* H.R. 3020, 80th Cong. § 3 (1st Sess. 1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 31, 44–45 (1949).

[78] S. 1126 at § 3.

[79] S. REP. No. 80-105, at 8 (1947).

administrative influences from the Board's decision-making process.[80] For instance, the Senate legislation prohibited the Board from relying on a trial examiner's determination.[81] Instead, the legislation envisioned a Board that would deliberate and decide cases more like an appellate court.[82]

Rather than expanding the Board, the House proposed a pure separation between the Board's adjudicative and administrative functions.[83] The House believed that a purely adjudicative Board would operate more efficiently.[84] Accordingly, the House advocated a purely adjudicative Board, with a new General Counsel to manage administrative matters.[85] The House also prohibited the Board from using trial examiners during the decision-making process.[86] Like the Senate, the House wanted the Board to operate more like an appellate court.[87]

Despite initial disagreement, a House and Senate conference committee agreed to expand the Board's membership to five members.[88] Although unclear, the five-member board apparently eased concerns that a seven-member board would be "unwieldy."[89] To be sure, several Senators thought that efficient case resolution required

[80] *Id.* at 9.

[81] S. 1126 at § 4.

[82] S. REP. No. 80-105, at 9.

[83] H.R. 3020, 80th Cong. § 3 (1st Sess. 1947).

[84] 93 CONG. REC. 3521, 3534 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 601, 613 (1949) (statement of Rep. Hartley).

[85] H.R. REP. No. 80-245, at 6 (1947).

[86] *Id.* at 25.

[87] *Id.* at 6.

[88] H.R. REP. No. 80-510, at 37 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505, 541 (1949) (printing initial joint resolution).

[89] S. REP. No. 80-105, pt. 2, at 33 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 463, 495 (1949) (Senate minority report).

sufficient appropriations, rather than increased membership.[90] This position coincides with the House legislation, which advocated case resolution through a more efficient allocation of resources and responsibilities.[91]

The joint legislation also gave the Board the ability to delegate decision-making authority to three-member panels.[92] Additionally, the legislation provided a quorum provision that created separate requirements for the Board and any delegated panel.[93] Under the legislation, the Board needed three members to quorum, while a delegated panel only needed two members.[94]

Moreover, the joint legislation created a new General Counsel to manage the Board's administrative matters, including the Board's prosecutorial and investigatory functions.[95] The legislation also abolished the Board's review division and prohibited the Board from consulting with trial examiners.[96] Effectively, the joint legislation "limit[ed] the Board to the performance of quasi-judicial functions."[97]

On June 23, 1947, Congress passed the Labor Management Relations Act ("Taft-Hartley Act").[98] Under the Taft-Hartley Act, Congress expanded the Board consistent with the conference

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[90] 93 CONG. REC. 4136, 4158 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1017, 1052 (1949) (statement of Sen. Murray); 93 CONG. REC. 6654, 6660 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1565, 1576 (1949) (statement of Sen. Murray).

[91] 93 CONG. REC. 3521, 3534 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 601, 613 (1949) (statement of Rep. Hartley).

[92] H.R. REP. No. 80-510, at 5 (1947) (Conf. Rep.).

[93] *Id*.

[94] *Id.*

[95] *Id.* at 5 (printing initial joint resolution).

[96] *Id.* at 37–38.

[97] *Id.* at 38.

[98] Labor Management Relations (Taft-Hartley) Act, ch. 120, §§ 3–6, 61 Stat. 136, 139–40 (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1, 4–5 (1949).

committee's recommendations; consequently, the Board would have five total members.[99] As set forth above, Section 3(b) stated that:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.[100]

Although the Taft-Hartley Act has since been amended, the relevant portions of Section 3(b) have remained unchanged.[101]

D. The Board at Issue: A Two-Member Panel

In December 2007, the Board had four active members, and thus one vacant seat.[102] At that time, the Board's members included: Wilma Liebman; Peter Schaumber; Peter Kirsanow; and Dennis Walsh.[103] However, Kirsanow and Walsh had terms expiring on December 31, 2007.[104] Without anyone appointed to fill the current or pending vacancies, the Board feared it would lose the ability to conduct business on January 1, 2008.[105] Specifically, the Board knew it would lose its three-member quorum, which would effectively preclude the

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[99] *Id.* at § 3(a).

[100] *Id.* at § 3(b).

[101] *Compare id*. at § 3(a)–(b), *with* National Labor Relations (Wagner) Act § 3(a)–(b), 29 U.S.C. § 153(a)–(b) (2006).

[102] Board Members Since 1935, http://www.nlrb.gov/about_us/overview/board/board_members_since_1935.aspx (last visited Jan. 5, 2010).

[103] *Id.*

[104] *Id.*

[105] *See* Brief of Petitioner at 8–9, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (No. 08-1162).

Board from acting until the three-member quorum could be satisfied.[106]

On December 20, 2007, the Board used Section 3(b) to delegate its decision-making authority to a three-member panel, which included Liebman, Schaumber and Kirsanow.[107] The Board scheduled the delegation to take effect on December 28, 2007—three days before Kirsanow's term expired.[108] Essentially, the Board believed it could avoid the three-member quorum by delegating its power to a three-member panel, which would be subject to a smaller, two-member quorum.[109] If correct, the Board would retain its ability to decide cases when Kirsanow and Walsh retired.[110] The Board justified its decision by relying on a plain reading of Section 3(b) and an opinion letter from the Office of Legal Counsel ("OLC").[111]

According to the Board and the OLC, Section 3(b) allowed the Board to issue decisions under the proposed arrangement, "as long as a quorum of two members remained."[112] They reasoned that, under Section 3(b), the Board could delegate power to a three-member panel, and that panel could decide cases with a two-member quorum.[113] Based on this interpretation, the two-member panel has gone on to issue hundreds of decisions.[114] However, the panel's decisions have

[106] *Id.*

[107] *Id.* at 8.

[108] *Id.* at 8–9.

[109] *See* National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006) ("[T]hree members of the Board shall . . . constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.").

[110] Brief of Petitioner at 8–9, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (No. 08-1162).

[111] *Id.* at 11.

[112] *Id.*; Quorum Requirements, Op. Off. Legal Counsel, 2003 WL 24166831, at *1 (Mar. 4, 2003).

[113] *Id.*

[114] *See* Brief of Petitioner at 13, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (No. 08-1162).

recently come under attack by petitioners challenging the Board's interpretation of its authority to decide cases under Section 3(b).[115]

II. THE CIRCUIT SPLIT

Thus far, the First, Second, Seventh and D.C. Circuits have issued opinions interpreting Section 3(b).[116] Despite the same relevant facts and statutory language, the Circuits have not only reached different conclusions, but they have also addressed different issues and applied different legal frameworks.[117] This section will discuss the issues, legal reasoning and outcomes in the First Circuit's decision in *Northeastern Land Services, Ltd., v. NLRB*, the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB* and the Second Circuit's decision in *Snell Island SNF, LLC v. NLRB*.[118] By analyzing these decisions, this section will establish a context for understanding the Seventh Circuit's decision in *New Process Steel, LP v. NLRB*.

A. The First Circuit: Northeastern Land Services, Ltd. v. NLRB

Northeastern Land Services, Ltd., v. NLRB began when the Board determined that Northeastern Land Services ("NLS") had violated the NLRA by committing an unfair labor practice.[119] On appeal to the First Circuit, NLS challenged the Board's authority to create what was

[115] *See, e.g.*, Snell Island SNF LLC v. NLRB, 568 F.3d 410, 416–20 (2d Cir. 2009) (discussing cases).

[116] *See* Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009); *Snell Island*, 568 F.3d 410; New Process Steel, LP v. NLRB, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009).

[117] *See generally Ne. Land Servs.*, 560 F.3d 36; *Snell Island*, 568 F.3d 410; *New Process Steel*, 564 F.3d 840; *Laurel Baye Healthcare*, 564 F.3d 469.

[118] *Ne. Land Servs.*, 560 F.3d 36; *Snell Island*, 568 F.3d 410; *New Process Steel*, 564 F.3d 840; *Laurel Baye Healthcare*, 564 F.3d 469.

[119] 560 F.3d at 39–40.

effectively a two-member panel.[120] Consequently, the First Circuit had to determine whether the Board's delegation complied with Section 3(b).[121]

The First Circuit held that the Board's "delegation of its institutional power to a panel that ultimately consisted of a two-member quorum . . . was lawful."[122] The First Circuit reached its conclusion based on a plain reading of Section 3(b).[123] According to the First Circuit, Section 3(b) allowed the Board to delegate all its powers to a three-member panel, which the Board had done.[124] Further, the First Circuit held that, under Section 3(b)'s vacancy and quorum provisions,[125] the two-member panel could decide cases despite permanently losing its third member.[126]

Beyond its textual analysis, the First Circuit argued that its decision was consistent with an OLC opinion letter and the Ninth Circuit's decision in *Photo-Sonics, Inc. v. NLRB*.[127] The First Circuit cited both opinions as support for the proposition that a three-member panel can operate with only a two-member quorum.[128] The OLC opinion letter argued that a panel could issue decisions, "as long as a quorum of two members remained."[129] The OLC reasoned that Section 3(b)'s plain meaning allowed the Board to delegate power to three-member panels, which could then act with two members.[130] In *Photo-Sonics*, the Ninth Circuit had to determine whether a three-member panel could act when one member resigned before the panel

[120] *Id.*

[121] *Id.* at 40–41.

