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Two Is Company but Is It a Quorum?

John Sanchez*

*The basic tool for the manipulation of reality is the manipulation of words. If you can control the meaning of words, you can control the people who must use the words.*¹

- Philip K. Dick

I. INTRODUCTION

At full strength, the National Labor Relations Board (NLRB) consists of a chairperson and four members. Historically, the chair is a member of the president's political party and the other board members consist of two Democrats and two Republicans.² Vacancies on the Board are common. On December 16, 2007, Board Chairman Robert J. Battista's term expired, leaving four members on the Board. On December 20, 2007, the remaining four members of the Board (Wilma Liebman, Peter Schaumber, Peter Kirsanow, and Dennis Walsh) unanimously voted to delegate all of its powers to a three-member group consisting of Board members Liebman, Schaumber, and Kirsanow, effective December 28, 2007. This delegation took place when there were "three or more" sitting Board members even though the Board knew at the time of the delegation that two members' terms would end in days. On December 31, 2007, the recess appointments of members Walsh and Kirsanow expired. From January 1, 2008³ until March 26, 2010 – when President Obama, exercising his recess appoint-

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¹ Philip K. Dick, *How to Build a Universe That Doesn't Fall Apart Two Days Later*, I HOPE I SHALL ARRIVE SOON 1 (1985).

² See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 244 & n.110 (2005); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714 & n.42 (2006); Ronald Turner, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, 27 HOFSTRA LABOR AND EMPLOYMENT L.J. 13 (2009); Kleisinger & Bales, *The Validity of the Two-Member NLRB*, 6 SETON HALL CIRCUIT REV. 261 (2010) (concluding that the Supreme Court should and will hold that the two-member Board decisions are contrary to the express language of the statute).

³ The Seventh Circuit in *New Process Steel* mistakenly cited the date as January 1, 2009. See *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009), *rev'd*, No. 08-1457, slip op. (U.S. June 17, 2010).

ments power,⁴ named two new members to the Board⁵ – the NLRB rendered nearly 600 decisions with only two sitting members.⁶

This article contends that the issue of whether a quorum of the NLRB requires two or three members can be resolved wholly on the basis of the plain language of the statute: there must at all times be three members of the NLRB for there to be a quorum. Neither canons of construction nor legislative history sheds much light on the quorum issue. Moreover, resort to common law agency principles or to analogous federal administrative agency quorum requirements is equally inconclusive. Also, no deference is owed to the NLRB on the quorum question since the Board never formally ruled on this issue. Finally, policy arguments weigh heavily in favor of a three-member quorum on the labor board. The quorum question may arise again in the future if board membership should ever again fall to two. For this reason, this article recommends that Congress amend the vacancy provision of Section 3(b) of the NLRA to make clear, as it has in the enabling statutes of other federal administrative agencies, that Board members whose terms expire will continue to serve until their successors officially take their places.

⁴ Recess appointments are authorized by Article II, Section 2 of the U.S. Constitution, which states: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” In *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), the Eleventh Circuit ruled that the Constitution permitted both intrasession recess appointments and recess appointments to fill vacancies that existed prior to the congressional recess. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1495 (2005). The Senate can prevent recess appointments by holding *pro forma* sessions, as Senate Majority Leader Harry Reid held from November 2007 to the end of President Bush’s term to prevent his controversial uses of the recess power. So long as a Senate recess is no longer than three days, no recess appointments can be made. After Becker’s recess appointment, Senate Republicans threaten to do the same to President Obama’s use of this power.

⁵ Steven Greenhouse, *Deadlock Is Ending on Labor Board*, N.Y. TIMES, Apr. 1, 2010, at B1. President Obama appointed Craig Becker, a lawyer for the A.F.L.-C.I.O and the Service Employees International Union and Mark Pearce, a Buffalo-based lawyer, both pro-union. Senator McCain prevented a Senate vote on these nominees, contending that Mr. Becker would deny employers their proper role in union elections. Steven Greenhouse, *Labor Panel Is Stalled by Dispute on Nominee*, N.Y. TIMES, Jan. 14, 2010. “Republicans and the business lobby have portrayed the vote on Becker in particular as a litmus test for the Democrats’ proposed ‘card check’ legislation which would make it easier to form unions.” Tony Romm, *Labor Board Chief Wants Vote on NLRB Nominees*, THE HILL’S BLOG BRIEFING ROOM, Feb. 5, 2010. Mr. Becker has been criticized by business groups over a law-review article published in 1993 that proposed limits on employers’ efforts to undermine unionization of their employees. *Quorum Quibbles*, THE ECONOMIST, Jan. 7, 2010.

⁶ *New Process Steel, L.P.*, No. 08-1457, slip op. at 3. The types of decisions include: resolving allegations of unfair labor practices and disputes over union representation; cases involving employers’ discharges of employees for exercising their organizational rights; disputes over secret ballot elections to select a union representative; employers’ unlawful withdrawals of recognition of union representatives, and refusals by employers or unions to honor their obligation to bargain in good faith.

Part II briefly summarizes the case of *New Process Steel* while Part III summarizes the circuit court split on the quorum issue. Part IV assesses the various legal bases for resolving whether two or three constitutes a quorum of the NLRB. This section looks at the text of the NLRA, its legislative history and tradition. As some courts have reasoned, when none of these sources resolves the issue, the question, at times, can be decided by giving deference to the NLRB's own interpretation of the quorum issue. Other courts have looked to common law doctrines such as agency and the *de facto* officer doctrine for assistance in deciding this issue. Moreover, the search for the relevant analogy has led some authorities to look at the quorum question involving federal judges or other federal administrative agencies such as the National Mediation Board and the Interstate Commerce Commission. Part IV examines the policy arguments for deciding whether two or three constitutes a quorum of the NLRB.

Part V reflects on the Supreme Court's ruling in *New Process Steel*, requiring the NLRB to have three members to conduct business, which leaves in legal limbo nearly 600 decisions rendered before President Obama's recess appointees reconstituted the Board in March 2010. Part V considers how the Court's own decision may affect the legal status of decisions rendered by the rump panel. Alternatively, this section addresses how Congress might amend the NLRA to deal with the quorum question in the event the Board shrinks to two members again in the future. Finally, Part V considers what options are open to the newly constituted Board on how to deal with past decisions handed down by the two-member Board.

