"A Nigh Endless Game of Battledore and Shuttlecock"1: The D.C. Circuit's Misuse of Chenery Remands In NLRB Cases

Matthew Ginsburg

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Matthew Ginsburg*

"A Nigh Endless Game of Battledore and Shuttlecock"\(^1\): The D.C. Circuit’s Misuse of *Chenery* Remands In NLRB Cases

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I. INTRODUCTION

In recent years, commentators have noted the propensity of the Court of Appeals for the District of Columbia Circuit to refuse to defer to administrative agency decisions\(^2\) and, more specifically, to remand

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\(^2\) See Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency*
such orders back to the agency,\(^3\) with several commentators specifically considering the D.C. Circuit's treatment of orders issued by the National Labor Relations Board ("NLRB" or "Board").\(^4\) Much of this scholarly literature has focused on such questions as whether judges on the court are voting according to their policy preferences,\(^5\) whether a remand without vacatur is an allowable and desirable mechanism for judicial review of agency action under the Administrative Procedure Act ("APA"),\(^6\) and the relevance of specific characteristics of


\(^4\) See Joan Flynn, The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review, 75 B.U.L. Rev. 387, 420 n.138 (1995) (noting that the D.C. Circuit is "the exception to the rule" among courts of appeals as "full and partial remands [of the NLRB] by the D.C. Circuit exceeded set-asides by a two-to-one margin"); Peter J. Leff, Failing to Give the Board its Due: The Lack of Deference Afforded by the Appellate Courts in Gissel Bargaining Order Cases, 18 Lab. Law. 93, 97–100 (2002) (discussing "the lack of deference being afforded to the NLRB [by the D.C. Circuit] in bargaining order determinations" and the court's propensity to remand such orders even when supported by substantial evidence).

\(^5\) See James J. Brudney et al., Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern, 60 Ohio St. L.J. 1675, 1761 (1999) [hereinafter Brudney, Judicial Hostility] (suggesting, based on a nation-wide study, that "social background factors play a meaningful role in influencing judicial approaches to labor law issues"); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1719 (1997) (concluding that "ideology significantly influences judicial decision-making on the D.C. Circuit"). Cf. Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 Va. L. Rev. 1335, 1335, 1337 (1998) (rejecting Revesz's charge that the D.C. Circuit is "influenced more by personal ideology than legal principles" and suggesting instead that "judicial decision making is a principled enterprise that is greatly facilitated by collegiality among judges").

\(^6\) See Kristina Daugirdas, Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemaking, 80 N.Y.U. L. Rev. 278 (2005) (concluding that "while there are situations when [remand without vacatur] is justified, the [D.C. Circuit]'s application of the remedy is flawed"); Levin, supra note 3, at 292 (concluding that the APA permits courts to remand without vacation and
NLRB policymaking to judicial treatment of the agency. None of this literature has considered, in any detailed fashion, the principle of administrative law that the D.C. Circuit has frequently relied upon in refusing to enforce and remanding many NLRB orders—the *Chenery* remand doctrine—and whether the court has properly applied this doctrine in its case law. This Article attempts to fill this gap.

The D.C. Circuit, which is an alternate venue for appeals under the National Labor Relations Act of 1935 ("NLRA" or "Act"), routinely hears more petitions for review of NLRB orders than any other circuit. As a result of its special jurisdiction, the court is a key arbiter of national labor policy, and its decisions have the practical effect of binding the NLRB nationwide. In recent years, the relationship between the court and the NLRB has become especially fractious. Members of the court have accused the Board of "rogue," "contumacious," and "recalcitrant behavior" and have described Board decisions as "inscrutable" and "the antithesis of reasoned decisionmaking." NLRB members, for their part, have expressed concern with "the disdain and contempt for board decisionmaking" shown by the court as well as the suspicion that "in some cases the appeals court simply disagree[s] with the board’s view of the facts and the appropriate remedies under the circumstances—areas where the board is supposed to

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7. Flynn, *supra* note 4, at 393, 418–21 (suggesting that the NLRB’s "subterranean mode of policymaking," especially the "disparity between the Board’s articulated adjudicative standard and its application of that standard" has led to "judicial hostility" towards the agency’s decisions).


9. In 2003, for example, the D.C. Circuit decided 41 petitions for review—more than one of every three of such petitions nationwide. 68 NLRB ANN. REP. 194 tbl. 19A (2003). In contrast, the court of appeals that decided the next largest number of such petitions, the Sixth Circuit, heard only 19 such petitions. *Id.*

10. Professors Estreicher and Revesz note that the NLRB does not acquiesce in adverse circuit court precedent. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706–10 (1989). However, as a practical matter, the Board "does not ordinarily initiate enforcement proceedings in an adverse circuit unless it is prepared to distinguish the prior case on its facts or to ask the circuit for reconsideration of the earlier decision." Id. at 708. Moreover, "[i]f the respondent seeks review in an adverse circuit, the Board does not ordinarily seek to reargue the matter but acknowledges the controlling authority of the prior circuit decision and submits to the entry of judgment against it." *Id.*


be entitled to deference." A particular point of tension has been the D.C. Circuit’s pattern of refusing to enforce and remanding NLRB orders on the grounds that the Board has failed to provide an adequate explanation of its reasoning. The court has routinely justified these remands by reference to the “Chenery doctrine.”

The Chenery doctrine, derived from two eponymous Supreme Court decisions from the 1940s, stands for the uncontroversial propositions that “the orderly functioning of the process of [judicial] review requires that the grounds upon which [an] administrative agency act[s] be clearly disclosed and adequately sustained” and that if an agency does not clearly state those grounds, the court should remand for further consideration rather than enter “the domain which Congress has set aside exclusively for agency administration.” In its SEC v. Chenery opinions, the Supreme Court stressed that it was not “imposing trammels on [agency] powers,” “enforcing formal requirements,” or “suggesting that [an agency] must justify its exercise of administrative discretion in any particular manner or with artistic refinement.” Rather, as Judge Henry Friendly explained in an influential article on the doctrine, Chenery only requires a remand “when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result.”

The D.C. Circuit nevertheless has frequently invoked the Chenery doctrine as a basis for refusing to enforce NLRB orders even when the Board’s decisional path can easily be ascertained and a remand is unlikely to lead the agency to reach a different result. Notably, the D.C. Circuit has remanded routine NLRB orders pertaining to the conduct of union representation elections, an area traditionally considered to lie close to the heart of the Board’s administrative expertise. In other instances, the court has refused to enforce NLRB orders based

on a strict requirement that the Board adequately distinguish its own precedents, a requirement the court links to the *Chenery* doctrine.\(^{20}\) Finally, the D.C. Circuit has rejected the NLRB's chosen remedies for unfair labor practices in a number of cases,\(^{21}\) requiring the Board to meet heightened explanatory requirements if it wishes to have its orders enforced.

The *Chenery* doctrine cannot bear the substantial weight the D.C. Circuit has placed on it. In the *SEC v. Chenery* decisions, the Supreme Court displayed as much concern with curtailing judicial interference with administrative policymaking as it did with the rigorous policing of the adequacy of agency reasoning. Later decisions construed *Chenery* as having a "limited office,"\(^{22}\) such that "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached," a remand is not necessary.\(^{23}\) Moreover, modern administrative law decisions, which counsel judicial deference to agency policy choices, cannot be squared with the D.C. Circuit's aggressive use of *Chenery*; it is difficult to reconcile the court's numerous remands for further agency explanation with the deference owed to an agency's "permissible construction" of a "statute [that] is silent or ambiguous with respect to the specific issue" as required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,\(^{24}\) and an agency's "methods of inquiry," as required by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*\(^{25}\) It is telling in this regard that while the D.C. Circuit continues to routinely utilize *Chenery* to remand NLRB orders, the Supreme Court has not relied on the doctrine to remand an agency decision based on inadequate reasoning in at least two decades.