[122] *Id.* at 41.

[123] *Id.* at 41–42.

[124] *Id.* at 41.

[125] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006).

[126] *Ne. Land Servs.*, 560 F.3d at 41.

[127] *Id.* at 41–42.

[128] *Id.*

[129] Quorum Requirements, Op. Off. Legal Counsel, 2003 WL 24166831, at *1 (Mar. 4, 2003).

[130] *Id.*

issued its official decision.[131] The Ninth Circuit held that the panel had the authority to issue its decision because "all three panel members concurred in the decision."[132] In dicta, the Ninth Circuit also argued that, under Section 3(b), the two-member panel satisfied the two-member quorum requirement, and thus the panel could issue its decision regardless of the third member's participation.[133]

The First Circuit also suggested that, under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,[134] the court should defer to the agency's interpretation.[135] However, the First Circuit neither applied *Chevron* nor explained how much deference it gave the Board's interpretation.[136] Furthermore, the First Circuit reasoned that finding the two-member panel unlawful would "impose an undue burden on the administrative process" by effectively halting Board operations.[137] Like its insubstantial *Chevron* analysis, the First Circuit did not clearly explain whether administrative efficiency was essential to its decision.[138] In fact, the First Circuit only briefly mentioned the concern, and provided little legal foundation to support the proposition.[139] Consequently, the First Circuit did not discuss whether *Chevron* deference or pragmatic concerns were determinative, or even relevant, to its decision.[140]

Nevertheless, after *Northeastern Land Services*, one thing was clear: the First Circuit interpreted Section 3(b) to allow three-member panels to continue operating with two-members.[141] For the First

[131] Photo-Sonic, Inc. v. NLRB, 678 F.2d 121, 122 (9th Cir. 1982).

[132] *Id.*

[133] *Id.* at 122–23.

[134] 467 U.S. 837 (1984).

[135] Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 40 (1st Cir. 2009).

[136] *See id.* at 38–42.

[137] *Id.* at 41 (quoting R.R. Yardmasters of Am. v. Harris, 721 F.2d 1332, 1343 (D.C. Cir. 1983)).

[138] *Id.* at 38–42.

[139] *Id.* at 41.

[140] *See id.* at 40–41.

[141] *Id.*

Circuit, neither the pending nor subsequent vacancies terminated the two-member panel's ability to decide cases.[142] In effect, the First Circuit held that, under Section 3(b), the Board lawfully delegated its decision-making authority to what was effectively a two-member panel.[143]

B. The D.C. Circuit: Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB came to the D.C. Circuit after the Board found that Laurel Baye Healthcare ("LBH") committed an unfair labor practice against a local union.[144] On appeal, LBH challenged the Board's authority to act on two grounds.[145] First, LBH made the same argument presented to the First Circuit: the Board cannot delegate its power to a three-member panel knowing the panel will operate with only two-members?[146] Alternatively, LBH argued that the two-member panel could not decide cases after the Board lost its three-member quorum.[147] In other words, LBH claimed that the two-member panel could not act when the Board had only two members.[148]

In *Laurel Baye Healthcare*, the D.C. Circuit found LBH's second argument persuasive.[149] Specifically, the D.C. Circuit held that the two-member panel lost its decision-making power when the Board's membership fell below three members, causing the Board to lose its quorum.[150] The D.C. Circuit began its analysis with a textual analysis

[142] *Id.*

[143] *Id*.

[144] 564 F.3d 469 (D.C. Cir. 2009).

[145] *Id.* at 472.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* ("Because we find the second formulation of the argument convincing, we pretermit the first.").

[150] *Id.* at 472.

of Section 3(b).[151] The D.C. Circuit reasoned that allowing the Board to operate with two total members would render portions of Section 3(b) inoperative.[152] First, the D.C. Circuit argued that Section 3(b) requires the Board to satisfy its quorum requirement before it can lawfully act.[153] If the Board could operate with only two members, the D.C. Circuit reasoned that Section 3(b)'s requirement that "the Board quorum . . . must be satisfied at all times" would be rendered inoperative.[154] The D.C. Circuit also noted that Section 3(b)'s language would be an "unlikely" way to allow a two-member panel to act.[155]

Second, the D.C. Circuit argued that Section 3(b)'s two quorum provisions operate concurrently.[156] According to the D.C. Circuit, the panel's two-member quorum requirement does not override the Board's three-member quorum requirement.[157] The D.C. Circuit reasoned that Section 3(b) uses two different "object nouns"—"the Board" and "any group"—which proves that "each quorum provision is independent from the other." [158] Therefore, the panel's quorum requirement merely establishes a different quorum for delegated panels.[159] The D.C. Circuit concluded that "the [Board's three-member] quorum requirement . . . must still be satisfied, regardless of

[151] *Id.* at 472–73.

[152] *Id.*

[153] *Id.* ("[B]oard quorum requirement must be satisfied '*at all times*.'"(quoting National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b)) (emphasis in original)).

[154] *Id.*

[155] *Id.* at 473 ("[I]f Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention.").

[156] *Id.* at 472–73.

[157] *Id.*

[158] *Id.* at 473.

[159] *Id.* at 472–73 ("[I]t does not seem odd at all that a sub-unit of any body would have a smaller quorum number than the quorum of the body as a whole" because quorums "are usually majorities.").

whether the Board's authority is delegated to a [smaller panel]."[160] Essentially, the D.C. Circuit saw the two-member panel as an unsuccessful attempt to circumvent the Board's three-member quorum.[161]

Furthermore, the D.C. Circuit read Section 3(b)'s vacancy provision[162] as being dependent on the Board's three-member quorum requirement.[163] The D.C. Circuit argued that the vacancy provision could be interpreted in two ways: (1) the Board cannot act with more than one vacancy[164]; or (2) the Board cannot function with more than two vacancies.[165] The D.C. Circuit held that the latter interpretation was most consistent with Section 3(b)'s language.[166] Specifically, the D.C. Circuit reasoned that this reading properly reconciled Section 3(b)'s quorum requirement and vacancy provisions.[167] Therefore, the D.C. Circuit concluded that no decisions can be issued when the Board has more than two vacancies.[168]

The D.C. Circuit also looked to agency and corporation law to support its plain reading.[169] According to the court, a panel loses its authority when the delegating Board loses its quorum.[170] When the Board lost its three-member quorum, the two-member panel also lost its decision-making authority.[171] The D.C. Circuit reasoned that a

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[160] *Id.* at 472.

[161] *Id.* at 473.

[162] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006) ("A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board . . . .").

[163] *Laurel Baye Healthcare*, 564 F.3d at 475.

[164] *See id.* (reading vacancy literally to allow only one vacancy).

[165] *Id.* ("The Board's ability to legally transact business exists only when three or more members are on the Board.").

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.* at 473.

[170] *Id.* (citing Restatement (Third) of Agency § 3.07(4) (2006) and Fletcher Cyclopedia of the Law of Corporations § 504 (2008)).

[171] *Laurel Baye Healthcare*, 564 F.3d at 473.

delegated panel does not act on its own behalf; instead, the delegated panel acts on the Board's behalf.[172] If the Board cannot act, then the delegated panel also has no authority to act.[173] Therefore, the two-member panel could no longer decide cases after the Board lost its three-member quorum.[174]

Furthermore, the D.C Circuit concluded that its prior precedents did not affect its holding.[175] First, the D.C. Circuit disagreed with the Board's contention that *Railroad Yardmasters of American v. Harris*[176] permitted the Board to function without a three-member quorum.[177] In *Yardmasters*, the D.C. Circuit allowed the National Mediation Board's ("NMB") two remaining members to delegate the NMB's powers to one member on the same day the second member resigned.[178] Effectively, the D.C. Circuit allowed a single member to exercise the NMB's powers even though the NMB could not satisfy its two-member quorum.[179] Despite the strikingly similar facts, the D.C. Circuit dismissed *Yardmasters* because the *Yardmasters* opinion explicitly limited the holding to its facts.[180] The D.C. Circuit also reasoned that *Yardmasters* applied to advisory agencies, but not to agencies making substantive adjudications, like the Board.[181]

The D.C. Circuit also distinguished *Falcon Trading Group, Ltd. v. SEC*.[182] In 1995, the Securities and Exchange Commission ("SEC") promulgated a quorum regulation that allowed the SEC to operate with