II. *NEW PROCESS STEEL V. NLRB*

In *New Process Steel v. NLRB*,⁷ the employer and the union reached an impasse in negotiating the terms of a collective bargaining agreement. The union filed an unfair labor practice charge. The administrative law judge (ALJ) ruled in the union's favor. The employer appealed to the NLRB, whose two members approved the ALJ's judgment. The employer appealed to the Seventh Circuit. Apart from challenging the merits of the Board's findings, the employer claimed that the Board lacked authority to issue its decision because, it argued, two members do not constitute a quorum under Section 3(b) of the NLRA. In response, the NLRB asserted that since the Board had properly delegated authority to a three-member panel, the two remaining members did constitute a quorum. The Seventh Circuit ruled in the Board's favor based on the plain language of Section 3(b). The same

⁷ *New Process Steel, L.P.*, No. 08-1457, slip op., rev'g, 564 F.3d 840.

day, the District of Columbia Circuit reached the opposite conclusion in *Laurel Bay Healthcare of Lake Lanier, Inc. v. NLRB*.⁸

On November 2, 2009, the Supreme Court granted review in *New Process Steel v. NLRB*,⁹ agreeing to rule on whether the vacancy-riddled NLRB lacked authority to render decisions with only two of its five members currently in office since January 1, 2008. Oral argument was held on March 23, 2010,¹⁰ and a decision was handed down June 17, 2010. By a vote of 5-4, the Supreme Court ruled “that the delegation clause requires that a delegatee group maintain a membership of three in order to exercise the delegated authority of the board.”¹¹ The majority based its decision primarily on the plain language of the statute. Moreover, the majority noted that its decision was consistent with the board’s longstanding practice with respect to delegatee groups.

III. CIRCUIT COURT SPLIT

The First,¹² Second,¹³ Fourth,¹⁴ Seventh,¹⁵ Ninth,¹⁶ and Tenth¹⁷ Circuits have upheld the authority of two-member Board decisions, and there are over seventy-seven challenges to the validity of two-member rulings currently pending in federal Courts of Appeals.¹⁸ Only the District of Columbia Circuit Court of Appeals has ruled that three members constitute a quorum on the NLRB.

The Seventh Circuit upheld a decision by the two-member NLRB panel grounded on the “plain meaning” of section 3(b) of the Act, noting that its reading squares with the legislative history of the Taft-Hartley Act. The Seventh Circuit also relied on the Office of Legal Counsel’s opinion letter,¹⁹ the First Circuit’s decision in *Northeastern Land Services v. NLRB*,²⁰ and dictum from the Ninth Circuit in *Photo-Sonics, Inc. v. NLRB*.²¹

⁸ 564 F.3d 469 (D.C. Cir. 2009).

⁹ *New Process Steel, L.P.*, No. 08-1457, slip op.

¹⁰ Transcript of Oral Argument, *New Process Steel, L.P. v. NLRB*, No. 08-1457, slip op. (U.S. June 17, 2010), 2010 WL 1285395.

¹¹ *New Process Steel, L.P.*, No. 08-1457, slip op. at 13.

¹² *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *rev’d*, 130 S. Ct. 3498 (2010).

¹³ *Snell Island SNF L.L.C. v. NLRB*, 568 F.3d 410 (2d Cir. 2009).

¹⁴ *Narricot Indus. v. NLRB*, 587 F.3d 654 (4th Cir. 2009).

¹⁵ *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009).

¹⁶ *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982).

¹⁷ *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009).

¹⁸ See NLRB’s Response to FOIA Request ID/LR-2009-0432 (May 29, 2009).

¹⁹ Memorandum Opinion issued by the Office of Legal Counsel of the U.S. Department of Justice, 2003 WL 24166831 (Mar. 4, 2003).

²⁰ *Ne. Land Servs., Ltd.*, 560 F.3d at 36.

²¹ *Photo-Sonics*, 678 F.2d at 121.

The First Circuit ruled that the “plain text” of the Act authorized the decisions by the two-member panel, without discussing the legislative history of the statute.²² The Second²³ and Tenth²⁴ Circuits relied on different reasoning from the First and Seventh Circuits, which grounded their rulings largely on the unambiguous plain text of the statute. Instead, both the Second and Tenth Circuits ruled that the text of section 3(b) was ambiguous and that the relevant canon of construction and the Act’s legislative history were unhelpful. For this reason, both circuits turned to the second step of *Chevron USA, Inc. v. Natural Resource Defense Council, Inc.*,²⁵ which insists upon deference to an agency’s statutory interpretation whenever the agency is charged with administering the statute and the agency’s reading is reasonable.

The Ninth Circuit, in *Photo-Sonics, Inc. v. NLRB*,²⁶ while not specifically addressing the precise issue, ruled that two members of a properly created three-member group could issue a decision even after the resignation of the third member of the group. The relevance of *Photo-Sonics* is further undermined by the fact that the NLRB “as a whole continued to have four members, even after one member of the ‘group’ resigned.”

By contrast, in *Laurel Baye*,²⁷ the District of Columbia Circuit overturned a ruling by a two-member panel, citing the plain language of section 3(b) of the Act, noting that its reading melds with analogous principles of agency law, but without discussing the relevant legislative history.

IV. ANALYSIS

A. Text

1. Plain Language

Section 3(b) of the NLRA states, in relevant part, 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

²² *Ne. Land Servs. Ltd.*, 560 F.3d at 41.

²³ *Snell Island SNF L.L.C. v. NLRB*, 568 F.3d 410 (2d Cir. 2009).

²⁴ *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009).

²⁵ *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²⁶ *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 123 (9th Cir. 1982).