Not only is the D.C. Circuit's application of *Chenery* contrary to Supreme Court precedent, it also imposes real costs in terms of the NLRB's ability effectively to exercise its congressionally delegated authority to develop labor policy and enforce the NLRA. This interference is not limited to the obvious cases in which the court uses *Chenery* remands as a means of preventing the Board from pursuing its chosen policies. Repeated remands in routine cases may have the effect, intended or otherwise, of coercing the Board to reverse its decision simply to appease the court. Even where the NLRB does not

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change course, routine remands force the agency to utilize scarce resources to reissue its decisions, a practice that exacerbates the Board’s existing problems with timely adjudication. The D.C. Circuit’s remands of NLRB orders for failure to adequately distinguish prior agency precedent raise both of these concerns. The overly strict enforcement of such a requirement improperly inhibits the Board from changing policies that lie within its delegated discretion. Further, such a requirement is especially burdensome for an agency that has accumulated seven decades of fact-specific decisions.

The D.C. Circuit should alter its approach to Chenery by undertaking a harmless-error analysis before remanding any NLRB decision on the basis of inadequate reasoning. The D.C. Circuit previously followed this approach itself. Several other circuits have adopted this approach, and it is in accordance with Supreme Court precedent. An NLRB decision should be upheld if adequate reasoning “can be discerned with a modicum of judicial benevolence, even though the ribbons have not been neatly tied,” if a “narrowing interpretation” would be sufficient to sustain the decision, or if there “is only one plausible explanation of the issues” that the agency addressed. If adopted, such a change in approach would contribute to a more coop-


27. See, e.g., Braniff Airways, Inc. v. CAB, 379 F.2d 453, 466 (D.C. Cir. 1967) (“The Supreme Court’s opinions reflect the concern that agencies not be reversed for error that is not prejudicial . . . . The principle of SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), does not mechanically compel reversal ‘when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached.’” (quoting Mass. Trs. of E. Gas and Fuel Assoc. v. United States, 377 U.S. 235, 248 (1964))).

28. See Hackett v. Barnhart, 475 F.3d 1166, 1175 (10th Cir. 2007) (endorsing harmless error review in certain limited circumstances); Ngarurh v. Ashcroft, 371 F.3d 182, 190 n.8 (4th Cir. 2004) (endorsing harmless-error doctrine and citing cases); In re Watts, 354 F.3d 1362, 1370 (Fed. Cir. 2004) (“[T]his [Chenery] principle does not obviate the need to consider the issue of harmless error or mechanically compel reversal ‘when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached.’” (quoting Mass. Trs. of E. Gas and Fuel Assoc. v. United States, 377 U.S. 235, 248 (1964))); Sahara Coal Co. v. Office of Workers’ Comp. Programs, 946 F.2d 554, 558 (7th Cir. 1991) (“The harmless-error doctrine is available in judicial review of administrative action; it is an exception to the Chenery principle. If the outcome of a remand is foreordained, we need not order one.” (citations omitted)).


30. Friendly, supra note 17, at 218.


erative relationship between the D.C. Circuit and the NLRB—a rela-
tionship in which the court and agency act as partners rather than
competitors “in the task of safeguarding the public interest.”

This Article examines the D.C. Circuit’s use of the Chenery doc-
trine in the review of NLRB orders and suggests that the court rou-
tinely misuses the doctrine to refuse to enforce and remand decisions
in which the Board’s policy choices are not unclear and where the re-
mand is unlikely to lead the agency to reach a different result. Section
II provides an overview of the relationship between the D.C. Circuit
and the NLRB, including a review of NLRB statistics from 1984
through 2003 that demonstrate that the court refused to enforce and
remanded far more Board orders than its sister circuits. Section III
reviews Supreme Court jurisprudence pertaining to the Chenery doc-
trine—from the two SEC v. Chenery decisions themselves to more re-
cent opinions interpreting the cases. Section IV provides a detailed
look at the D.C. Circuit’s use of the Chenery doctrine through a discus-
sion of a number of cases in which the court has remanded NLRB or-
ders. Finally, Section V evaluates the D.C. Circuit’s use of Chenery,
concluding that the court’s approach is badly out of step with the Su-
preme Court’s own views on the scope of the doctrine and creates sig-
nificant costs for the NLRB’s administrative process that should be a
matter of concern for all parties who depend on the effective enforce-
ment of our nation’s labor laws.

II. THE D.C. CIRCUIT’S ROLE IN REVIEWING NLRB ORDERS

The D.C. Circuit, owing to its role as the sole or alternate venue for
the review of the decisions of many administrative agencies, is widely
acknowledged to be the nation’s “de facto . . . administrative law
court.” The court has, over the years, developed a number of doc-
trines intended to more tightly regulate administrative decision mak-
ing—several of which have been struck down by the Supreme Court

34. Wald, supra note 3, at 509 (noting that, in 1986, 48% of the court’s filings came
from agencies and another 25% were appeals from cases involving government
parties).
35. See, e.g., Int’l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973)
(Bazelon, J., concurring) (elaborating the proceduralist view that “the court’s
proper role is to see to it that the agency provides a ‘framework for principled
decision-making’” (quoting Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584,
598 (1971))); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir.
1970) (Leventhal, J.) (setting forth the “hard look” doctrine—that a reviewing
court should “intervene not merely in case of procedural inadequacies, or bypas-
sing of the mandate in the legislative charter, but more broadly if the court be-
comes aware . . . that the agency has not really taken a ‘hard look’ at the salient
problems”).
as too restrictive of agency policymaking authority. Nevertheless, in recent years the D.C. Circuit has been even "less deferential to the political branches of government than its predecessors." This lack of deference is especially evident in the court's relationship with the NLRB.

The D.C. Circuit's special role in reviewing NLRB orders derives from the venue provisions of the NLRA. Under § 10(f) of the Act, a party aggrieved by an order issued by the Board may petition the court of appeals for review of such a decision "in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." Parties charged with unfair labor practices, who are made up overwhelmingly of employers rather than unions, therefore can forum-shop, "seek[ing] out a circuit with venue over the action that has rejected the agency's position." As one prominent employer-side labor attorney advises potential clients:

An important early decision in the appeal process is the selection of the proper court of appeals in which to file.... The [NLRA] always permits an employer to challenge NLRB orders in the District of Columbia Circuit.... The choice of forum can be crucial to the outcome of the appeal.

NLRB orders, like all administrative decisions, are supposed to be treated with deference by reviewing courts. In a number of post-Chevron decisions, the Supreme Court has "emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy," stating that it "accord[s] Board rules considerable deference" and "will uphold a Board rule as long as it is rational and


37. Pierce, supra note 2, at 301.


39. Typically, at least 90% of Board orders appealed to the circuit courts involve unfair labor practices against employers. See, e.g., 68 NLRB ANN. REP. 194 (2003). For example, there were 125 NLRB petitions for enforcement or review decided by federal courts in 2003. Of these, 116 involved Board orders against employers, 7 against unions, and 2 against both employers and unions. Id.

40. Estreicher & Revesz, supra note 10, at 710.

consistent with the [National Labor Relations] Act"—a standard of 
review that is "virtually indistinguishable" from that set forth by the 
Supreme Court in Chevron. Although the NLRB has formal 
rulemaking power, it virtually always sets policy through case-by-
case adjudication—a practice the Supreme Court has several times 
upheld. The Court has also endorsed the Board’s ability to change 
its policies “in light of changing industrial practices and the Board’s 
cumulative experience in dealing with labor management relations,” 
even when this means overruling longstanding agency precedent, 
since “the Board has the ‘special function of applying the general pro-
visions of the Act to the complexities of industrial life.’”