[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* at 474.
[176] 721 F.2d 1332 (D.C. Cir. 1983).
[177] *Laurel Baye Healthcare*, 564 F.3d at 474.
[178] 721 F.2d at 1342–45.
[179] *Id.* at 1340.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 474–75.

a quorum of its remaining members.[183] The petitioner in *Falcon Trading* challenged the SEC's authority to promulgate quorum regulations under the Securities and Exchange Act.[184] The D.C. Circuit upheld the SEC's quorum regulation on the grounds that Congress had authorized the SEC to promulgate its own quorum rules.[185] The D.C. Circuit argued that *Falcon Trading* did not apply to the Board because Section 3(b) explicitly establishes the Board's quorum requirements.[186] The D.C. Circuit found this distinction persuasive because Section 3(b)'s quorum requirements, unlike the SEC's, precluded the Board from promulgating its own quorum regulations.[187]

Finally, the D.C. Circuit did not find the First Circuit's decision in *Northeastern Land Services* persuasive.[188] The D.C. Circuit noted that the First Circuit's decision only determined whether a *panel* can operate with two members.[189] However, in *Laurel Baye Healthcare*, the D.C. Circuit addressed the question whether a panel can operate when the Board loses its three-member quorum.[190] Because the First Circuit addressed a different question, the D.C. Circuit concluded that *Northeastern Land Services* offered little guidance.[191] Therefore, the D.C. Circuit held that, under Section 3(b), the Board, and any

[183] 17 C.F.R. § 200.41 (2009) ("A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office.").

[184] Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579, 582 (D.C. Cir. 1996).

[185] *Id.* (citing the Securities Exchange Act of 1934 § 23(a)(1), 15 U.S.C. § 78w(a)(1) (2006) as authority for the proposition that Congress had delegated the relevant rulemaking authority to the SEC).

[186] *Laurel Baye Healthcare*, 564 F.3d at 475.

[187] *Id.*

[188] *Id.* at 475–76.

[189] *Id.* ("The determination of [the continuing validity of a three-member delegee group after the expiration of the term of one member] is not necessary to our decision.").

[190] *Id.* at 476 (finding "the lack of a quorum on the Board as a whole is the determining factor").

[191] *Id.*

delegated panel, cannot decide cases when the Board has less than three members.[192]

Although the D.C. Circuit found LBH's second argument dispositive, the court indirectly discussed whether the Board could create what was effectively a two-member panel.[193] The D.C. Circuit suggested that the court would have interpreted Section 3(b) to allow the two-member panel to act after the third member vacated her seat.[194] Specifically, the D.C. Circuit stated that "a three-member Board may delegate its powers to a three-member group, and this [panel] may act with two members" if the Board's three-member quorum requirement is satisfied.[195] The D.C. Circuit's reasoning is consistent with the First Circuit decision finding two-member panels lawful under Section 3(b).[196] However, the D.C. Circuit did not discuss whether the Board's intent for the three-member panel to operate as a two-member panel would be a relevant distinction.[197] Regardless of this distinction, the D.C. Circuit would only allow the panel to act if the Board could satisfy its three-member quorum.[198] Therefore, the D.C. Circuit has not definitively decided whether the Board can delegate its power to what is effectively a two-member panel.[199]

C. The Second Circuit: Snell Island SNF, LLC v. NLRB

Snell Island SNF, LLC v. NLRB came to the Second Circuit after the two-member panel determined that an employer illegally refused

[192] *Id.* at 472–73.
[193] *Id.* at 472.
[194] *See id.* at 472–73.
[195] *Id.*
[196] *Id.*
[197] *See id.* at 472–76.
[198] *Id.* at 472–73 (holding two-member panel may act "so long as the Board quorum requirement is, 'at all times,' satisfied) (quoting National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. 153(b) (2006)).
[199] *Id.* at 472.

to negotiate with a local union.[200] On appeal, the employers challenged the Board's authority to act on the same two grounds that the petitioners relied on in *Laurel Baye Healthcare*.[201] First, the employers argued that the Board could not delegate its power to what was effectively a two-member panel.[202] Second, the employers argued that the two-member panel could not act when the Board lost its three-member quorum.[203]

Unlike the D.C. Circuit,[204] the Second Circuit addressed both of the employer's arguments.[205] The Second Circuit began its analysis by holding that the Board could delegate its power to what was effectively a two-member panel.[206] Agreeing with the *Northeastern Land Services* decision,[207] the Second Circuit interpreted Section 3(b) to allow the Board to establish a three-member panel.[208] Further, the Second Circuit reasoned that a pending vacancy had "no bearing on the fact that the panel was lawfully constituted in the first instance."[209] In effect, a two-member panel can issue decisions, so long as the Board initially delegates its powers to three active members.[210]

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[200] 568 F.3d 410, 414 (2d Cir. 2009).

[201] *Compare Snell Island*, 568 F.3d at 411 (deciding "whether . . . a two-member panel . . . is permitted under Section 3(b) . . . where a third member of the panel was disqualified because his term had expired and the total membership of the NLRB was only two members"), *with Laurel Baye Healthcare*, 564 F.3d at 472 (deciding whether Board can delegate power to what is effectively a two-member panel and whether the NLRB can act with only two members).

[202] *Snell Island*, 568 F.3d at 419.

[203] *Id.*

[204] *Laurel Baye Healthcare*, 564 F.3d at 472 ("Because we find the second [argument] convincing, we pretermit the first [argument].").

[205] *Snell Island*, 568 F.3d at 419–24.

[206] *Id.* at 419.

[207] *See* Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 41–42 (1st Cir. 2009) (interpreting Section 3(b)'s plain meaning to allow the Board to delegate its power to a three-member panel despite a third member's pending vacancy).

[208] *Snell Island*, 568 F.3d at 419.

[209] *Id.*

[210] *Id.* (holding a panel must be "duly constituted in the first instance . . . before the action of a quorum of the panel is valid") (internal quotation

Next, the Second Circuit addressed the employer's argument that the panel could not decide cases when the Board could not satisfy its three-member quorum.[211] The Second Circuit, however, offered a different framework for analyzing the issue.[212] The Second Circuit applied *Chevron* analysis[213] to determine whether the panel could act when the Board had only two members.[214] Initially, the Second Circuit found that *Chevron* applied even though the statutory interpretation involved a question about the agency's authority.[215] After deciding that *Chevron* applied, the Second Circuit began its analysis by determining whether Section 3(b) allowed the two-member panel to continue deciding cases.[216] However, the Second Circuit found that Section 3(b)'s plain language did not explicitly answer the question.[217] Following Second Circuit precedent, the court turned to canons of statutory construction to help resolve this question.[218] The Second Circuit agreed with the D.C. Circuit that the Board cannot act without a three-member quorum; otherwise, the quorum provision's "at all

marks and citations omitted); *see also* Nguyen v. United States, 539 U.S. 69, 82 (2003).

[211] *Snell Island*, 568 F.3d at 419–20.

[212] *Compare id.* at 419–24 (analyzing the Board's authority to act with two members under *Chevron*), *with* Laurel Baye Healthcare of Lake Lanier, LLC v. NLRB, 564 F.3d 470, 472–76 (D.C. Cir. 2009) (analyzing the Board's authority to act with a primarily plain meaning reading), *and* New Process Steel, LP v. NLRB, 564 F.3d 840, 846–48 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457) (same).

[213] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (when Congress has not explicitly expressed its intent in a statute, the court will defer to the administrating agency's reasonable statutory interpretation).

[214] *Snell Island*, 568 F.3d at 419–24.

[215] *Id.* at 415–16 (collecting cases).

[216] *Id.* at 419–20.

[217] *Id.* at 420 ("[N]othing in the statute itself explains what happens to a duly constituted *panel* of the NLRB when the *Board* itself loses its quorum.") (emphasis in original).

[218] *Id.* (quoting N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Servs. Admin., 556 F.3d 90, 97 (2d Cir. 2009)).

times" language would be rendered inoperative.[219] However, the Second Circuit found that this argument did not explicitly indicate "what happens to a panel that was duly constituted before the Board lost its quorum."[220]

The Second Circuit explained that, unlike the D.C. Circuit, its precedent did not allow it to look to traditional doctrines of agency for guidance.[221] Instead, the Second Circuit focused on Section 3(b)'s legislative history.[222] The Second Circuit noted that the Taft-Hartley Act's primary purpose was to equalize the power between employers and employees.[223] Despite the Taft-Hartley Act's sweeping reform, the Second Circuit found little legislative history on Section 3(b).[224] Nevertheless, the Second Circuit found that Senators, both supporting and opposing the Taft-Hartley Act, acknowledged that increasing the Board would increase its efficiency.[225] By expanding the Board's membership, the Board could double its productivity and relieve its overcrowded docket.[226] Although the Senate appeared concerned with

[219] *Id.* (holding Board quorum requirement must be satisfied at all times); *accord* Laurel Baye Healthcare of Lake Lanier v. NLRB, 564 F.3d 469, 472–73

[220] *Id.* at 420.