²⁷ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009).

that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.²⁸

As the Fourth Circuit put it:

Section 3(b) contains three provisions that are pertinent here: (1) a ‘delegation’ provision, allowing the Board to delegate ‘any or all’ of its powers to a three-member group; (2) a ‘vacancy’ provision, providing that a vacancy in the Board ‘shall not impair’ the authority of the remaining Board members to act; and (3) a ‘quorum’ provision, providing that three members constitute a quorum of the Board, but with an exception providing that two Board members constitute a quorum of any group designated pursuant to the ‘delegation’ provision.²⁹

The D.C. Circuit Court adds, I think correctly, that section 3(b) contains a fourth provision, a “delegee group” quorum provision that “two members shall constitute a quorum of any [three-member] group [to which the Board delegated its powers pursuant to the delegation provision.]”³⁰

Two separate arguments emerge from section 3(b)’s “delegation” provision, both of which lead to the conclusion that two-member Boards are unauthorized to act. The first argument avers “that the Board’s delegation was improper in the first instance” because the Board knew no third member would ever hear cases since his term expired a week after the delegation took place.³¹ The second argument insists that, although the initial delegation was valid, it became invalid once the third Board member left. By contrast, defenders of two-member Boards make clear that provided the initial delegation to a three-member group was valid, it is irrelevant that subsequently one member left or her term expired.³²

The First Circuit focused on the vacancy provision:

[A] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board. In our view, if the board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.³³

²⁸ 29 U.S.C. § 153(b) (2006).

²⁹ *Narricot Indus. v. NLRB*, 587 F.3d 654, 660 (4th Cir. 2009).

³⁰ *Laurel Baye Healthcare*, 564 F.3d at 471.

³¹ This argument was made by *New Process Steel*. See *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009), *rev’d*, No. 08-1457, slip op. (U.S. June 17, 2010).

³² See, e.g., Opinion of the Office of Legal Counsel, *supra* note 19.

³³ *Ne. Land Servs. Ltd.*, 560 F.3d at 41.

Similarly, the Fourth Circuit concluded that “under the plain and unambiguous text of Section 3(b), . . . the designated three-member group was empowered to act with a two-member quorum.”³⁴ The Fourth Circuit deemed the D.C. Circuit’s decision as:

an overly narrow construction of the modifying phrase that directly follows the three-member quorum requirement. . . . The statutory phrase ‘except that’ ordinarily introduces an exception. . . . If the loss of one member of a three-member group automatically caused the group to cease to exist, then a two-member quorum would *never* suffice. The statute, however, expressly provides for a three-member designated group to act with only two members.³⁵

Moreover, the Fourth Circuit held that the D.C. Circuit’s reading of section 3(b) is “inconsistent with 3(b)’s ‘vacancy’ provision, which specifies that a ‘vacancy in the Board’ – or, necessarily, a three-member group acting with the full powers of the Board – ‘shall not impair the right of the remaining members to exercise all of the powers of the Board.’”³⁶

Finally, the Seventh Circuit concluded that:

the vacancy of one member of a three[-] member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy.³⁷

By contrast, in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, the District of Columbia Court of Appeals, alone among the circuit courts, concluded that two-member NLRB Boards are unauthorized to render binding decisions.³⁸ Relying principally on the “at all times” requirement for Board quorum, the Court ruled that a “three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, ‘at all times,’ satisfied. Whenever the Board loses jurisdiction because of a loss of quorum, so too do any panels of the Board lose jurisdiction, regardless of whether the panel retains a quorum.”³⁹ The D.C. Circuit Court refused to rely on Laurel Baye’s argument that the Board delegation could not stand because it was a sham.

³⁴ *Narricot Indus.*, 587 F.3d at 659.

³⁵ *Id.* at 659-60.

³⁶ *Id.* at 660.

³⁷ *New Process Steel*, 564 F.3d at 845-46.

³⁸ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

³⁹ *Id.* at 472-73.

The D.C. Circuit rejected the NLRB's argument that the "except that" provision was an exception to the "at all times" requirement:

[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 group designated pursuant to the first sentence hereof. . . . Congress's use of differing object nouns ['quorum of the Board' versus 'quorum of any group'] within the two quorum provisions indicates clearly that each quorum provision is independent from the other . . . the delegee group quorum provision does not eliminate [the Board's quorum] requirement . . . nor does it permit the two-member panel to 'circumvent the statutory Board quorum requirement.'⁴⁰

By contrast, supporters of a two-member quorum make an intertextual argument⁴¹ in reconciling the "at all times" and "except" provisions of section 3(b). "Indeed, Congress has used the construction 'at all times . . . except' in a number of statutes to accomplish exactly what it did [in § 3(b)] – to provide that a general rule should apply at all times except in the instances specified in the statute."⁴² For example, the Higher Education Opportunity Act⁴³ provides that the Secretary of Education shall "maintain and preserve at all times the confidentiality of any program review report . . . except that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review."⁴⁴

2. Canons of Construction

"The plain meaning rule relies upon the definitions of particular words and phrases to interpret text. In contrast, the canons of construction are rules of inference that draw meaning from the structure or context of a written rule."⁴⁵ In the end, however, reliance on any or all of the following canons of construction, either because they are unhelpful or because each

⁴⁰ *Id.* at 470.

⁴¹ Intertextual arguments "draw inferences about the meaning of legal text by comparing it to language of other legal documents. . . ." WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 37 (2d ed. 2008).

⁴² See Brief for NLRB by Solicitor General at 6, *New Process Steel, L.P. v. NLRB*, No. 08-1457, slip op. (U.S. June 17, 2010).

⁴³ Pub. L. No. 110-315, § 497, 122 Stat. 3328, (to be codified at 20 U.S.C. § 1099c-1(b)(8) (Supp. II 2008)).

⁴⁴ *Id.*

⁴⁵ HUHN, *supra* note 41, at 22.

canon can be undermined by a conflicting canon, does not resolve the quorum issue.⁴⁶

According to *Chevron*, “[o]nly if [a court] determines that Congress has not directly addressed the precise question at issue will [it] turn to canons of construction. . . .”⁴⁷ Concluding that “[n]othing in the statute itself explains what happens to a duly constituted panel of the NLRB when the Board itself loses its quorum,” in *Snell Island v. NLRB*, the Second Circuit, like the D.C. Circuit in *Laurel Baye*, relied on “[a] cardinal principle of interpretation . . . that no provision is rendered inoperative or superfluous, void or insignificant.”⁴⁸ Under this canon, “courts should avoid interpretations of statutes that ‘render statutory language surplusage.’”⁴⁹ Specifically, the D.C. Circuit stressed that “the Board quorum requirement must be satisfied at all times.”⁵⁰ While agreeing with this aspect of the D.C. Circuit’s analysis, the Second Circuit noted that this language “does not answer the precise question presented here: Once the Board has lost its quorum, what happens to a panel that was duly constituted before the Board lost its quorum?”⁵¹ For this reason, the Second Circuit turned to the Act’s legislative history for guidance, since the relevant canon of construction led nowhere.