The D.C. Circuit has, nevertheless, refused to extend much defer-
ence to the NLRB in recent years, placing it out of step with the gen-
eral trend towards judicial deference to agency action since Chevron. 
In their empirical study of appellate court disposition of all adminis-
trative agency cases nationwide in the immediate wake of Chevron,

42. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786–87 (1990); see also 
Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) (upholding a 
Board decision that a successor to a predecessor employer had a duty to bargain 
with the union representing the predecessor's employees). Even in
Allentown 
Court denied enforcement of a Board order as not based on substantial evidence, 
the Court concluded that the NLRB's policy choice—to use a “reasonable doubt” 
test for employer polls—was “facially rational and consistent with the Act.” Id. at 
380.

43. Flynn, supra note 4, at 438.

44. 28 U.S.C. § 156 (2000) (“The Board shall have authority from time to time to 
make, amend, and rescind, in the manner prescribed by [the Administrative Pro-
cedure Act], such rules and regulations as may be necessary to carry out the pro-
visions of this [Act].”).

45. The most notable exception to this practice was the NLRB's promulgation in the 
late 1980s of a rule governing bargaining unit determinations in health care facil-
16,336 (Apr. 21, 1989) (codified at 29 C.F.R. § 103.30 (2006)); see generally Mark 
H. Grunewald, The NLRB's First Rulemaking: An Exercise in Pragmatism, 41 
DUKE L.J. 274 (1991) (documenting the Board's health care rulemaking 
experience).

46. Allentown Mack, 522 U.S. at 374 (noting that the NLRB "has chosen to promul-
gate virtually all the legal rules in its field through adjudication rather than 
Board is not precluded from announcing new principles in an adjudicative pro-
ceeding and . . . the choice between rulemaking and adjudication lies in the first 
instance within the Board's discretion.”); NLRB v. Wyman-Gordon Co., 394 U.S. 
759, 771 (1969) (Black, J., concurring) (“If [an] agency decision reached under the 
adjudicatory power becomes a precedent, it guides future conduct in much the 
same way as though it were a new rule promulgated under the rule-making 
power . . . . No language in the National Labor Relations Act requires that the 
grant or the exercise of one power was intended to exclude the Board's use of the 
other.”).

47. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) (quoting NLRB v. Erie 
Resistor Corp., 373 U.S. 221, 236 (1963)).
Professors Schuck and Elliott found that affirmances increased from 70.9% to 81.3% between 1984 and 1985.\textsuperscript{48} Statistics published by the NLRB similarly demonstrate that the percentage of Board orders affirmed by appellate courts nationwide increased from 67.6% to 83.6% between these two years.\textsuperscript{49} In contrast, the percentage of NLRB orders affirmed by the D.C. Circuit decreased from 66.7% to 55.6% between 1984 and 1985.\textsuperscript{50} This trend has continued; in the two decades following \textit{Chevron}, the D.C. Circuit's rate of affirmances remained below the national average in 19 of 20 years.\textsuperscript{51} Over this entire period, the D.C. Circuit affirmed only 58.4% of all NLRB orders it considered, compared to a rate of 71.6% affirmed by all appellate courts nationwide.\textsuperscript{52}

\textbf{Table A: Percentage Of NLRB Orders Affirmed In Full By The D.C. Circuit And All Courts Of Appeal Nationwide, 1984–2003}\textsuperscript{53}

<table>
<thead>
<tr>
<th>YEAR</th>
<th>% AFFIRM - ALL CIR.</th>
<th>% AFFIRM - D.C. CIR.</th>
<th>YEAR</th>
<th>% AFFIRM - ALL CIR.</th>
<th>% AFFIRM - D.C. CIR.</th>
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<tr>
<td>2003</td>
<td>75.0</td>
<td>61.0</td>
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<td>78.2</td>
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<td>2002</td>
<td>61.9</td>
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<td>1992</td>
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<td>1997</td>
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<td>56.3</td>
<td>1987</td>
<td>79.4</td>
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<td>1996</td>
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<td>62.7</td>
<td>46.7</td>
<td>1984</td>
<td>67.6</td>
<td>66.7</td>
</tr>
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| AVERAGE: | 71.6 | 58.4 |

\textsuperscript{48} Schuck & Elliott, \textit{supra} note 2, at 1031.
\textsuperscript{49} 50 NLRB \textit{Ann. Rep.} 198 tbl. 19A (1985); 49 NLRB \textit{Ann. Rep.} 230 tbl. 19A (1984). It is likely that the majority of these cases were disposed of in unpublished "table" decisions. \textit{See Flynn, supra} note 4, at 418 n.129 ("By the mid-1980s, courts were disposing of 60% of administrative appeals in unpublished, or 'table' decisions . . . . It stands to reason that a high percentage of NLRB appeals result in table decisions").
\textsuperscript{51} \textit{See infra} Table A.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} The data in Tables A, B and C was derived from data included in Table 19A, "Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders," that appears in each NLRB \textit{Annual Report} for the years 1984 through 2003. 68 NLRB \textit{Ann. Rep.} 184 tbl. 19A (2003); 67 NLRB \textit{Ann. Rep.} 141 tbl. 19A (2002); 66 NLRB \textit{Ann. Rep.} 187 tbl. 19A (2001); 65 NLRB.
During the twenty-year period after *Chevron*, the number of NLRB orders appealed to the D.C. Circuit grew as a percentage of such appeals nationwide. This trend accelerated sharply in the early 1990s, presumably reflecting an increase in the number of employer appeals to a forum that has proved especially willing to reverse or remand NLRB orders. Throughout the 1980s, less than ten percent of petitions for review nationwide were filed in the D.C. Circuit. By 2003, however, over one-third of all appeals of Board orders nationwide were filed in the D.C. Circuit. The D.C. Circuit’s role as the key judicial arbiter of national labor policy is further underlined by the fact that the Supreme Court has granted review to very few labor cases in recent years. Between 1998 and 2003, for example, the Court decided only four cases involving the NLRB as a party.

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54. See infra Table B.

55. The NLRB does not break out the number of petitions filed by employers in each judicial circuit in its Annual Report. However, the Board does publish the total number of proceedings decided by the courts of appeal filed against employers and against unions. During the period from 1990–2003, the percentage filed against employers has remained steady at 90% or greater. See, e.g., 68 NLRB ANN. REP. 194 (2003) (93% filed against employers); 62 NLRB ANN. REP. 154 (1996) (90% filed against employers); 56 NLRB ANN. REP. 191 (1990) (90% filed against employers). It is therefore likely that the overall increase in the number of appeals to the D.C. Circuit in recent years can be attributed primarily to appeals filed by employers.

56. See infra Table B.

57. 68 NLRB ANN. REP. 194 (2003).


Table B: Percentage Of NLRB Orders Nationwide Reviewed By The D.C. Circuit, 1984–2003

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<th>YEAR</th>
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<th>% OF ALL APPEALS REVIEWED BY D.C. CIRCUIT</th>
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<tr>
<td>1994</td>
<td>10.6</td>
<td>1984</td>
<td>6.9</td>
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An important aspect of the D.C. Circuit’s lack of deference to the NLRB is its propensity to remand Board orders. In their survey of appellate review of all agency decisions nationwide, Professors Schuck and Elliot found that the frequency of remands in the year after *Chevron* was decided decreased by over 40 percent. NLRB statistics reveal that appellate court remands of NLRB orders nationwide decreased by roughly the same percentage between 1984 and 1985 and remained relatively steady in the 20 year period that followed. In contrast, the percentage of NLRB orders remanded by the D.C. Circuit increased dramatically between 1984 and 1985 and remained steadily higher than the national average over the next two decades. Thus, between 1984 and 2003, the D.C. Circuit remanded more than one of every five NLRB orders it reviewed, a rate more than twice the national average.