[221] *Id.* ("Our Court's precedents . . . require us to turn to legislative history instead of considering related fields of law . . . .").

[222] *Id.* at 420–23.

[223] *Id.* at 420 (citing Lawrence M. Friedman, AMERICAN LAW IN THE 20TH CENTURY 189 (2002)).

[224] *Id.* at 420–23.

[225] *Id.* at 421; 93 CONG. REC. 3950, 3953 (1947) *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1005, 1011 (1949) (Taft-Hartley Act sponsor Senator Robert A. Taft explaining that increasing the Board's membership would allow the Board to hold twice as many hearings); 93 CONG. REC. 6593, 6614 (1947) *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1526, 1562 (1949) (Taft-Hartley Act opponent Senator Wayne L. Morse explaining that a larger Board could hear more cases).

[226] *See* S. REP. No. 80-105, at 19 (1947) (Senate Bill expanded the Board from three members to seven members subject to the delegation and quorum provisions currently provided for in Section 3(b)); *id.* at 8 ("[E]xpansion of the Board . . . would

the Board's efficiency, the Second Circuit claimed that the House did not substantively discuss expanding the Board;[227] rather, the House only noted that the final bill retained the Board, but increased its membership from three to five members.[228] In all of Section 3(b)'s legislative history, the Second Circuit only found one statement addressing the precise issue presented.[229] The Second Circuit found that Senator Joseph C. O'Mahoney raised the question whether Section 3(b) allowed the Board to operate with "less than a quorum of the Board."[230] Because Senator O'Mahoney's statement elicited no response, the Second Circuit dismissed his statement as a stray comment.[231]

Additionally, the Second Circuit observed that originally the NLRA had established a three-member Board that could act with a two-member quorum.[232] The Second Circuit also found that, prior to the Taft-Hartley Act, the Board had operated with a two-member quorum on three separate occasions.[233] Nonetheless, the Second Circuit concluded that, although the Taft-Hartley Act intended to enable the Board to resolve more disputes, the legislative history did

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permit [the Board] to operate in panels of three, thereby increasing . . . its ability to dispose of cases" by one-hundred percent, thus relieving its crowded docket).

[227] *See* H.R. REP. No. 80-245, at 25 (1947).

[228] H.R. REP. No. 80-510, at 37 (1947) ("The conference agreement . . . retains the existing Board but increases its membership to five").

[229] Snell Island SNF LLC v. NLRB, 568 F.3d 410, 422 (2d Cir. 2009).

[230] 93 CONG. REC. 7677, 7679 (1947) *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1629, 1632 (1949) (Senator Joseph C. O'Mahoney stating that "we have a bill . . . which not only authorizes the Board to delegate its powers, but authorizes the Board to delegate its powers . . . to less than a quorum of the Board").

[231] *Snell Island*, 568 F.3d at 422.

[232] *Id.* at 421–22.

[233] *Snell Island*, 568 F.3d at 421 (Board operated with a two-member quorum three times before the Taft-Hartley Act passed: (1) two-member quorum issued three decisions between August 31, 1936 and September 23, 1936; (2) two-member quorum issued 239 decisions between August 27, 1940 and November 26, 1940; and (3) two-member quorum issued 224 decisions between August 27, 1941 and October 11, 1941).

not conclusively determine whether a delegated panel could continue to act when the Board lost its quorum.[234]

Because the Second Circuit could not conclude that Congress had addressed the precise question presented, the court proceeded to *Chevron* step-two.[235] At step-two, the Second Circuit held that the Board's interpretation—Section 3(b) allowed two-member panels to act when the Board lost its quorum—was reasonable.[236] The Second Circuit reasoned that the Taft-Hartley Act intended to increase the Board's efficiency and the Board's interpretation fulfilled this purpose.[237] Moreover, the Second Circuit noted that "[c]ourts have generally been sympathetic to a federal agency's efforts to continue to operate in the face of vacancies."[238]

Although the Second Circuit found the Board's interpretation reasonable, the court did not accept the Board's interpretation as the only reasonable conclusion.[239] In fact, the Second Circuit noted that the D.C. Circuit's interpretation of Section 3(b) was also reasonable.[240] Nevertheless, the Second Circuit still deferred to the Board's interpretation, as required by *Chevron*.[241] Consequently, the court upheld the two-member panel's authority to decided cases.[242] The Second Circuit's outcome, however, is the result of *Chevron's* deferential framework, rather than the court reaching a definitive conclusion.[243]

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[234] *Id.* at 423 (holding "we are unable to conclude that delegation to less than a quorum of the Board was an intended or unintended consequence of the Taft-Hartley amendments").

[235] *Id.* at 423–24.

[236] *Id.* at 424.

[237] *Id.* at 423–24.

[238] *Id.* at 423 n.8.

[239] *Id.* at 424.

[240] *Id.* (noting that "the D.C. Circuit's view that where a Board loses its authority, so does its panels . . . is also a reasonable interpretation of [Section 3(b)]")

[241] *Id.* at 423–24.

[242] *Id.* at 424.

[243] *See id.* at 419–24 (Second Circuit fails to offer its own interpretation of Section 3(b)).

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III. *NEW PROCESS STEEL, LP V. NLRB*

After receiving an adverse ruling from the two-member panel, New Process appealed the decision to the Seventh Circuit.[244] In the relevant portion of the appeal, New Process challenged the Board's ability to delegate its power to what was effectively a two-member panel.[245] Because of New Process' limited argument, the Seventh Circuit did not have to determine whether a panel could continue to act after the Board lost its quorum.[246]

According to the Seventh Circuit, the Board could delegate its power to what was effectively a two-member panel.[247] Consequently, the Seventh Circuit upheld the two-member panel's ability to continue issuing decisions.[248] The Seventh Circuit interpreted Section 3(b) to allow this result by its plain language.[249] Specifically, the Seventh Circuit reasoned that Section 3(b)'s delegation provision[250] allowed

[244] New Process Steel, LP v. NLRB 564 F.3d 840, 845 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[245] *Id.* ("New Process alleges that [the] delegation procedure violates . . . [Section] 3(b) . . . because it was in fact a delegation to a two-member panel rather than a three-member panel.").

[246] *Compare id.* at 845–48 (analyzing only whether the Board could delegate power to what is effectively a two-member panel), *with* Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 472–76 (D.C. Cir. 2009) (analyzing only whether the panel could continue acting when the Board had two total members), *and Snell Island*, 568 F.3d at 419–24 (analyzing both whether the Board could delegate power to what is effectively a two-member panel and whether the panel could continue acing when the Board had two total members).

[247] *New Process Steel*, 564 F.3d at 845–48.

[248] *Id.* at 845–46.

[249] *Id.* at 845 ("[T]he vacancy of one member of a three member panel does not impede the right of the remaining two members" from acting "indeed is the plain meaning of [Section 3(b)].").

[250] "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006).

the Board to delegate its authority to a three-member panel.[251] Further, the Seventh Circuit argued that Section 3(b)'s quorum provision[252] expressly states that a three-member panel only needs a two-member quorum to issue decisions.[253] The Seventh Circuit reasoned that New Process' interpretation would render Section 3(b)'s quorum provision inoperative because a three-member panel would be prohibited from operating with two members.[254] The Seventh Circuit noted that its interpretation was consistent with the First Circuit's opinion in *Northeastern Land Services* and the Ninth Circuit's opinion in *Photo-Sonics*.[255]

The Seventh Circuit then analyzed the Taft-Hartley Act's legislative history to determine whether its interpretation was consistent with Congress' intent.[256] The Seventh Circuit discovered that the House and Senate had proposed different solutions for amending the Board.[257] According to the Seventh Circuit, the House

[251] *New Process Steel*, 564 F.3d at 845–46.

[252] "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any [three-member panel]." National Labor Relations (Wagner) Act § 3(b).

[253] *New Process Steel*, 564 F.3d at 846.

[254] *Id.* at 846 n.2 ("New Process' reading . . . appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.").

[255] *Id.* (interpreting Section 3(b) as allowing the Board to delegate power to what is effectively a two-member panel); *accord* Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 41 (1st Cir. 2009); Photo-Sonics, Inc. v. NLRB, 678 F.2d 121, 122–23 (9th Cir. 1982) (interpreting Section 3(b) to allow legally delegated three-member panels to continue acting with a two-member quorum). However, at the time the Seventh Circuit decided *New Process Steel*, neither the D.C. Circuit nor the Second Circuit had issued their opinions. *Compare New Process Steel*, 564 F.3d 840 (decided May 1, 2009), *with* Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (decided May 1, 2009), *and* Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009) (decided June 17, 2009).

[256] *New Process Steel*, 564 F.3d at 846–47.