The 2003 Opinion by the Office of Legal Counsel invoked a canon of construction in interpreting section 3(b)’s vacancy provision:

In the construction of an Act of Congress, ‘unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things.’ Thus, the provision under which ‘[a] vacancy in the Board shall not impair the right of the remaining members,’ also applies to more than one vacancy, as long as the quorum requirement is met.⁵²

⁴⁶ But a foolish consistency is not necessarily a virtue. As Walt Whitman put it: “Do I contradict myself? Very well then, I contradict myself. I am large, I contain multitudes.” WALT WHITMAN, *LEAVES OF GRASS* 77 (The Modern Library 1921) (1855).

⁴⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁴⁸ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472 (D.C. Cir. 2009) (citing *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998)). This canon of construction is known as a textual canon which “operates like rules of syntax in that they are used to infer the meaning of a rule from its textual structure or context.” HUHNS, *supra* note 41, at 23. By contrast, “substantive canons are interpretive principles that are derived from the legal effect of a rule.” *Id.* at 24.

⁴⁹ *Snell Island SNF, L.L.C. v. NLRB*, 568 F.3d 410, 420 (2d Cir. 2009).

⁵⁰ *Laurel Baye*, 564 F.3d at 472.

⁵¹ *Snell Island SNF*, 568 F.3d at 420.

⁵² Opinion of the Office of Legal Counsel, *supra* note 19, at 2 n.3 (quoting 1 U.S.C. § 1 (2006), and 29 U.S.C. § 153(b) (2006), respectively).

An amicus brief⁵³ invokes the “constitutional avoidance” canon of construction: “Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”⁵⁴ According to this argument, deferring to the NLRB’s interpretation of Section 3(b) “raises serious separation of powers concerns by permitting an independent regulatory agency to supplant the necessity of the President and the Senate to carry out their Article II responsibilities to nominate and confirm officials to constitute the requisite quorum.”⁵⁵

The Supreme Court brief for Petitioner, New Process Steel, cited three additional canons of statutory construction in support of its conclusion that two-member groups lack authority to issue binding decisions: (1) words and clauses in a statute cannot be ignored, and each of them should be accorded its ordinary and natural meaning; (2) conflicts that arise between words and clauses must be resolved in a way that harmonizes them without diminishing the force or meaning of any of them; and (3) each word and clause must be considered in its context so that no meaning is lost by unnaturally narrow focus.⁵⁶ Again, application of these canons becomes circular and begs the question: Is there a separate quorum requirement for the Board and for a panel of the Board? A substantive canon – “remedial statutes are to be liberally construed” – might apply in this context, since the NLRA has been deemed a remedial statute. If properly invoked, a liberal interpretation of the statute would seem to uphold the authority of two-member Boards to act. Otherwise, two-member boards would have no alternative but to shut down altogether, leaving the goals of the NLRA unfulfilled. Of course, it might be argued, such a stalemate would exert pressure on the President and Congress to fill vacancies. But, again, this canon clearly conflicts with another substantive canon – “statutes in derogation of the common law are to be strictly construed.”⁵⁷ The NLRA is both a remedial statute and in derogation of the common law; therefore, conflicting canons cancel each other out.

⁵³ See Brief for Amicus Curiae, Chamber of Commerce of the United States, In Support of Petitioner, New Process Steel, L.P. v. NLRB, No. 08-1457, slip op. (U.S. June 17, 2010).

⁵⁴ *Id.* at 9 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

⁵⁵ *Id.*

⁵⁶ Brief for Petitioner at 13, *New Process Steel, L.P. v. NLRB*, No. 08-1457, slip op. (U.S. June 17, 2010).

⁵⁷ HUHNS, *supra* note 41, at 102.

B. Legislative History

“Evidence of intent may be drawn from the text of the law itself, from previous versions of the text, from its drafting history, from official comments, or from contemporary commentary.”⁵⁸

The National Labor Relations Act⁵⁹ originally provided that the NLRB would consist of three members.⁶⁰ Section 3(b) of the NLRA was amended by the Taft-Hartley Act, increasing the size of the Board from three members to five. The Taft-Hartley Act itself was a compromise between the House bill,⁶¹ which kept a three-member Board, and the Senate bill,⁶² which proposed increasing the Board from three to seven members.

In support of its ruling that two-member Boards are valid, the Seventh Circuit noted that the primary reason Congress expanded the size of the Board from three to five was to increase the efficiency of the Board.⁶³ A five-member Board would:

allow the NLRB to hear more cases by creating panels of the entire Board. There is no suggestion in the relevant reports that the Board is restricted from acting when its membership falls below a certain level. . . . Indeed, a court interpreting the statute that way would hinder the efficient panel operation that Congress intended to create.⁶⁴

At first glance, the “efficiency” argument gleaned from the Taft-Hartley amendments appears to be a strong argument in support of the view that Congress authorized two-member Boards. But is the Board operating efficiently when one Board member or another is constantly stifling his or her true beliefs in the interest of preventing gridlock? Indeed, both current Board members, Liebman and Schaumber, have stated on the record that each has trimmed his or her sails on many cases these past two years in the interest of keeping the NLRB up and running.

On rare occasions, the NLRB has rendered decisions by a two-member Board where the third member either recused himself or otherwise failed to

⁵⁸ *Id.* at 34.

⁵⁹ 29 U.S.C. §§ 151-169.

⁶⁰ See Act of July 5, 1935, ch. 372, § 3(a), 49 Stat. 449, 451 (amended 1947).

⁶¹ H.R. REP. NO. 80-245 (1947).

⁶² S. REP. 80-105, at 19 (1947).

⁶³ *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 847 (7th Cir. 2009), *rev'd*, No. 08-1457, slip op. (U.S. June 17, 2010) (“There is no field in which time is more important, yet the Board from 12 to 18 months behind in its docket. . . . The expansion of the Board from three to seven members, which this bill proposes, would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage. . . .” (quoting S. REP. NO. 80-105, at 8 (1947))).