60. See supra note 53.
61. Schuck & Elliott, supra note 2, at 1030.
62. See infra Table C.
63. Id.
64. Id.
The D.C. Circuit has relied on the *Chenery* doctrine as the basis for many of these remands. A review of the D.C. Circuit's published decisions reveals that the court cited one of the *Chenery* decisions, one of the court's own precendents interpreting the *Chenery* cases, or used language closely tracking the *Chenery* doctrine to remand NLRB orders in at least twenty-one instances between 1984 and 2003.66 In

Table C: Percentage Of NLRB Orders Remanded By The D.C. Circuit And All Other Courts Of Appeal Nationwide, 1984-200365

<table>
<thead>
<tr>
<th>YEAR</th>
<th>% REMAND D.C. CIR.</th>
<th>% REMAND ALL OTHER</th>
<th>YEAR</th>
<th>% REMAND D.C. CIR.</th>
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</tbody>
</table>

**AVERAGE:** 22.1 10.0

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65. See supra note 53. Orders remanded include both those categorized by the NLRB as "[r]emanded in full" and those categorized as "[a]ffirmed in part and remanded in part."


In the following cases, the D.C. Circuit cited its own precedent interpreting *Chenery* in support of its decision to remand an NLRB order: *Ark Las Vegas Res-
contrast, other courts of appeals rarely used *Chenery* to remand NLRB orders during this period. In the twenty years from 1964 to 1983, the D.C. Circuit itself remanded only five NLRB orders based on *Chenery*. Finally, the Supreme Court did not remand any administrative agency decision based on *Chenery* between 1984 and 2003.

Interestingly, the D.C. Circuit's use of *Chenery* to remand NLRB orders cuts across political and ideological divides on the court, confounding predictions that the political party of the appointing President can predict judicial voting patterns. Indeed, the D.C. Circuit's

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67. The following are the relatively few cases in which courts of appeals other than the D.C. Circuit used *Chenery* to remand NLRB orders during this period: *Local Joint Executive Board Of Las Vegas v. NLRB*, 309 F.3d 578, 585, 586 (9th Cir. 2002); *Edward C. Quirk Co. v. NLRB*, 241 F.3d 41, 45–46 (1st Cir. 2001); *Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 896–98 (3d Cir. 1997); *Louisiana-Pacific Corp. v. NLRB*, 52 F.3d 255, 258–60 (9th Cir. 1995); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 758–60 (7th Cir. 1989); *NLRB v. United States Postal Service*, 827 F.2d 548, 555 (9th Cir. 1987); *Harberson v. NLRB*, 810 F.2d 977, 984 (10th Cir. 1987); *Slaughter v. NLRB*, 794 F.2d 120, 122 (3d Cir. 1986); *International Union, UAW v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986); *Ewing v. NLRB*, 768 F.2d 51, 54–55 (2d Cir. 1985).

68. In addition to these remands, the Seventh Circuit utilized *Chenery* to deny enforcement to NLRB orders in the following cases: *J.C. Penney Co. v. NLRB*, 123 F.3d 988, 995, 999 (7th Cir. 1997); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 322–23 (7th Cir. 1995); *NLRB v. Special Mine Services*, 11 F.3d 88, 90 (7th Cir. 1993); *NLRB v. *P*I*E* Nationwide, Inc.*, 923 F.2d 506, 518 (7th Cir. 1991).


70. See *Brudney, Judicial Hostility*, supra note 5, at 1761 (concluding that “personal, political, and professional background factors . . . are significantly associated
increased use of *Chenery* to remand NLRB orders in the mid-1980s appears to be the result of efforts by judges appointed by President Carter—especially Judge Harry Edwards—to police the Reagan-era Board’s overturning of long-established precedent that was protective of workers. In the wake of seven appointments by President Reagan in the mid-1980s, “the D.C. Circuit [became] more conservative politically,” however, as Professor Pierce has noted, “it [did] not become more deferential to the politically accountable branches of government.” As a result, what began as a small trickle of cases applying an aggressive and inflexible interpretation of *Chenery* to remand NLRB orders for inadequate explanation of reasoning soon widened into a veritable flood, with judges appointed by Presidents of both parties regularly and vigorously applying the doctrine.

The timing of the D.C. Circuit’s increased reliance on *Chenery* to remand NLRB orders—immediately after the Supreme Court’s *Chevron* decision—raises suspicion that the D.C. Circuit is using *Chenery* to avoid extending the deference it owes to the Board. In order to evaluate whether this is in fact the case, it is necessary to review the contours of the *Chenery* doctrine and to take a closer look at how it has been applied by the D.C. Circuit in specific cases.

### III. THE *CHENERY* DOCTRINE AND ITS PROGENY

Neither the Supreme Court’s opinions in the *SEC v. Chenery* cases nor subsequent jurisprudence interpreting the decisions justifies the D.C. Circuit’s aggressive use of the *Chenery* doctrine to remand NLRB orders. In the original *Chenery* opinions, the Supreme Court carefully balanced its concern with ensuring that agencies provide courts with an adequate basis for review with a warning against judicial interference with agency policymaking. In subsequent decisions interpreting the cases, the Court made clear that it considered the *Chenery* doc-

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70. See *Int’l Bhd. of Elec. Workers, Local Union No. 474*, 814 F.2d at 699 (Edwards, J.) (remanding Board decision establishing presumption “that there are only two appropriate [bargaining] units in the health care industry”); *Lima*, 819 F.2d at 303–04 (Edwards, J.) (remanding Board order applying new strict rule defining striker misconduct); *Prill*, 755 F.2d at 948 (Edwards, J.) (remanding Board decision reversing precedent to hold that individual employee’s complaint to state agency regarding workplace safety issue does not constitute protected “concerted activit[y]” within the meaning of NLRA).

71. *Pierce*, supra note 2, at 304.
trine to occupy a "limited office,"72 such that a reviewing court should only use the doctrine to remand an administrative order if there is a real possibility that but for the error the agency would have reached a different result or if the reasoning is so unclear that the underlying policy decision is truly in doubt. More recently, the Court has stated that judicial review of the adequacy of agency decisions must be conducted within the deferential framework required by cases such as Vermont Yankee and Chevron and that the Chenery doctrine cannot be used as an end-run around this required deference.

The SEC v. Chenery decisions73 involved the rejection by the Securities and Exchange Commission ("SEC") of a reorganization plan filed by the Federal Water Service Corporation ("Federal"), as required by the Public Utility Holding Company Act of 1935.74 The SEC rejected Federal's plan because it would allow "the management of the company . . . to participate in the reorganization on an equal footing with all other preferred stock," which the SEC held would breach a "duty of fair dealing" to shareholders.75 In reaching its decision, the SEC claimed that it was "acting only as it assumed a court of equity would have acted in a similar case," relying on a series of judicial opinions and "explicitly disavow[ing] any purpose of going beyond those [policies] which the courts had theretofore recognized."76

In Chenery I, the Supreme Court, with Justice Frankfurter writing for the majority, held that the SEC had misread judicial precedent, since "the courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them . . . from buying and selling the corporation's stock."77 Although the SEC had broad discretionary authority to "take appropriate action for the correction of reorganization abuses found to be detrimental to the public interest or the interest of investors or consumers," even without relying on judicial precedent, the agency had failed to exercise this authority in reaching its decision.78 Rather than reversing or recasting the order so as to make it enforceable, however, the Court instead remanded the case back to the SEC, so that "findings might [be] made and considerations disclosed which would justify its order."79 Justice

73. SEC v. Chenery Corp. (Chenery II) 322 U.S. 194 (1947); SEC v. Chenery Corp. (Chenery I) 318 U.S. 80 (1943).
75. Chenery I, 318 U.S. at 81, 85; see also Federal Water Service Corporation, 8 S.E.C. 893, 915–17 (1941) (concluding that the reorganization plan for Federal, of which C.T. Chenery was president, would violate the corporate directors' fiduciary duties).
76. Chenery I, 318 U.S. at 87, 89.
77. Id. at 88.
78. Id. at 92 (citations omitted).
79. Id. at 94.
Frankfurter explained that an agency action “cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order.” Rather, “the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.” "The administrative process," the Court added, "will best be vindicated by clarity in its exercise."