[257] *Id.* at 847 (comparing H.R.REP. No. 80-245, at 25 (1947) with S. REP. No. 80-105, at 19 (1947)).

intended to create a new board that would only decide cases.[258] The Senate, on the other hand, wanted to expand the Board to seven members, subject to provisions similar to those found in Section 3(b).[259] The Seventh Circuit concluded that Congress' primarily concerned was improving the Board's efficiency.[260] The Seventh Circuit reasoned that invalidating the panel, and effectively preventing the panel from operating, would be an inefficient result.[261] Therefore, the Seventh Circuit held that, without additional legislative history,[262] allowing the panel to decide cases would be more consistent with congressional intent.[263]

The Seventh Circuit also reviewed several prior decisions to determine whether its interpretation was sound.[264] The Seventh Circuit began by discussing *Nguyen v. United States*, in which the Supreme Court held that a court of appeals panel could not operate with two Article III judges and one Article IV judge.[265] According to the Supreme Court, under the relevant statute,[266] a court of appeals panel could not lawfully operate without three Article III judges.[267] The Supreme Court also held that a two-judge common law quorum requirement did not affect the initial delegation's lawfulness.[268] The

[258] *Id.* (analyzing H.R.REP. No. 80-245, at 25).

[259] *Id.* (analyzing S. REP. No. 80-105, at 19).

[260] *Id.* (holding that although the House was also concerned with the quality of the Board's decisions, Congress' "primary concern was increasing the efficiency of the Board").

[261] *Id.* at 847.

[262] *Id.* (arguing that, to support its interpretation, New Process needed legislative history "establishing that the Board was forbidden from operating with a quorum of two, or that Congress was particularly concerned about delegating authority to Board members whose term was about to expire").

[263] *Id.*

[264] *Id.* at 847–48.

[265] Nguyen v. United States, 539 U.S. 69, 82–83 (2003).

[266] 28 U.S.C. § 46(b) (2000).

[267] *Nguyen*, 539 U.S. at 83.

[268] *Id.*

Seventh Circuit distinguished *Nguyen* on two grounds.[269] First, the Seventh Circuit reasoned that the court of appeals statute contained neither a delegation nor a quorum provision.[270] Second, the court noted that Congress created the court of appeals statute to stop circuits from assigning cases to two-judge panels.[271] Because of these distinctions, the Seventh Circuit found little guidance in *Nguyen*.[272]

Furthermore, the Seventh Circuit discussed its decision in *Assure Competitive Transportation, Inc. v. United States* to support its Section 3(b) interpretation.[273] In *Assure*, the court had to determine what constituted a quorum of the Interstate Commerce Commission ("ICC").[274] The ICC consisted of eleven members and the statute defined a quorum as "a majority of the ICC."[275] However, the statute also contained a vacancy provision that prevented vacancies from stopping ICC operations.[276] According to the court, the ICC statute only required the ICC to have a majority of existing members to satisfy its quorum.[277] Therefore, the ICC could act when a majority of the existing six members participated.[278] New Process objected that the *Assure* court upheld the quorum because the ICC asked Congress to resolve the statute's ambiguity before it acted.[279] But according to the Seventh Circuit, this distinction was irrelevant.[280] The court reasoned that, unlike the ICC statute, Section 3(b) explicitly allowed

[269] *New Process Steel*, 564 F.3d at 848.

[270] *Id.*

[271] *Id.*

[272] *Id.* (Section 3(b) "contains quorum and delegation clauses that cover the scenario at issue here").

[273] *Id.* at 845.

[274] Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 472–73 (7th Cir. 2009).

[275] *Id.* at 472.

[276] *Id.*

[277] *Id.* at 473.

[278] *Id.*

[279] New Process Steel, LP v. NLRB, 564 F.3d 840, 848 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[280] *Id.*

the Board to delegate its power to what would effectively be a two-member panel.[281]

Finally, the Seventh Circuit cited three additional cases for the proposition that a "public board has the authority to act despite vacancies."[282] The Seventh Circuit reasoned that only the Board has the authority to act, not individual Board members.[283] However, the Seventh Circuit recognized that the Board could not act without a three-member quorum.[284] Because the Seventh Circuit did not address the question of whether the Board can act with only two members, it is unclear whether this proposition would have persuaded the Seventh Circuit. [285] Nevertheless, it is worth noting that the Seventh Circuit's language is nearly identical to language used by the D.C. Circuit in its agency law analysis.[286] With that said, the Seventh Circuit found the Board's initial delegation lawful under Section 3(b), and therefore upheld the two-member panel's authority to issue decisions.[287]

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[281] *Id.* (holding that "[g]iven that the plain meaning of the statute supports NLRB's [sic] reading of the statute, New Process' interpretation of *Assure* is unpersuasive").

[282] *Id.* (citing FTC v. Flotill Prods., Inc., 389 U.S. 179 (1967); Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579 (D.C. Cir. 1996); R.R. Yardmasters of Am. v. Harris, 721 F.2d 1332 (D.C. Cir. 1983)).

[283] *Id.*

[284] *Id.* (reasoning that the "NLRB has the authority to act so long as they have satisfied the quorum requirements").

[285] *See id.* at 845 (deciding whether the NLRB violated Section 3(b) "because [the delegation] was in fact a delegation to a two-member panel rather than a three-member panel").

[286] *Compare id.* at 848 ("[A] public board has the authority to act despite vacancies because the board, rather than the individual members, has the authority to act."), *with* Laurel Baye Healthcare of Lake Lanier v. NLRB, 564 F.3d 469, 473 (D.C. Cir. 2009) ("It must be remembered that the delegee committee does not act on its own behalf . . . . [t]he only authority by which the committee can act is that of the Board.").

[287] *See New Process Steel*, 564 F.3d at 848.

IV. *CHEVRON*: A WORKABLE LEGAL FRAMEWORK

At the outset, it is critical to remember that there are two separate arguments challenging the two-member panel's authority.[288] First, there is a question whether the Board can delegate its powers to what is effectively a two-member panel.[289] In other words, can the Board create a three-member panel when it knows the panel will really operate with two members?[290] This argument challenges the lawfulness of the Board's initial delegation. In effect, petitioners have argued that the Board's intent determines whether the delegation is lawful.[291] According to the Board's challengers, if the Board really wants a two-member panel, then the delegation violates Section 3(b).[292] On the contrary, the Board argues that its intent is irrelevant, and thus Section 3(b) only requires an initial delegation to three active members.[293] That is to say, if the Board delegates authority to a three members, then the delegation is always lawful.[294]

Unlike the first issue, the second question involves events occurring after the Board's initial delegation.[295] The second question asks whether the two-member panel may continue deciding cases when the Board loses its three-member quorum.[296] This argument involves the relationship between the Board and the delegated panel.[297] Specifically, petitioners argue that when the entire Board

[288] *Laurel Baye Healthcare*, 564 F.3d at 472.

[289] *See id.*

[290] *Id.*

[291] *See id.*

[292] *Id.*

[293] New Process Steel, LP v. NLRB, 564 F.3d 840, 845 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[294] *See id.*

[295] *See* Snell Island SNF LLC v. NLRB, 568 F.3d 410, 422 (2d Cir. 2009).

[296] *Id.*

[297] *See Laurel Baye Healthcare*, 564 F.3d at 472–73.

cannot quorum, any delegated panel also loses its authority.[298] Under this theory, a panel cannot act when the Board's membership falls below three members.[299] To properly analyze Section 3(b), one must first recognize the distinction between these arguments.

Furthermore, these two issues provide alternative arguments for challenging the Board's authority.[300] If the Supreme Court finds that either interpretation precludes the two-member panel from acting, then the panel's actions must be deemed unlawful.[301] Accordingly, the Supreme Court would have to invalidate the Board's decision and preclude the Board from issuing decisions.[302] Removing the Board's authority, however, would have a significant impact on labor relations. In effect, the Board would be prevented from resolving labor disputes until "such times as [the Board] may once again consist of sufficient members to constitute a quorum."[303] Nevertheless, the Circuits have mostly succeeded in allowing the Board to avoid this fate.[304] Through various legal frameworks and analyses, every Circuit addressing the Board's current structure, except the D.C. Circuit, has found that the two-member panel complies with Section 3(b).[305]

Despite these decisions, this section will show that a close reading of Section 3(b) and its legislative history does not precisely resolve either question. [306] Consequently, the Circuits have been forced into

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[298] *Id.* at 472.

[299] *See id.*

[300] *Id.* (holding that "because we find the second formulation . . . convincing, we pretermit the first").

[301] *Id.*

[302] *Id.* at 476.

[303] *Id.*

[304] *E.g.*, New Process Steel, LP v. NLRB, 564 F.3d 840, 848 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[305] *Compare New Process Steel*, 564 F.3d at 848, Snell Island SNF LLC v. NLRB, 568 F.3d 410, 422 (2d Cir. 2009), *and* Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 41–42 (1st Cir. 2009), *with Laurel Baye Healthcare*, 564 F.3d at 472–73.