⁶⁴ *Id.*

join in a decision.⁶⁵ Nevertheless, these decisions were still issued by all three members and so do not undermine the principle that a three-member board constitutes a quorum.

C. Tradition

1. 1935-1947

Under the original Wagner Act, the NLRB consisted of only three members. The Act specifically provided that a vacancy on the three-member Board would not impair the quorum of the two remaining members from exercising all of the powers of the Board.⁶⁶ In fact, from 1935 to 1947, the Board frequently decided cases with a quorum of two members when one of the three seats was vacant. Originally, the NLRB was intended to be a nonpartisan body composed of three impartial government members.⁶⁷

2. 1947-2010

When the Taft-Hartley Act increased the NLRB's size to five members, Congress decided it wanted the labor board to remain nonpartisan.⁶⁸ But over time it became customary for the President to appoint three members of his political party and two members from the opposite political party.⁶⁹ This evolution from nonpartisan to partisan means that the Board could end up with members of only one political party. While Petitioner's brief suggests that this fact bolsters the argument in favor of a three-member quorum,⁷⁰ a two-member board could just as likely end up representing only one political party.

In 1974, when the NLRB had three members, it issued a decision in a representation case, *KFC National Management Corp. v. NLRB*,⁷¹ through a single Board member and two senior staff attorneys. The Second Circuit

⁶⁵ *E.g.*, *Wisconsin Bell, Inc.*, 346 N.L.R.B. 62 (2005).

⁶⁶ *See* Wagner Act, Pub. L. No. 74-198, § 3(a), 49 Stat. 449, 451 (1935) ("There is hereby created a board. . . which shall be composed of three members. . . ."); *id.* § 3(b) ("A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.").

⁶⁷ *See* Sen. Comm. Print, Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.) § 3 (1935), *reprinted in* 1 Leg. Hist. 1947 at 1319-20.

⁶⁸ *See* H.R. REP. 80-510 at 36-37 (1947), *reprinted in* 1 Leg. Hist. 1947 at 540-41.

⁶⁹ *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714 n.42 (2006).

⁷⁰ Brief for Petitioner, *supra* note 56, at 33-34.

⁷¹ *KFC Nat'l Mgmt. Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974).

rejected the Board's attempt to ignore the quorum and panel requirements in the service of efficiency.⁷²

The problem of Board member turnover and vacancies was persistent during President Clinton's first year in office, when the Board fell to two members.⁷³

When the NLRB's membership has dropped to three, the Board consistently designated those members as a "group" in cases where one member would be disqualified yet a quorum of the remaining two members would reach a ruling. As the 2003 Opinion of the Office of Legal Counsel made clear, "this practice suggests that three-member groups may be constituted even when it is foreseen that only two members will actually participate in a decision."⁷⁴

Former Board Chair, Robert Battista, estimated "that in his time on the NLRB, it operated with fewer than the full five members about 30 percent of the time."⁷⁵

On August 26, 2005, the three-member NLRB delegated all of the Board's powers to themselves as a three-member group in anticipation of the expiration of Member Schaumber's term on August 27, 2005.⁷⁶ For the next four days, before Member Schaumber was reappointed through a recess appointment, the two-member group handed down several unpublished orders and one published ruling on a procedural motion.⁷⁷ In *Snell Island SNF LLC v. NLRB*, the Second Circuit upheld a two-member quorum in part because Congress historically has let decisions stand by a two-member NLRB.⁷⁸

⁷² *Id.*

⁷³ See Brief for Petitioner, *supra* note 56, at 6 ("For a short period in 1993, the Board actually fell to two members, one short of its statutory quorum" and noting: "During this period, the Board could not act on contested cases. Anticipating the loss of a quorum, the Board delegated the section 10(j) authority to the General Counsel." The Board's "10(j)" authority is the power to seek injunctive relief in certain Unfair Labor Practice cases. . . .") (citing John E. Higgins, Jr., *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U.L. REV. 941, 954 n.43 (1998)).

⁷⁴ Opinion of the Office of Legal Counsel, *supra* note 19, at 3; see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1274 (2000) ("[W]here the Board has fallen below three members, the Board has declined to rule on pending contested matters until a third member has been appointed."); John C. Trusdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. J. 1, 6 n.20 (2000).

⁷⁵ Adele Nicholas, *Court Approves Authority of Two-Member NLRB*, INSIDE COUNSEL, June 1, 2009, at 70.

⁷⁶ Brief for NLRB by Solicitor General, *supra* note 42 (citing BNA, 166 Daily Labor Rep., A-1, at 17 n.15 (Aug. 29, 2005)).

⁷⁷ *Id.* (citing *Extencicare Homes, Inc.*, 345 N.L.R.B. 905 (2005)).

⁷⁸ 568 F.3d 410.

D. *Chevron* Deference

While courts generally enjoy a wide berth in reviewing questions of law, in administrative law there is a long tradition of deferring to the legal positions taken by agencies. Coincidentally, one of the first Supreme Court decisions that shaped this doctrine of deference involved the NLRB. In *NLRB v. Hearst Publications, Inc.*,⁷⁹ the Supreme Court deferred to the Board's ruling that newsboys were employees covered by the NLRA because Congress delegated to the Board the duty to determine what kinds of workers constitute employees. So long as the Board applied proper legal standards, the reviewing court's function was at an end.

The Supreme Court refined its deference to agencies' interpretations doctrine in what is now the leading case on the doctrine, *Chevron U.S.A., Inc. v. NRDC*.⁸⁰ According to *Chevron*, if neither the canons of construction nor legislative history reveal Congress's intent, courts should proceed to *Chevron*'s step two, directing courts to defer to an agency's interpretation of the statute it administers, so long as it is reasonable.⁸¹ Turning to step two, both the Second and Tenth⁸² Circuits concluded that the NLRB's interpretation of Section 3(b) – asserting that two members constitute a quorum – was a reasonable interpretation, especially given that panels of two members would allow the Board to continue to operate. While conceding that the D.C. Circuit's reading of the statute was equally reasonable, the Second and Tenth Circuits concluded that “in applying *Chevron* deference, an agency's ‘view governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts.’”⁸³

Nevertheless, the argument can be made that the NLRB never itself authoritatively determined what number of members constitutes a quorum, relying instead entirely on the Office of Legal Counsel's opinion that two members constitute a quorum.⁸⁴ Under this view, no deference is owed the OLC opinion since it is not the agency that administers the NLRA.⁸⁵ As pointed out in *New Process Steel's* brief,⁸⁶ “[e]ven if deference were appropriate, it is undermined by the Board's failure to conduct rulemaking or engage in any public deliberative process.”⁸⁷

⁷⁹ *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

⁸⁰ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁸¹ 568 F.3d at 415.