Justice Frankfurter took care to explain, however, that the Court's holding was not an invitation for courts to commandeer administrative policymaking:

In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

Quoting his own opinion in *Phelps Dodge Corp. v. NLRB*, Frankfurter declared that:

> We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.

80. *Id.* (emphasis added).
81. *Id.*
82. *Id.* (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) (Frankfurter, J.)).
83. *Id.* at 95.
84. 313 U.S. 177 (1941). *Phelps Dodge*, an important precursor to Justice Frankfurter's opinion in *Chenery*, involved an NLRB decision holding that an employer must offer reinstatement to workers fired because of their union activity notwithstanding the fact that they had subsequently obtained employment elsewhere. The Court remanded the order because, although "the mere fact that the victim of discrimination has obtained equivalent employment does not preclude the Board from undoing the discrimination and requiring employment," the agency had failed to adequately "disclose the basis of its order." *Id.* at 193–94, 197.
85. *Chenery I*, 318 U.S. at 94–95 (quoting *Phelps Dodge*, 313 U.S. at 197). Despite the limitations that Justice Frankfurter placed on his holding in *Chenery I*, Justice Hugo Black penned a spirited dissent, explaining:

> I do not suppose, as the Court does, that the Commission's rule is not fully based on Commission experience. The Commission did not "explicitly disavow" any reliance on what its members had learned in their years of experience, and of course they, as trade experts, made their findings that respondent's practice was "detrimental to the interests of investors" in the light of their knowledge. That they did not unduly parade fact data across the pages of their reports is a commendable saving of effort since they meant merely to announce for their own jurisdiction an obvious rule of honest dealing. Of course, the Commission can now change the form of its decision to comply with the Court order. The Court can require the Commission to use more words; but it seems difficult to imagine how more words or different words could further illuminate its
On remand, the SEC once again rejected Federal’s reorganization plan, this time justifying its action by reference to its own expertise rather than to Supreme Court precedent. The Commission explained that “[o]ur study of and experience with corporate reorganizations have made us cognizant that many evils have occurred in the course of recapitalizations and reorganizations effected through management plans without the supervision of any court or regulatory body” and referenced one of its own reports on the subject. Federal appealed this second order as well.

In Chenery II, a new Supreme Court majority upheld the SEC’s decision, explaining that it “definitely avoids the fatal error of relying on judicial precedents which do not sustain it” and noting that the agency “has drawn heavily upon its accumulated experience in dealing with utility regulation. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of the order.” The majority rejected an expansive reading of the original Chenery I decision urged by Justice Jackson’s dissent, explaining that in the “prior decision . . . [w]e held no more and no less than that the Commission’s first order was unsupportable for the reasons

purpose or its determination. A judicial requirement of circumstantially detailed findings as the price of court approval can bog the administrative power in a quagmire of minutiae. Hypercritical exactions as to findings can provide a handy but almost invisible glideway enabling courts to pass “from the narrow confines of law into the more spacious domain of policy.”

Id. at 98–99 (Black, J., dissenting) (quoting Phelps-Dodge, 313 U.S. at 194). Judge Friendly later expressed his agreement with the essence of Justice Black’s reasoning, suggesting that

there is a fair basis for debate whether Justice Frankfurter’s reading of the SEC’s report in Chenery was not, to say the least, ungenerous. Certainly it would have been possible to write an opinion affirming the Commission on the basis that, in fact, it had considered the lessons of experience as well as what it erroneously thought had been the decisions of the courts.


87. Id. at 865 (referring to the SEC’s “Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees”).
88. Between the Chenery I and Chenery II decisions, Chief Justice Stone and Justice Robert left the Court and Justices Vinson, Burton, and Rutledge joined it. STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 449 n.2 (3d ed. 1999).
89. SEC v. Chenery (Chenery II), 332 U.S. 194, 199 (1947).
90. Justice Jackson argued that the SEC’s mere act of “recasting[ing] its rationale [to] reach[ ] the same result” was insufficient, since “[i]t makes judicial review . . . a hopeless formality” and “reduces the judicial process . . . to a mere feint.” Id. at 210. (Jackson, J., dissenting). Justice Frankfurter, who wrote the majority’s decision in Chenery I, joined the dissent.
supplied by that agency.”91 “Our duty,” the Court explained, “is at an end when it becomes evident that the Commission’s action is based upon substantial evidence and is consistent with the authority granted by Congress.”92

Although the Supreme Court applied the Chenery doctrine to remand agency orders through the mid-1970s,93 the general trend of the Court’s post-Chenery decisions has been, in Professor Kenneth Davis’ words, a “soften[ing] in [the rule’s] application.”94 In Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States,95 for example, the Supreme Court stated that the purpose of Chenery was merely to “assur[e] that initial administrative determinations are made with the relevant criteria in mind and in a proper procedural manner.”96 A remand is therefore not warranted “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached.”97 Similarly, in NLRB v. Wyman-Gordon Co.,98 Justice Fortas, writing for a plurality, stated that “Chenery does not require that we convert judicial review of agency action into a ping-pong game;” when “[t]here is not the slightest uncertainty as to the outcome of a proceeding before the Board . . . . It would be meaningless to remand.”99 Summarizing this trend, D.C. Circuit Judge Harold Leventhal explained: “The Supreme Court’s opinions reflect the concern that agencies not be reversed for error that is not prejudicial.”100 In a similar vein, a number of circuit

91. Id. at 200.
92. Id. at 206.
93. Most notable are two decisions in which the Supreme Court added further glosses to the basic Chenery principle. In Burlington Truck Lines, Inc. v. United States, the Court held that “courts may not accept appellate counsel’s post hoc rationalizations for agency action; Chenery requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.” 371 U.S. 156, 168–69 (1962). In Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, the Court held that when an agency departs from its prior precedent, “it must . . . clearly set forth [the ground for its departure] so that the reviewing court may understand the basis of the agency’s action and so may judge the consistency of that action with the agency’s mandate.” 412 U.S. 800, 808 (1973). Other examples of Chenery remands from this period include the following cases: Fed. Power Comm’n v. Texaco, Inc., 417 U.S. 380 (1974); Camp v. Pitts, 411 U.S. 138 (1973); Fed. Trade Comm’n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); and NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965).
94. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §14:29, at 130 (2d ed. 1980).
96. Id. at 248.
97. Id.
99. Id. at 766–67 n.6 (Fortas, J.).
courts have concluded that "[t]he harmless-error doctrine . . . is an exception to the Chenery principle."101

In addition to applying an implicit harmless-error test to Chenery

remands, the Supreme Court has made clear that reviewing courts
should, in Judge Friendly's words, uphold agency orders "where ade-
quate findings can be discerned, . . . with a modicum of judicial benev-
olence, even though the ribbons have not been neatly tied."102 In
Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,103 for example, the Court, while acknowledging that Chenery re-
quires that it "may not supply a reasoned basis for the agency's action
that the agency itself has not given," held that it would nonetheless
"uphold a decision of less than ideal clarity if the agency's path may
reasonably be discerned."104 In the post-Chevron case of National
Railroad Passenger Corp. v. Boston & Maine Corp.,105 the Court went

even further, accepting an interpretation of the dispositive statutory
term offered by the Interstate Commerce Commission for the first
time in its briefs to the Supreme Court.106 The Court explained that
"Chenery does not require a remand" in this situation, since "the only
reasonable reading of the Commission's opinion, and the only plausi-
ble explanation of the issues . . . is that the ICC's decision was based
on the proffered interpretation."107