[306] Although the Board has continued to function, the two-member panel has refused to decide difficult cases. *See* Sam Hananel, *Gridlocked NLRB Puts Off Notable Labor-Law Cases*, RICHMOND TIMES-DISPATCH, Sept. 26, 2009,

attenuated reasoning to justify allowing the Board to continue operating. Furthermore, each Circuit has provided its own unique analysis statute.[307] With hundreds of Board decision hanging in the balance, a more convincing justification is needed. Fortunately, *Chevron* analysis provides a legal framework that both embraces Section 3(b)'s ambiguity and allows the Board to continue resolving disputes.[308]

A. Chevron *Analysis: Deferring to an Agency's Interpretation of Its Own Authority?*

Before applying *Chevron* analysis, the Supreme Court must first determine whether *Chevron* deference should apply to the Board's interpretation of its own authority.[309] While many Circuits apply *Chevron* in such cases, some Circuits, like the Seventh Circuit, have reached the opposite conclusion.[310] Traditionally, Circuits have offered two rationales for refusing to extend *Chevron* to an agency's interpretation of its own authority.[311] First, these Circuits claim that agencies have "no special expertise" in interpreting their own authority.[312] Second, these Circuits argue that agencies should not make policy determinations that limit or expand their own authority.[313]

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http://www2.timesdispatch.com/rtd/lifestyles/health_med_fit/article/I-NLRB0903_20090924-231810/295413/.

[307] *See generally Ne. Land Servs.*, 560 F.3d 36; Snell Island SNF LLC v. NLRB, 568 F.3d 410; *New Process Steel*, 564 F.3d 840; *Laurel Baye Healthcare*, 564 F.3d 469.

[308] *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

[309] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844 (1986).

[310] *See* N. Ill. Steel Supply Co. v. Sec'y of Labor, 294 F.3d 844, 847 (7th Cir. 2002) ("While . . . several other [C]ircuits have granted deference to an agency's determination of its own jurisdiction . . . . [w]e believe that de novo review is appropriate.").

[311] *See* Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988) (Scalia, J., concurring).

[312] *Id.*

[313] *Id.*

Nevertheless, as Justice Antonin Scalia has observed, the Supreme Court has rejected both arguments.[314] In *Commodity Futures Trading Commission v. Schor*, the Commodity Futures Trading Commission ("CFTC") promulgated a rule that allowed it to hear certain counterclaims.[315] Under the CFTC's enabling act, the CFTC could promulgate rules "reasonably necessary to effectuate any of the provisions or to accomplish any of the [CFTC's] purposes."[316] The CFTC argued that this provision granted the CFTC the authority to hear counterclaims.[317] Despite the "statutory interpretation-jurisdictional nature of the question," the Supreme Court deferred to the CFTC's interpretation.[318] In doing so, the Supreme Court explicitly rejected the argument that an agency does not have superior expertise in interpreting its own authority.[319]

In *City of New York v. Federal Communication Commission*, the Supreme Court also rejected the argument that agencies cannot interpret the scope of their own authority.[320] The Court reasoned that federal agencies are often given a "broad grant of authority to reconcile conflicting policies."[321] So long as the policy determination is delegated to the agency, courts should not disturb an agency's reasonable determination.[322]

Justice Scalia also noted that *Chevron* deference is both necessary and appropriate when agencies interpret their own authority.[323] First,

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[314] *Id.*

[315] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844 (1986).

[316] *Id.* at 845.

[317] *Id.*

[318] *Id.*

[319] *Id.* at 843–44 ("The Court of Appeals declined to defer to the CFTC's interpretation because, in its view . . . the question was not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, had superior expertise. . . . We find [this reason] insubstantial.").

[320] City of N.Y. v. FCC, 486 U.S. 57, 64 (1988).

[321] *Id.*

[322] *Id.*

[323] Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring).

Chevron is necessary because there is no relevant distinction between an agency taking unauthorized action and an agency exceeding its delegated authority.[324] If this distinction controlled, courts would apply *Chevron* deference "depending upon how generally [they] describe[d] the authority."[325] Second, *Chevron* deference, by its own rationale, "would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority."[326] Otherwise, federal courts would have to resolve every statutory ambiguity de novo; however, Congress would not want de novo review of "every ambiguity in statutory authority."[327] If Congress disagrees with the agency's interpretation, Congress can amend the statutory language to resolve the ambiguity.[328] Thus, *Chevron* deference places the ultimate policy determination with the legislative and executive branches, rather than the judiciary.[329] Finally, *Chevron* limits the agency's interpretation to the relevant statute, which allows the Circuits to avoid expanding traditional legal doctrines beyond what they can bear.[330]

As applied to the Board, Congress has granted the Board the authority to make "such rules and regulations as may be necessary to carry out" the Board's responsibilities.[331] Congress also "declared [it] the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce."[332] Furthermore, Section 3(b) gives the Board considerable authority in arranging its own decision-making apparatus.[333] When read together,

[324] *Id.* at 381.

[325] *Id.* (internal quotations omitted).

[326] *Id.* at 381–82.

[327] *Id.* at 382.

[328] *Id.*

[329] *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

[330] *See id.*

[331] National Labor Relations (Wagner) Act § 6, 29 U.S.C. § 156 (2006).

[332] *Id.* § 1.

[333] *Id.* § 3(b).

the provisions have given the Board the ability to interpret its own authority under Section 3(b). In sum, the Supreme Court has solid legal support for applying *Chevron* deference to the Board's interpretation of its own authority.

B. Chevron *Application*

After determining that *Chevron* controls, the Supreme Court applies *Chevron's* two-step test to the Board's interpretation.[334] At *Chevron* step-one, the Supreme Court must determine whether Congress has explicitly answered the precise question presented.[335] Primarily, the Supreme Court looks to the applicable statute when determining whether Congress has provided the answer.[336] However, the Supreme Court will also look to the statute's legislative history, particularly when the statute's language is unclear.[337] If Congress has explicitly answered the question, the Supreme Court will enforce Congress' intent.[338] In other words, the Supreme Court will not defer to an agency's interpretation when the statute clearly provides the answer.[339] In the Board's case, the Supreme Court does not have to decide how Section 3(b) resolves the issues presented; instead, the Supreme Court has to decide whether Section 3(b) is ambiguous on those issues.[340]

If they find Section 3(b) ambiguous, the Supreme Court proceeds to *Chevron* step-two.[341] At *Chevron* step-two, the Court defers to a reasonable agency interpretation.[342] In fact, *Chevron* deference applies

[334] *Chevron*, 467 U.S. at 842–45.

[335] *Id.* at 842–43.

[336] *See id.* at 843 n.9.

[337] *Id.* at 845.

[338] *Id.* at 842–43.

[339] *Id.* (holding that "the agency[] must give effect to the unambiguously expressed intent of Congress").

[340] *See* Snell Island SNF LLC v. NLRB, 568 F.3d 410, 419–23 (2d Cir. 2009).

[341] *Chevron*, 467 U.S. at 843.

[342] *Id.*

even though the statute can be interpreted in multiple ways.[343] *Chevron* deference only requires a reasonable interpretation and not the best interpretation.[344] Accordingly, the Supreme Court should defer to the Board's Section 3(b) interpretation, as long as they find the interpretation reasonable.[345]

1. Delegating Power to What Is Effectively a Two-Member Panel

First, the Supreme Court should use *Chevron* analysis to determine whether the Board can delegate its power to what is effectively a two-member panel. At *Chevron* step-one, the Supreme Court must determine whether Section 3(b) explicitly answers the question.[346] Thus far, the Circuits have unanimously interpreted Section 3(b) to allow the Board to create what is effectively a two-member panel.[347] At first glance, their reasoning appears persuasive; however, a closer reading reveals that the Section 3(b) does not precisely indicate whether the delegation is lawful.

The Circuits have answered the question with a purely technical reading of Section 3(b).[348] According to the Circuits, the dispositive inquiry is: was power initially delegated to three members?[349] If the answer is yes, then the Circuits have found the delegation lawful.[350] While this reading is tenable, the question remains whether Section 3(b) explicitly allows this result. Clearly, Section 3(b) would not allow the Board to delegate its power to a two-member panel.[351]

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[343] *Id.* at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction.").

[344] *See id.*

[345] *Snell Island*, 568 F.3d at 422–23.

[346] *Chevron*, 467 U.S. at 843–45.

[347] *See generally* New Process Steel, LP v. NLRB, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457); Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009); *Snell Island*, 568 F.3d 410.

[348] *See, e.g.*, *New Process Steel*, 564 F.3d at 845–46.

[349] *See id.* at 845.

[350] *See id.*

[351] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006).

Nevertheless, under the Circuits' reading, the Board can delegate its power to a two-member panel by including a sham member—a member whose term is about to expire—in its initial delegation.[352] But should a purely technical delegation allow the Board to create a two-member panel? In both cases, after all, the Board intends to create a two-member panel.