⁸² *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009).

⁸³ 568 F.3d at 424 (quoting *Energy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009)).

⁸⁴ *See, e.g.*, Brief for Petitioner, *supra* note 56, at 12 n.6.

⁸⁵ *Id.* (citing *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997)).

⁸⁶ *Id.* at 28 & n.13.

⁸⁷ *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

Some legal scholars have noted that, for a time, the Supreme Court “added a third, threshold step – a ‘Step Zero’ – to the *Chevron* framework, asking whether an agency’s decision is of a kind that deserves any deference at all.”⁸⁸

E. Common Law Doctrines

1. Agency Principles

In *Laurel Baye*, the D.C. Circuit relied in part on basic tenets of agency and corporation law in support of its ruling that three Board members are required for it to conduct business.⁸⁹ In other words, three-member groups acted as an agent of the Board. Consequently, “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended.”⁹⁰ “Under established common law principles, institutional delegations of power are not affected by changes in personnel” since such power is not held individually, “but collectively among the members of a public board or commission.”⁹¹

But this reliance on agency is misplaced for a few reasons. First, agency suggests the creation of a fiduciary relationship which does not accurately describe how NLRB panels relate to the Board itself. As one brief put it, “Board members in the group have been jointly delegated all of the Board’s institutional powers and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.”⁹² Secondly, in *Yardmasters of America v. Harris*,⁹³ the same D.C. Circuit rejected reliance on agency principles in a case addressing the definition of quorum under another federal labor statute, concluding that the operations of a public agency should continue to function in circumstances where a private body might be disabled.

⁸⁸ See Abigail R. Moncrieff, *Reincarnating the ‘Major Questions’ Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got it Wrong)*, HARV. LAW SCHOOL FACULTY SCHOLARSHIP SERIES 5 (2008), available at http://lsr.nellco.org/harvard_faculty/12; see also Cass R. Sustein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (assessing the “major questions” exception).

⁸⁹ The D.C. Circuit relied on the RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006), and WILLIAM MEADE FLETCHER, 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 421 (“If there are fewer than the minimum of directors required by statute, [the remaining directors] cannot act as a board.”). *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

⁹⁰ *Id.* at 473.

⁹¹ Appellate Brief, *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 & 08-1214, 2008 WL 4735424, at *10 (D.C. Cir. 2008).

⁹² Surreply Brief For The National Labor Relations Board at 9, No. 09-1194, *NLRB v. Am. Directional Boring, Inc. d/b/a ADB Utility Contractors, Inc.* (8th Cir. 2009).

⁹³ 721 F.2d 1332 (D.C. Cir. 1983).

2. *De Facto* Officer Doctrine

In oral argument before the Supreme Court, Justice Kennedy raised the possibility that two-member quorums might be allowed under the *de facto* officer doctrine. An officer *de facto*:

is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised . . . under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity . . . being unknown to the public.⁹⁴

The doctrine was developed to protect the public from the confusion that would ensue if actions taken by public officials could subsequently be invalidated by pointing out defects in the officials' authority.

The doctrine, however, distinguishes between procedural defects, which are subject to waiver, and jurisdictional defects, which are non-waivable. The weight of authority strongly suggests that lack of a quorum is a jurisdictional, not a procedural, defect that can be waived. For this reason, it is unlikely that the *de facto* officer doctrine can settle the quorum issue satisfactorily.

F. Analogies

In assessing the NLRB quorum issue, both sides support their position by pointing to other quorum cases arising under other federal statutes, such as the enabling statute for federal courts, or the operation of the National Mediation Board and the Interstate Commerce Commission. In the end, however, none of these analogies are dispositive, either because of the differing statutory language or because of differences in the way these federal courts and agencies operate.

1. Analogies to Judges

In *New Process Steel*, the petitioner analogized NLRB panels to panels of circuit court judges. Invoking legislative history, *New Process Steel* argued "that the Taft-Hartley revisions were designed to make the NLRB function more like a court of appeals and to bring a greater variety of opinions into the review of administrative decisions."⁹⁵ Similarly, in *Photo-*

⁹⁴ Norton v. Shelby Cnty., 118 U.S. 425, 446 (1886).

⁹⁵ *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 847 (7th Cir. 2009), *rev'd*, No. 08-1457, slip op. (U.S. June 17, 2010).

Sonics, Inc. v. NLRB, the Ninth Circuit drew an analogy to cases where courts having three members “have issued decisions by a quorum of two judges when the third died or was ill.”⁹⁶ In these cases, “[c]ourts have interpreted ‘quorum’ to mean the ‘number of the members of the court as may legally transact judicial business.’”⁹⁷

In *Nguyen v. United States*,⁹⁸ however, the Supreme Court ruled that a circuit court of appeals could not operate with a panel of two Article III judges and a third Article IV judge. Only a panel consisting of three Article III judges was a properly constituted panel.

The relevance of the judicial analogy is problematic given that the judicial statute lacks a delegation or quorum clause. The statute starkly requires that panels consist of three judges. Moreover, Congress amended the statute out of concern over circuit courts too often assigning cases to panels of two.⁹⁹

2. Analogy to Other Administrative Agencies

a. National Mediation Board (NMB)

In *Railroad Yardmasters of America v. Harris*, the D.C. Circuit upheld the National Mediation Board’s delegation of its authority to a single member, concluding that “it would seem that if the [National Mediation] Board can use its authority to delegate in order to operate more efficiently, then *a fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled.”¹⁰⁰ Seeking to distinguish the two federal agencies, the D.C. Circuit stressed that, “[u]nlike the National Labor Relations Board, the [NMB] is not principally engaged in substantive adjudications” and “does not adjudicate unfair labor practices or seek to enforce individual rights under [its governing statute].”¹⁰¹

b. Interstate Commerce Commission

In *Nicolson v. ICC*,¹⁰² a case was assigned to a panel of three commissioners. Since the case was assigned to a properly constituted group of three commissioners – as expressly allowed under the Interstate Commission Act – the D.C. Circuit rejected the challenge to the Commission’s authority to act.