The Supreme Court's invocation of the Chenery cases as support
for its holdings in the landmark administrative law decisions of Ver-
mont Yankee Nuclear Power Corp. v. Natural Resources Defense Coun-
cil, Inc.108 and Chevron U.S.A., Inc. v. Natural Resources Defense
Counsel, Inc.109 underlines the point that Chenery remands cannot be
used by a court to avoid required deference to agency policymaking.
In Vermont Yankee, the Court quoted Chenery II in rejecting the D.C.
Circuit's attempt to dictate "the methods, procedures, and time dimen-
sion" of agency decisionmaking, stating that such efforts "clearly run[] the risk of 'propell[ing] the court into the domain which Con-
gress has set aside exclusively for the administrative agency.'"110
Similarly, in Chevron, the Court cited Chenery I as one of several
cases standing for "the principle of deference to administrative inter-

101. Sahara Coal Co. v. Office of Workers' Comp. Programs, 946 F.2d 554, 558 (7th
Cir. 1991); see also cases listed supra note 28.
102. Friendly, supra note 17, at 218.
104. Id. at 285–86. The Court reiterated this holding in its decision in Motor Vehicles
106. Id. at 426–27 (White, J., dissenting).
107. Id. at 420.
110. Vermont Yankee, 435 U.S. at 545 (quoting SEC v. Chenery (Chenery II), 332 U.S.
194, 196 (1947)).
pretations” in support of its holding that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” Indeed, in the few instances in which the Court has cited the Chenery decisions since Chevron, it has continued to interpret them as standing for the principle of judicial deference to agency policymaking. Most strikingly, the Court has not utilized Chenery to remand an agency decision for inadequate reasoning since Chevron was decided, more than two decades ago.

IV. THE D.C. CIRCUIT’S USE OF CHENERY IN REMANDING NLRB ORDERS

Despite the clear line of Supreme Court authority indicating that the Chenery doctrine should be applied so as to protect agency decision making authority, a review of D.C. Circuit cases decided between 1984 and 2003 that involved the NLRB demonstrates that the court has instead applied the principle in a manner that interferes with the agency’s delegated authority. The D.C. Circuit remanded routine cases even when it was clear that the Board would reach the same decision upon further review, applied the requirement that the Board explain its departure from precedent so strictly as to inhibit its ability to change policy, and utilized Chenery in a manner that frustrates the Board’s ability to pursue its chosen remedies for employer violations of the NLRA.

A. Unnecessary Remands of Routine Cases

In a number of routine representation cases, the D.C. Circuit has remanded NLRB orders even though it was clear that the Board would reach the same decision upon further review. Not only are such remands unnecessary under the Supreme Court’s interpretation of Chenery, but the court’s refusal to enforce such routine decisions has led to significant delays in the enforcement of NLRB orders and a substantial waste of administrative and judicial resources.

111. Chevron, 467 U.S. at 844–45.
112. See, e.g., INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) (quoting SEC v. Chenery (Chenery I), 318 U.S. 80, 88 (1943) in reversing Ninth Circuit’s refusal to remand asylum decision back to immigration service for reconsideration in light of changed conditions, stating that in these circumstances a “judicial judgment cannot be made to do service for an administrative judgment”); Gonzales v. Thomas, 547 U.S. 183 (2006) (per curiam) (reiterating holding of Ventura in similar case); Dept. of Treasury v. Fed. Labor Relations Auth., 494 U.S. 922, 933 (1990) (citing Chenery I as support for Chevron’s command that “an agency is charged with . . . giving reasonable content to [a] statute’s textual ambiguities” and that this “is not a task that we ought to undertake on the agency’s behalf in reviewing its orders.”).
For example, in *Macmillan Publishing Co. v. NLRB*, the D.C. Circuit remanded an NLRB order overturning a representation election on the basis of an anti-union leaflet distributed by the employer that stated: "Without a union, Macmillan will be free to proceed ahead with the announced wage increases . . . . With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package would be. WHY TAKE THE RISK? VOTE NO!") The court found that the NLRB Regional Director's analysis of the leaflet—that "'it is well settled that, during a union organizing campaign, an employer should decide the question of granting or withholding benefits as it would if a union were not in the picture'" was "inscrutable," commenting that "there is no such principle governing employer communications during election campaigns, and we doubt that there could be in light of the First Amendment." The court therefore remanded the Board's decision, holding that "the Regional Director's judgment rested on no sound principle" and citing *Chenery* for the proposition that a court "cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings."

As a result of the D.C. Circuit's remand, the NLRB ordered that a hearing be held before an Administrative Law Judge ("ALJ") to consider the full complement of the union's original eight objections to the election. The ALJ found three of these objections to have merit, including the original objection concerning the leaflet. The ALJ stated that: "The leaflet explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union. As such, it clearly interfered with the [employees'] exercise of free choice in the election." The NLRB affirmed the ALJ's decision, reiterating that "the Respondent's distribution of the leaflet threatening withdrawal of a promised wage increase, just days before the election, was objectionable and independently sufficient to set aside the election."

The employer once again petitioned the D.C. Circuit for review. This time the court affirmed the Board's order, explaining that: "The settled law is clear: to state that a previously-announced wage increase will probably be lost if a union wins constitutes employer coer-

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113. 194 F.3d 165 (D.C. Cir. 1999).
114. *Id.* at 166.
115. *Id.* at 168 (quoting Regional Director's decision).
116. *Id.*
117. *Id.*
119. *Id.* at 979–80.
120. *Id.* at 979 (internal quotations omitted).
121. *Id.*
We agree with the Board that this constitutes classic coercive conduct.”123 After stating that it “agree[d] with the Board that the company’s distribution of the leaflet was objectionable conduct ‘independently sufficient to set aside the election,’”124 the court stated that it did “not need to reach the additional allegations” considered by the NLRB on remand.125 The court thus ended up enforcing the Board’s order on the precise ground that it had rejected in the case’s previous trip to the court—resulting in a four and a half year delay in the enforcement of the NLRB’s order as well as a significant expenditure of agency resources to rehear the election objections.126

Sundor Brands, Inc. v. NLRB127 is another example of a remand of a routine order where “with a modicum of judicial benevolence” the Board’s decision could have been affirmed “even though the ribbons ha[d] not been neatly tied.”128 The case involved an NLRB unit determination that five subclassifications of technical employees should be included in a skilled maintenance bargaining unit based on their shared community of interest.129 The employer objected to the unit determination. As a result, after the union won an election to represent the unit by a margin of 15 to 6, the employer refused to bargain.130 The Board determined that this was an unfair labor practice. The employer appealed to the D.C. Circuit.131

The court recognized that “the Board’s unit determination, if supported by substantial evidence, is entitled to ‘wide deference.’”132 The court refused to enforce the order, however, because the Board had not adequately explained all of the factors on which it might have relied in making its community of interest determination.133 The court acknowledged that under the NLRB’s own precedent, “[n]o one factor is controlling” in such a determination,134 but the court refused to reach the issue of “whether the factors for which there is support in the record could suffice by themselves to support the Board’s present unit determination.”135 Instead, the court remanded the agency’s order, citing Chenery I as support for the proposition that “[t]he grounds...
upon which an administrative order must be judged are those upon
which the record discloses that its action was based."136

Considering the case again on remand, the Board "adhere[d] to
[its] previous finding that the petitioned-for skilled maintenance unit
[was] appropriate."137 The NLRB explained that, by "longstanding
policy" it "does not require all factors to be present in order to find a
petitioned-for maintenance unit appropriate;" rather, "‘collective bar-
gaining units must be based upon all the relevant evidence in each
individual case.’"138 In the case before it, the Board stated, "the fac-
tors found by the court to be supported by substantial evidence on the
record . . . are sufficient support for our conclusion that the peti-
tioned-for maintenance employees are a readily identifiable group
with a distinct community of interest and are an appropriate unit for
bargaining."139

Following the Board’s decision, the employer appealed to the D.C.
Circuit a second time. This time, the court held that one of the factors
on which the NLRB had relied in making its unit determination was
not supported by substantial evidence in the record.140 Since the
Board had failed to "distinguish between the factors upon which it re-
lied," the D.C. Circuit stated, a remand to the agency was once again
necessary.141 Based on a review of published agency orders, the
NLRB does not appear to have attempted to issue its unit determina-
tion a third time in the face of these two judicial remands.