In fact, the Circuits' interpretations have completely ignored the Board's intent.[353] By ignoring the Board's intent, the Circuits create an irrational result: the Board can delegate its power to a two-member panel, so long as it includes a sham third member.[354] Effectively, the Circuits interpret the delegation provision as allowing two-member panels.[355] Thus, the Board is now free to circumvent the three-member panel requirement by including a sham member in the initial delegation. Such a result is inconsistent with Section 3(b)'s language.[356]

The vacancy and quorum provisions also fail to answer the question. The vacancy provision states that "a vacancy in the *Board* shall not impair . . . the powers of the *Board.*"[357] The Circuits read this provision as explicitly allowing a two-member panel to operate despite a subsequent vacancy.[358] However, the vacancy provision does not explicitly address a vacancy in a three-member panel, only the Board as a whole.[359] Thus, the vacancy provision offers little guidance on the precise question presented.

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[352] *See New Process Steel*, 564 F.3d 845–46.

[353] *E.g.*, *id.* at 845–48.

[354] *Id.* at 846 (holding that "[a]s long as the panel consisted of three NLRB members at the time it was constituted," the panel can operate with two members).

[355] *Id.*

[356] *See* National Labor Relations (Wagner) Act § 3(b).

[357] *Id.* (emphasis added).

[358] *New Process Steel*, 564 F.3d 845–46.

[359] *See* National Labor Relations (Wagner) Act § 3(b) (stating that "[A] vacancy in *the Board* shall not impair . . . the powers of the Board" (emphasis added)).

The quorum provision provides a better explanation about the effect of vacancies on a three-member panel.[360] Because the quorum provision allows a three-member panel to operate with a two-member quorum, it seems clear that a panel can operate with two members, so long as the original delegation is lawful.[361] Nevertheless, the quorum provision does not answer the precise question.[362] The challenge is to the Board's *initial* delegation, which must be lawful before the panel can act.[363] Even if the quorum provision allows a three-member panel to act with two members, the question remains whether the Board can delegate its powers to the panel in the first place.

In fact, both the vacancy and quorum provisions regulate events occurring after the delegation, rather than the actual delegation.[364] If the delegation initially violates Section 3(b), neither the quorum provision nor the vacancy provision can save the delegation.[365] That is, even if an initial two-member delegation satisfies the vacancy and quorum provisions, the initial two-member delegation nevertheless clearly violates Section 3(b). Consequently, neither provision helps resolve the question whether the Board's delegation was lawful.

The legislative history also fails to provide a precise answer. The Circuits that have parsed the legislative history have been persuaded by the Senate's concern about the Board's efficiency.[366] Specifically, those Circuits have noted that the Senate wanted to expand the Board to seven members and to allow three-member panels; this way, the Board could resolve more cases.[367] While this explains why Section 3(b) allows the Board to delegate its powers to three-member panels,

[360] The panel's quorum provision states that "two members shall constitute a quorum" when the Board delegates its authority to a three-member panel. *Id.*

[361] *Id.*

[362] *See id.*

[363] *Id.*

[364] *See id.*

[365] *See id.*

[366] *See* New Process Steel, LP v. NLRB, 564 F.3d 840, 847 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[367] *Id.* (noting that Congress' "primary concern was increasing the efficiency of the Board" by creating a larger Board).

efficiency alone cannot justify delegating power to a two-member panel. Again, Section 3(b) explicitly disallows two-member panels.[368] If Congress had wanted to allow two-member panels, they would have drafted Section 3(b) accordingly.

Moreover, a closer reading of Section 3(b)'s legislative history shows that Congress also wanted a more judicious Board.[369] Specifically, some Senators wanted a Board that would act like an appellate court "where divergent views . . . [would] be reflected in each decision."[370] Other Senators feared that a seven-member Board would become "unwieldy."[371] These Senators believed that a large Board would "interfere with efficient administration, without any . . . compensating advantage."[372] Instead, they argued that increased appropriations would allow the Board to focus on deciding cases, rather than worrying about its administrative duties.[373]

The House voiced a similar desire for more deliberative adjudication and less administration.[374] In fact, the House's initial bill did not expand the Board at all; instead, the bill separated the Board's administrative and adjudicative functions.[375] The House believed that the Board's administrative duties had caused the Board to become lazy in its decision-making.[376] Specifically, the House thought that the Board had become too reliant on trial examiners, often deferring to their decisions.[377] Therefore, the House sought a purely adjudicative Board, which would focus almost exclusively on deciding cases.[378]

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[368] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006).

[369] H.R. REP. No. 80-510, at 5 (1947) (Conf. Rep.) (printing initial joint resolution).

[370] S. REP. No. 80-105, at 9 (1947).

[371] S. REP. No. 80-105, pt. 2, at 33 (1947) (Senate minority report).

[372] *Id.*

[373] *Id.*

[374] H.R. REP. No. 80-245, at 6 (1947).

[375] H.R. 3020, 80th Cong. §§ 3–4 (1st Sess. 1947).

[376] H.R. REP. No. 80-245, at 6.

[377] *Id.* at 25.

[378] *Id.* at 6.

Despite congressional concern about the Board's adjudicative procedures, the Circuits have virtually ignored the impact of these concerns on Section 3(b).[379] However, the legislative history suggests that the Taft-Hartley Act intended to create a deliberative judicial body, like an appellate court.[380] This intent is also reflected in the Taft-Hartley Act's amendments, as they allow three-member panels.[381] Presumably, Congress believed three-member panels would have enough divergent views to mitigate their concerns. While the two-member quorum provision seems to be in conflict with Congress' intent, Section 3(b) can be narrowly read to allow two-member panels only when the third member is temporarily disabled. This narrow reading is consistent with *Photo-Sonics*, where the Ninth Circuit held that a two-member panel could act after a third-member resigned.[382] The Circuits have cited *Photo-Sonics* for the proposition that a panel may act so long as the Board's initial delegation includes three members,[383] but this reading overstates the case's holding and the quorum provision's effect.[384] *Photo-Sonic* involved an unforeseen resignation, unlike the pending expiration in the current line of cases.[385] Thus, in contrast to the current problem, the case did not involve actual intent to delegate authority to a two-member panel.[386]

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[379] New Process Steel, LP v. NLRB, 564 F.3d 840, 847 n.4 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457) (dismissing concerns about the Board's judiciousness as a minor concern to Congress).

[380] *See, e.g.*, H.R. REP. No. 80-245, at 6.

[381] Labor Management Relations (Taft-Hartley) Act, ch. 120, § 3, 61 Stat. 136, 139 (1947).

[382] Photo-Sonics, Inc. v. NLRB, 678 F.2d 121, 122 (9th Cir. 1982) (comparing Section 3(b) to federal court of appeals where three-member panels have issued opinions after a third member died or became ill).

[383] *New Process Steel*, 564 F.3d at 847.

[384] *Photo-Sonics*, 687 F.2d at 122 (holding that "since all three [panel] members concurred in the decision, we need not determine whether [the panel member's] resignation precluded his participation in the Board's decision" issued after the panel member's resignation).

[385] *Id.*

[386] *Id.*

And again, the quorum provision cannot be read to save an initially unlawful delegation.

In sum, Section 3(b) fails to indicate whether the Board can delegate its authority to what is effectively a two-member panel. Accordingly, the Supreme Court should proceed to *Chevron* step-two, where they must determine whether the Board's interpretation is reasonable.[387] Here, the Board interprets Section 3(b) as allowing the Board to delegate its power to a three-member panel, even when the Board knows the panel will operate with two members.[388] Thus, the Supreme Court will have to determine whether Section 3(b) can be reasonably interpreted to allow this result.

Based on the legal reasoning applied in the Circuits,[389] Section 3(b)'s language can easily bear the Board's interpretation. Moreover, *Chevron* deference applies even though Section 3(b) can also be interpreted as requiring an intended three-member panel.[390] In fact, *Chevron* deference only requires a reasonable interpretation and not the best interpretation.[391] Either way, the Board's interpretation is reasonable, and thus the Supreme Court should uphold the Board's delegation.

2. Panel Actions when the Board Has Only Two Total Members

The second issue presents a different question: can a panel continue deciding cases when the Board loses its three-member quorum?[392] Again, the Supreme Court must first determine whether

[387] Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[388] *See generally* New Process Steel, LP v. NLRB, 564 F.3d 840, 845 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[389] *See, e.g.*, *id.* at 845–47.

[390] *See Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction.").

[391] *See id.*

[392] Snell Island SNF LLC v. NLRB, 568 F.3d 410, 420 (2d Cir. 2009).