⁹⁶ *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 122 (9th Cir. 1982).

⁹⁷ *Id.* (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)).

⁹⁸ *Nguyen v. United States*, 539 U.S. 69 (2003).

⁹⁹ See *New Process Steel, L.P.*, 564 F.3d at 848.

¹⁰⁰ *R.R. Yardmasters of America v. Harris*, 721 F.2d 1332, 1340 n.26 (D.C. Cir. 1983).

¹⁰¹ *Id.* at 1345.

¹⁰² *Nicolson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983).

G. Policy Arguments

A public policy argument against allowing two-member boards to issue binding rulings is that such boards cannot reverse precedent. According to NLRB tradition, only three-member Board majorities can overturn precedent. In light of this tradition, since 2008, “Schaumber or Liebman set aside their policy position for ‘institutional reasons.’ This has resulted in parties being denied an effective remedy or defense because of the Board’s desire to avoid a tie-vote stalemate.”¹⁰³

Moreover, a three-person group makes good sense: “decision-making by odd-numbered bodies is commonplace; even-numbered or even two-member adjudicatory bodies are not.”¹⁰⁴ The vigor of dissent cannot inform decisions of a two-member Board.”¹⁰⁵ Indeed, “majority rule facilitates the expression of minority views.”¹⁰⁶ Former NLRB Chairman Robert J. Battista told Congress in 2007, “[D]issent is healthy for many reasons, including the assurance dissent provides that the members of the majority have considered carefully opposing views and arguments.”¹⁰⁷

The distinction between agencies, like the NLRB, that make policy through adjudications, not rulemaking, has also been enlisted in support of the view that two-member boards are to be discouraged.

New Process Steel’s brief emphasized that the NLRB makes policy through adjudication, not rulemaking, as a policy argument in favor of a three-member quorum.¹⁰⁸ According to this argument, “a two-member body does not maximize the potential for meaningful debate or consideration of differing viewpoints. It is simply too small to be representative or even to permit a decision by a majority vote.”¹⁰⁹

V. DEALING WITH THE BOARD’S PRE-*NEW PROCESS STEEL* DECISIONS

Since the Supreme Court ruled in *New Process Steel* that three members constitute a quorum necessary for Board action, the question arises: What to do with the hundreds of decisions rendered by a rump board? Part V assesses this question from three perspectives: 1) what impact the

¹⁰³ Brief for the Michigan Regional Council of Carpenters as Amicus Curiae in Support of Petitioner at 17, *New Process Steel, L.P. v. NLRB*, No. 08-1457, slip op. (U.S. June 17, 2010).

¹⁰⁴ While both the Federal Election Commission and the International Trade Commission have an even number of Commissioners (6), their enabling statutes spell out either the need for a supermajority (4 votes), 2 U.S.C. §§ 437(c), 437d(a)(6)-(9), or other ways of handling tie votes, 19 U.S.C. § 1330(a), (d). See Brief for Petitioner, *supra* note 56, at 25 n.11.

¹⁰⁵ Brief for Petitioner, *supra* note 56, at 15.

¹⁰⁶ *Id.* at 26.

¹⁰⁷ *Id.*

¹⁰⁸ Brief for Petitioner, *supra* note 56, at 34.

¹⁰⁹ *Id.* (citing Robert’s Rules of Order, § 3 (10th ed. 2001)).

Supreme Court ruling itself can have on this question; 2) what Congress can do to amend the NLRA to deal with past decisions and the possibility of two-member boards again in the future; and 3) what the NLRB itself can do – either through ratification or reconsideration – to dispose of nearly 600 cases decided by a two-member Board.

Both the Supreme Court majority and dissent in *New Process Steel* noted that the Board had also delegated authority to the general counsel, who made use of that authority over the 27-month two-member board period. On July 7, 2010, the newly constituted five-member board ratified the December 2007 temporary delegation, stating “[a]lthough we believe that the court litigation delegation has always been valid, this ratification is intended to remove any question that has arisen or may arise regarding that delegation. Accordingly, the board hereby ratifies the court litigation authority of the general counsel described in the December 28, 2007 delegation.”¹¹⁰ On that same day, the board also “ratified all personnel, administrative, and procurement actions taken by the two members during the 27-month period, including but not limited to appointments of regional directors, administrative law judges, and senior executives.”¹¹¹

A. Impact of Supreme Court’s Ruling

There are three approaches the Supreme Court can take in deciding the issue of retroactivity, according to Justice Souter in *James B. Beam Distilling Co. v. Georgia*:

1) Most commonly, “a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with *res judicata* and procedural barriers such as statutes of limitations.”¹¹²

2) A court may apply its new rule wholly prospectively, “neither to the parties in the law making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision.”¹¹³

3) A court may turn to “selective prospectivity,” where it applies the new rule to the parties in the case in which it is announced, but refuses

¹¹⁰ Edwin S. Hopson, “NLRB Further Responds to Supreme Court’s New Process Steel Decision,” Wyatt Employment Law Report, July 9, 2010 (on file with author).

¹¹¹ *Id.*

¹¹² 501 U.S. 529, 535 (1991).

¹¹³ *Id.* at 536.

to apply it retroactively to other cases based on facts antedating its new rule.¹¹⁴

Since the Supreme Court had never before ruled on what constitutes a proper quorum for the NLRB, no party could make the case that it reasonably relied on either a two-member or three-member quorum requirement. As the Supreme Court said in *Rivers v. Roadway Express, Inc.*, “a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.”¹¹⁵

In assessing which of these approaches to take, the Court weighs the following policies: finality, fairness, reliance and stare decisis.¹¹⁶ These policies, in turn, are shaped by whether the Supreme Court is 1) creating a new rule, 2) overturning its own precedent, or 3) interpreting a statutory provision for the first time (i.e., where there is no precedent at all). Since the Court’s decision in *New Process Steel* marks the first time it is addressing this issue, arguably the reliance and stare decisis factors drop out of the picture and the question of retroactivity should turn on the fairness and finality factors.