B. Remands Based on Strict Requirements of Distinguishing
Precedent

In a number of other cases, the D.C. Circuit has invoked the Chen-
ery doctrine to remand NLRB orders because of the Board’s failure to
adequately distinguish its own precedent.142 Although it is beyond

136. Id. at 519 (quoting SEC v. Chenery (Chenery I), 318 U.S. 80, 87 (1943)).
138. Id. at 756 (quoting American Cyanamid Co., 131 N.L.R.B. 909, 911 (1961)).
139. Id.
141. Id. at *5–6.
142. In addition to the cases discussed infra, see Speedrack Prod. Group, Ltd. v.
NLRB, 114 F.3d 1276 (D.C. Cir. 1997), citing Chenery in remanding a Board deci-
sion holding that a group of prison work-release inmates were ineligible to vote in
a representation election because the NLRB allegedly "ignored its own precedent
without offering any explanation as to why this precedent was inapplicable." Id.
at 1279. In fact, in its underlying decision, the Board explicitly found that "[t]he
factual situation presented here has not occurred before" and that "[t]he cases on
which our [dissenting] colleague relies are distinguishable." Speedrack Prod.
Group, Ltd., 320 N.L.R.B. 627, 628 (1995). In Lemoyne-Owen College v. NLRB,
357 F.3d 55 (D.C. Cir. 2004), the D.C. Circuit remanded a Board decision finding
a college faculty bargaining unit appropriate because "the [NLRB] Regional Di-
dispute that “an agency action is arbitrary and capricious if it represents an unexplained departure from the agency’s prior policies and precedent,”143 the Supreme Court made clear in *Chevron* that such a rule cannot be so strictly applied so as to prevent an agency from reconsidering “the wisdom of its policy on a continuing basis,”144 including occasionally overruling its own decisions.145

In *Randell Warehouse of Arizona, Inc. v. NLRB*,146 the D.C. Circuit remanded an NLRB decision that reversed Board policy on the question of whether and when it is objectionable for a union to photograph employees involved in an organizing campaign. The NLRB’s guiding precedent at the time, *Pepsi-Cola Bottling Co.*,147 held that photographing or videotaping of employees constituted an unfair labor practice “[a]bsent any legitimate explanation from the Union” since “employees could reasonably believe that the Union was contemplating some future reprisals against them.”148 In the facts of *Randell Warehouse*, “union representatives took photographs of other union representatives distributing union literature outside the Employer’s facility. These photographs necessarily included both employees who accepted and those who rejected proffered literature.”149 When asked by an employee why the pictures were being taken, a union representative would only say, “It’s for the union purpose.”150 The union won the election and the employer filed an objection with the NLRB. Signaling that it was considering changing its precedent on the topic, the Board issued a notice of hearing, scheduling oral argument and inviting amici curiae to file briefs and participate.151

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145. Even former D.C. Circuit Judge David Bazelon, who was partial to the use of *Chenery* remands as a part of his broader effort to ensure the adequacy of agency procedures, recognized the limits of the application of the doctrine to this requirement, stating that “[t]he Board cannot be expected, on pain of reversal, to anticipate and distinguish every marginal case that a litigant might uncover in preparing a petition for review.” *Teamster Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C. Cir. 1976) (Bazelon, J.).

146. 252 F.3d 445 (D.C. Cir. 2001).


148. *Id.* at 737.


150. *Id.*

151. *Id.* Amici curiae who filed briefs and participated in oral argument included the American Federation of Labor and Congress of Industrial Organizations, the
In its decision, the NLRB overturned its precedent, explaining that "we have concluded that the standard for union photographing of employees in a pre-election setting established by Pepsi-Cola Bottling is inconsistent with Board law involving union inquiry into employees' sentiments respecting representation," such as "cases permitting unions to ask employees directly whether they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' responses." The Board therefore "overrule[d] Pepsi-Cola and reject[ed] its premise that union photographing or videotaping of employees engaged in protected activities during an election campaign, without more, necessarily interferes with employee free choice." The Board declined to overturn another of its precedents regarding union filming of employees, Mike Yurosek & Son, Inc., which held that union videotaping of anti-union employees accompanied by threats constituted an unfair labor practice. The Board made clear that the case before it was not governed by the rule of Mike Yurosek, since "no threats of this character, attributable to the Union, are present in the instant case." One NLRB Member concurred in the result, agreeing with the majority that "the act of photographing is not inherently coercive," but protesting the Board's failure to overrule its precedent holding that "identical conduct when engaged in by an employer is presumptively coercive." Another Member dissented, stating that he would uphold Pepsi-Cola as sound precedent and find the union's filming of employees in this case to constitute an unfair labor practice.

The employer petitioned the D.C. Circuit for review of the NLRB's decision. The court refused to enforce the order, holding that "the Board erred by failing to consider the applicability of Mike Yurosek here" and criticizing the Board for "silent departure from precedent." In particular, the court stated, the NLRB was obliged to explain why threatening statements made by individual pro-union employees—although not proximate in space or time to the

Council on Labor Law Equality, the Labor Policy Association, and the International Brotherhood of Teamsters. Id.

152. Id. at 1036.
153. Id.
156. Id. at 1038 (Member Brame, concurring) (discussing F.W. Woolworth Co., 310 N.L.R.B. 1197 (1993)).
157. Id. at 1049 (Member Hurtgen, dissenting).
159. Id. at 448 (quoting Cleveland Constr. Inc. v. NLRB, 44 F.3d 1010, 1016 (D.C. Cir. 1995)).
photographing incident—when put together with the filming "did not amount to objectionable conduct under [Mike Yurosek]." The D.C. Circuit reached this conclusion despite acknowledging that the NLRB Hearing Officer had decided that these threatening statements on their own terms did not amount to objectionable conduct and despite the fact that neither the NLRB majority opinion, the concurrence, nor the dissent considered the statements relevant to a Mike Yurosek analysis. The court remanded the case, citing D.C. Circuit precedent interpreting Chenery as holding that a remand is required where the Board "did not clearly explain [the] basis for its decision." Over five years later, and seven years after the NLRB's original decision in the case, a new Board, now with a majority of members appointed by President George W. Bush, issued a new decision in the case, reversing course and effectively reaffirming the rule of Pepsi-Cola Bottling, thus avoiding the need to conduct the analysis demanded by the court.