Congress has explicitly answered the question.[393] To determine Congress' intent, the Circuits will look to Section 3(b)'s language and legislative history.[394] So far, the two Circuits that have addressed this issue, the D.C. Circuit and the Second Circuit, have reached different conclusions.[395] However, these Circuits did not completely disagree about Section 3(b)'s interpretation.[396] Both Circuits agree that the Board's three-member quorum requirement must be satisfied before the *Board* can act.[397] Specifically, Section 3(b) states that "three members of the Board shall, *at all times*, constitute a quorum of the Board."[398] As both Circuits noted, the Board must have at least three members to conduct Board business.[399] Otherwise, the quorum provision's "at all times" language would be rendered inoperative.[400] The D.C. Circuit also reasoned that Section 3(b)'s Board and panel quorum provisions operate independently.[401] According to the D.C. Circuit, the panel's two-member quorum cannot be substituted for the Board's three-member quorum.[402]

But Section 3(b)'s plain language does not answer the question presented. The issue is not whether the Board can act as a two-member Board; in fact, both Circuits agree that the Board cannot act with two

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[393] *Chevron*, 467 U.S. at 842–43.

[394] *Id.* at 843–45.

[395] *Compare* Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 472 (D.C. Cir. 2009) (interpreting Section 3(b) as removing the panel's authority to act when the Board cannot satisfy its quorum requirement), *with Snell Island*, 568 F.3d at 420 (interpreting Section 3(b) as allowing the panel to act despite the Board failing to meet its quorum requirement).

[396] *Snell Island*, 568 F.3d at 420 (noting that the D.C. Circuit's interpretation of Section 3(b) is also reasonable).

[397] *Id.* (agreeing with the D.C. Circuit that the Board cannot act without three members).

[398] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006) (emphasis added).

[399] *Id.*

[400] *Laurel Baye Healthcare*, 564 F.3d at 472.

[401] *Id.* at 472–73.

[402] *See id.*

members.[403] Instead, the more precise question is whether the two-member panel can act after the Board loses its quorum.[404] In other words, does Section 3(b) allow panels to operate completely independent from the Board? The D.C. Circuit answered this narrower question by consulting traditional agency doctrines.[405] The D.C. Circuit reasoned that a panel is the Board's agent, so that the panel's agency ceases the moment the Board loses its quorum.[406]

Unlike the D.C. Circuit, the Second Circuit did not consider traditional agency doctrine.[407] Instead, the Second Circuit attempted to the resolve Section 3(b)'s ambiguity by looking at the Taft-Hartley Act's legislative history.[408] However, the Taft-Hartley Act's legislative history is inconclusive.[409] As the Second Circuit noted, some Senators wanted to increase the Board's decision-making capacity through increased membership.[410] Yet, Congress did not amend Section 3(b) to allow seven members; instead, Congress only expanded the Board to five members.[411] In fact, this change is more consistent with the Senate Minority Report and the House's initial bill.[412] The Senate Minority Report raised concerns that a seven-member Board would be too "unwieldy."[413] Similarly, the House believed that the Board's efficiency could be improved by simply separating the Board's adjudicative and administrative functions.[414] The Senate Minority

[403] *Compare Laurel Baye Healthcare*, 564 F.3d at 472, *with Snell Island*, 568 F.3d at 420.

[404] *Snell Island*, 568 F.3d at 420.

[405] *Laurel Baye Healthcare*, 564 F.3d at 473.

[406] *Id.*

[407] *Snell Island*, 568 F.3d at 420.

[408] *Id.*

[409] *Id.* at 423.

[410] S. REP. No. 80-105, at 8 (1947).

[411] Labor Management Relations (Taft-Hartley) Act, ch. 120, § 3, 61 Stat. 136 (1947).

[412] *Compare* S. REP. No. 80-105, pt. 2, at 33 (1947) (Senate minority report), *with* H.R. 3020, 80th Cong. § 3 (1st Sess. 1947).

[413] S. REP. No. 80-105, pt. 2, at 33 (Senate minority report).

[414] H.R. 3020 at § 3–4.

Report and the House essentially argued that a smaller, purely adjudicative Board would: (1) be able to decide more cases; and (2) make more judicious decisions.[415]

Unfortunately, neither purpose offers a clear resolution to the question presented. While Congress wanted more efficient case resolution, the Board is concerned with its authority to hear cases.[416] That is to say, the Board advocates efficiency by allowing case resolution with low membership, while the legislative history advocates efficiency by expanding membership and segregating responsibilities.[417] These two different types of efficiency are easily distinguishable, and thus they should not be equated with one another. In fact, when Section 3(b)'s purpose is broadly defined to include all efficient outcomes, the definition becomes overinclusive. For example, a broad definition of efficiency would support Board members acting individually, as this arrangement would clearly allow the Board to resolve more cases. However, Section 3(b) clearly prohibits Board members from acting individually.[418]

Congress' concern about judicious decision-making also fails to resolve the issue. Congress wanted the Board to act like an appellate court, with divergent views and deliberative decision-making.[419] Section 3(b) suggests that Congress thought three members offered a number sufficient to meet their concerns.[420] However, the panel's two-member quorum provision conflicts with this reading.[421] To resolve this conflict, the quorum provision can be read narrowly. That is to say, if the panel quorum provision only allows two-member panels when a third member is temporarily disabled, then less-deliberative

[415] S. REP. No. 80-105, pt. 2, at 33 (Senate minority report); H.R. REP. No. 80-245, at 6 (1947).

[416] New Process Steel, LP v. NLRB, 564 F.3d 840, 847 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[417] *See id.*

[418] National Labor Relations (Wagner) Act § 3(b), 29 U.S.C. § 153(b) (2006).

[419] S. REP. No. 80-105, at 9 (1947).

[420] Section 3(b) allows the Board to form three-member panels and to act with a three-member quorum. National Labor Relations (Wagner) Act § 3(b).

[421] *Id.*

decisions will rarely occur. This narrow reading is also consistent with Section 3(b)'s three-member Board quorum requirement.[422] Nevertheless, Congress' desire to create a purely adjudicative Board does not precisely answer whether a two-member panel can operate when the Board loses its quorum.

Because Section 3(b) is ambiguous, the Supreme Court must determine whether the Board's interpretation is reasonable.[423] According to the Board, Section 3(b) allows a panel to decide cases even when the Board has only two members.[424] In *Snell Island*, the Second Circuit correctly applied *Chevron* step-two to this precise question.[425] As the Second Circuit reasoned, the Board's interpretation is reasonable because the Taft-Hartley Act's "animating purpose" was to increase the Board's overall efficiency.[426] The Second Circuit also correctly noted that the Board's interpretation is not necessarily the only or best interpretation.[427] Instead, the Second Circuit concluded that the D.C. Circuit's opposite interpretation in *Laurel Baye Healthcare* was also a reasonable interpretation.[428] Nevertheless, the Second Circuit properly deferred to the Board's interpretation, thus allowing the two-member panel to continue to act.[429] In sum, the Supreme Court should uphold the two-member panel's decision-making authority, despite the Board's inability to quorum.

[422] *Id.*

[423] Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[424] *See generally* Snell Island SNF LLC v. NLRB, 568 F.3d 410, 420 (2d Cir. 2009).

[425] *Id.* at 423–24.

[426] *Id.* at 423.

[427] *Id.* at 424.

[428] *Id.*

[429] *Id.*

CONCLUSION

The Seventh Circuit's decision in *New Process Steel* demonstrates the current uncertainty surrounding Section 3(b).[430] Despite interpreting Section 3(b) to allow the Board's initial delegation,[431] the Seventh Circuit's legal reasoning is unsatisfying. A closer reading of Section 3(b)'s language and legislative history shows that Section 3(b) does not conclusively support the Seventh Circuit's holding. Moreover, the Seventh Circuit has yet to determine whether the two-member panel can decide cases while the Board does not have a three-member quorum.[432] Consequently, whether the panel is acting lawfully remains unresolved in the Seventh Circuit, at least until the second issue is addressed or the Supreme Court offers its conclusion.

In spite of Section 3(b)'s ambiguity, *Chevron* allows the Supreme Court to preserve the Board's authority to decide cases while also creating a stable legal framework. Although *Chevron* deference does not resolve Section 3(b)'s ambiguity, *Chevron* allows the Board to make the ultimate determination.[433] However, *Chevron* does not give unlimited deference to the agency; instead, the agency must offer a reasonable interpretation.[434] By deferring to the Board's reasonable interpretation, the Supreme Court can reach an acceptable outcome without having to make a conclusive interpretation based on inconclusive evidence. In doing so, the Board can consider not only Section 3(b)'s language and legislative history, but also the Board's desire to continue operating. If Congress disagrees with the Board's interpretation, then Congress can amend Section 3(b) to resolve the

[430] *See generally* 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457).

[431] *Id.* at 846–47.

[432] See i*d*. at 846.

[433] *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[434] *Id.*

ambiguity.[435] Thus, *Chevron* deference allows the legislative and executive branches to make the policy determination. In this way, *Chevron* provides a legal framework that both embraces Section 3(b)'s ambiguity and creates a satisfying outcome.

[435] *See id.*