Given that the Court was silent on the question of retroactivity, viewed prospectively the rump decisions fall into two categories: 1) all currently pending NLRB cases plus all pending appeals from NLRB rulings, and 2) all previously decided and unappealed NLRB rulings and rulings appealed, decided and not the subject of a pending cert petition. A Supreme Court decision requiring a three-member quorum, therefore, would apply to the first class of cases but not to the second.

B. Congress Can Amend the NLRA

In 1978, the Interstate Commerce Commission faced resignations that left the Commission with less than seven members, the minimum number to conduct business. The Commission petitioned Congress to amend the statute. Congress did, allowing the Commission to act through a majority of the Commissioners.¹¹⁷

¹¹⁴ *Id.* at 537.

¹¹⁵ *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994).

¹¹⁶ *See, e.g.*, *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86 (1993).

¹¹⁷ *See Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980).

1. Section 3(b) Amendments

- a. Amend “Quorum” Provision

Regardless of the Supreme Court’s decision in *New Process Steel*, Congress is free to accept the Court’s interpretation of what constitutes a quorum or it could decide for itself whether it meant two or three members were required for the labor board to conduct business. Even if the Court had ruled that two constitutes a Board quorum, Congress could still amend Section 3(b) and make clear that there must always be three NLRB members before it may conduct business. So long as the Supreme Court is merely interpreting federal law, Congress is free to overrule a Court’s decision simply by amending federal law. It is only when the Court’s ruling involves the Constitution that Congress is not able to overrule the Court’s decision.

- b. Amend “Vacancy” Provision

One option would be to amend section 3(b)’s vacancy provision, making clear that any Board member whose term expires shall continue to serve until a replacement is either confirmed by the Senate or appointed by the President under his recess appointment power. Petitioner’s brief cites three federal administrative agencies – the Federal Election Commission, the Commodity Futures Trading Commission, and the Equal Employment Opportunity Commission – whose enabling statutes prescribe that when a commissioner’s term expires, he or she may continue to serve until his or her successor has taken office as a member of the commission.¹¹⁸

Aside from amending the NLRA to address future Board quorum issues, could Congress enact a law retroactively ratifying all decisions rendered by the two-member Board? Conceivably it could, but such a move creates its own separation of powers and due process questions.

- C. What the NLRB Can Do

1. Shut Down Whenever Board Lacks a Quorum

Any business transacted where a quorum is not present is null and void except for one item, and that is a motion to adjourn. As extreme an action as suspending operations while a commission lacks a quorum may seem, Petitioner’s brief cited four federal administrative agencies that did just that until the lack of a quorum was remedied.¹¹⁹

¹¹⁸ Brief for Petitioner, *supra* note 56, at 37.

¹¹⁹ *Id.* at 29-30.

2. Newly Constituted Board Can Ratify Past Decisions

One option for dealing with decisions rendered by a Board lacking a quorum would be for the newly-constituted Board to simply ratify those decisions rather than to rehear them. In dicta in *Laurel Baye*, the D.C. Circuit suggested “[p]erhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel’s previous decisions, including the case before us.”¹²⁰ While ratification may be challenged on due process grounds, as a general rule, “courts cannot probe the mental processes of government decisionmakers.”¹²¹ Moreover, at least two of those ratifiers, Liebman and Schaumber, would already be quite familiar with the cases they are ratifying. Requiring the new Board to reconsider each rump decision *de novo* would be an empty gesture and would not necessarily afford parties any additional substantive or procedural rights. Indeed, going back to square one might allow “parties to avoid liability entirely because of a statute of limitations that could be construed to bar a refiled case.”¹²²

Then there is the matter of cases decided by the two-member Board for which no quorum objection was raised. Whether these decisions even need to be ratified is an open question – it may turn on whether lack of a quorum is a procedural or jurisdictional defect. Under the *de facto* officer doctrine, procedural defects may be waived, but jurisdictional ones cannot.

3. Newly Constituted Board Can Reconsider All Past Decisions

Now that two new members have joined the labor board, thanks to recess appointments, the Board might have to reconsider all the decisions rendered earlier by the two-member Board. It might do so if only in the face of potential due process challenges raised if the new Board merely ratified in one fell swoop all decisions handed down by the rump panel. This alternative, however, poses its own risks, assuming, as it does, that the Board would be back to square one with these cases. In this event, the statute of limitations might bar reevaluation of many if not most of these cases. As such, reconsideration is a most unattractive option and should be undertaken only as a last resort.

¹²⁰ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009).

¹²¹ Appellant’s Reply Brief, *FEC v. Legi-Tech, Inc.*, Nos. 94-5379 & 95-5085, 1995 WL 17204319, at *2 (D.C. Cir. Nov. 27, 1995).

¹²² *Id.*

4. NLRB Cannot Do What the SEC Did

Unlike the NLRA, the Securities and Exchange Act did not contain a quorum provision. In the face of Congressional silence on the issue, the SEC adopted its own rule to allow two members of the five-member SEC to conduct business. In *Falcon Trading Group, Ltd.*,¹²³ the D.C. Circuit upheld the SEC's power to decide its own quorum in the face of congressional silence. But this option is not available to the NLRB because its enabling statute specifically spells out the definition of a quorum, albeit ambiguously.

VI. CONCLUSION

For now, with the addition of two recess appointments, the NLRB quorum issue recedes. But the issue can re-emerge in the future as it has in the past. The Supreme Court upheld the D.C. Circuit in *Laurel Baye* and concluded the NLRB must consist of three members at all times to conduct business. In light of this ruling, this article has attempted to address the possible options for disposing of the hundreds of cases decided by a Board lacking a quorum.

As politics become more polarized, it is foreseeable that any President's Board nominees flunk a cloture vote in the Senate, once again leaving the Board without a quorum. Even the President's recess appointment power might be thwarted, as it was in 2007-08, when Senate Democrats prevented President Bush from making any recess appointments by keeping the Senate in session virtually nonstop for the last fifteen months of his term in office.

The Supreme Court may have settled the quorum issue in *New Process Steel*, but the political branches of government ultimately enjoy the power to deny the NLRB whatever number of members are needed to conduct business. The best approach for avoiding shutting down the labor board for lack of a quorum would be for Congress to amend section 3(b)'s vacancy clause to make clear that members whose terms expire will continue to serve until a replacement's term begins.

¹²³ *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996).