In McDonnell Douglas Corp. v. NLRB, by contrast, the court refused to accept the agency's interpretation and application of its own precedent. The case involved the court's review of an unfair labor practice charge against an employer for "transferring certain employees from one corporate division to another . . . reclassifying them out of a bargaining unit." The employer argued that its actions were permitted by its collective bargaining agreement with the union and that the dispute should therefore be decided by an arbitrator rather than the Board. The NLRB disagreed, stating that "[r]epresentation issues . . . are matters for decision exclusively by the Board, not an arbitrator," and issued an order adverse to the employer. The employer petitioned for review in the D.C. Circuit, citing several cases in support of the proposition that "the Board's

160. Apart from the photographing incident, the NLRB Hearing Officer found that several pro-union employees made threatening statements in the weeks leading up to the election. Randell Warehouse, 328 N.L.R.B. at 1053–54.
161. Randell Warehouse, 252 F.3d at 449.
162. The NLRB Hearing Officer held that since "[n]one of the individuals who were alleged to have engaged in unlawful threats . . . were shown to have been union officers, representatives, or agents . . . the Union cannot be held accountable for such conduct." Randell Warehouse, 328 N.L.R.B. at 1054.
163. Randell Warehouse, 252 F.3d at 449 (citing Lima v. NLRB, 819 F.2d 300, 303 (D.C. Cir. 1987) and Darr v. NLRB, 801 F.2d 1404, 1408–09 (D.C. Cir. 1986)).
165. 59 F.3d 230 (D.C. Cir. 1995).
166. Id. at 231.
167. Id.
general policy is to defer to arbitration whenever the parties' agreement provides for arbitration."169

While acknowledging that "the Board has discretion to choose whether to defer to arbitration," the panel refused to enforce the NLRB's order because "the Board's categorical statement that 'representational issues' are not susceptible to resolution by contract does not square with Board precedent," noting that "McDonnell Douglas points to several cases in which an employer has been compelled, pursuant to a collective bargaining agreement, to arbitrate a dispute about the agreed-upon scope of the bargaining unit."170 Analyzing the precedent relied on by the Board, the court concluded that the agency had misinterpreted its own decisions.171 The D.C. Circuit remanded the case, citing Chenery as support for its conclusion that it "cannot definitively review [the Board's decision not to defer to arbitration] in the absence of some explanation by the Board."172

Upon considering the case again on remand, the NLRB expressed its "regret [for] using such overbroad language" in explaining its position on deferral and representation issues.173 The Board clarified that it "‘only infrequently defers to arbitration in representation proceedings,’ [and that] deferral is appropriate ‘when the resolution of the issue turns solely on the proper interpretation of the parties’ contract.’"174 The case before it, the Board held, involved both a "contract interpretation issue" and an issue of "statutory policy, i.e., an analysis of community-of-interest factors" and therefore only part of the case was appropriate for deferral.175 The NLRB nevertheless acquiesced in the strong suggestion implicit in the D.C. Circuit's remand, deferring to an arbitrator regarding both issues.176 The Board emphasized, however, that it had reached this decision because of "the unique circumstances of this case, including the fact of the court's remand," stating that it was "only making an exception to, and most decidedly not abandoning, our long-standing general policy ... against deferral of representation issues which can only be resolved through application of statutory policy."177

170. Id.
171. Id. at 235–36.
172. Id. at 236.
174. Id. (citing St. Mary's Med. Ctr., 322 N.L.R.B. 954 (1997)).
175. Id.
176. Id.
177. Id. (emphasis added).
C. Remands Based on Disagreement with NLRB Remedies

In a series of cases involving the NLRB's use of "affirmative bargaining orders" as a remedy for employer unfair labor practices, the D.C. Circuit has used the Chenery doctrine to frustrate the agency's ability to utilize its chosen remedy, despite the Supreme Court's holding in *NLRB v. Gissel Packing Co.*\(^\text{178}\) that the Board has considerable discretionary authority to issue such orders.\(^\text{179}\) The heightened explanatory requirements the D.C. Circuit has demanded from the Board for affirmative bargaining orders appear less rooted in procedural concerns with reasoned decisionmaking than with expressing the court's substantive disagreement with this particular agency policy choice.

The debate between the panel majority and dissent in *Sullivan Industries v. NLRB*\(^\text{180}\) provides a useful illustration of the issues involved in this area. The case involved a unionized company which declared bankruptcy and was purchased by a new owner.\(^\text{181}\) Although the new owner was required by law to recognize and bargain with the incumbent union,\(^\text{182}\) he refused.\(^\text{183}\) Then, after several months, the owner relented and recognized the union.\(^\text{184}\) Two days later, however, he withdrew recognition, relying on a petition signed by a majority of employees stating that they did not "wish to be represented by . . . any union at this time."\(^\text{185}\) The union filed unfair labor practice charges against the employer for refusing to bargain and unlawfully withdrawing recognition.\(^\text{186}\)

The NLRB upheld both charges, affirming the ALJ's finding that the employer "was not justified in withholding recognition" and that "[b]y doing so . . . improperly undermined the union's majority status, thereby tainting the employee petition."\(^\text{187}\) As a remedy, the NLRB ordered the company to cease and desist from refusing to recognize the union and, in addition, issued an affirmative bargaining order\(^\text{188}\)—

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\(^{179}\) *Id.* at 610 ("We have long held that the Board is not limited to a cease-and-desist order . . . but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status.").
\(^{180}\) 957 F.2d 890 (D.C. Cir. 1992).
\(^{182}\) *See NLRB v. Burns Int'l Sec. Servs.*, Inc., 406 U.S. 272, 279 (1972) (upholding Board rule that a successor employer must recognize and bargain with an incumbent union "if a majority of employees after the change of ownership or management were employed by the preceding employer.").
\(^{183}\) *Sullivan Indus.*, 302 N.L.R.B. at 145–46.
\(^{184}\) *Id.* at 146–47.
\(^{185}\) *Id.* at 147 (quoting Respondent's Exhibit 7(a), *Sullivan Indus., Inc.*, 302 N.L.R.B. 144 (March 21, 1991) (Nos. 1-CA-25698 & 1-CA-25869)).
\(^{186}\) *Id.* at 144.
\(^{187}\) *Id.* at 149.
\(^{188}\) *Id.* at 151.
"the traditional . . . remedy for restoration of the status quo after the unlawful refusal of an employer to recognize and bargain with an incumbent union which was the majority representative."189 The employer petitioned the D.C. Circuit for review.190

Judge Patricia Wald, writing for the panel majority,191 enforced the NLRB's decision in so far as it held that the employer had committed unfair labor practices by refusing to bargain and withdrawing recognition from the union, but refused to enforce the Board's affirmative bargaining order remedy.192 Referring to affirmative bargaining orders as "an extreme remedy"193 and expressing particular concern with the impact of the "decertification bar" on the rights of employees to rid themselves of the union,194 the majority relied on a pre-Chevron precedent, Peoples Gas System, Inc. v. NLRB,195 to hold that it would not enforce an affirmative bargaining order unless the NLRB first explained:

(1) that it gave due consideration to employees' section 7 rights . . . (2) why it concluded that other purposes must override the rights of employees to choose their bargaining representatives and (3) why other remedies, less destructive to employees' rights, are not adequate.196

Finding that the Board's decision in the case at bar lacked a "reasoned explanation" of these judicially-created factors, the court vacated the bargaining order and remanded, paraphrasing Chenery: "[W]e emphasize that we harbor no disagreement with the Board's policy choices. We ask only for a clear statement of what those choices and the reasons for them are."197

Judge Laurence Silberman concurred in the holding that the employer had used unfair labor practices, but dissented from the major-
ity's refusal to enforce the Board's affirmative bargaining order remedy.198 He explained that:

It is fair to contend that the Board has not explained, as clearly as it could, its position on the issue—at least as it is presented in this case—although the Board is not required to distinguish other cases that are inapposite. I feel obliged to dissent, however, because I think the board's path is discernable... and, more important, because the majority opinion appears to question the Board's remedial judgment.199

The NLRB's decision to utilize an affirmative bargaining order, Judge Silberman argued, "is not an inevitable remedial choice, but it is hardly an irrational or unorthodox one" and had been applied by the Board in numerous prior cases.200 Moreover, Silberman argued, the case relied upon by the majority, Peoples Gas, "is in tension with subsequent governing legal developments"—namely the Supreme Court's decision in Chevron—"that call[ ] for greater deference than used to be given to agency interpretation of general or imprecise statutory terms."201 While acknowledging that, "[w]e are, of course, entitled to remand to an agency for an adequate explanation of its position so that judicial review is possible," he warned that "[i]t is important that we do so only on those occasions when we really do not perceive the rationale for agency action—not when we are merely uncomfortable with an agency's determination."202

The NLRB did not act on the court's remand until almost five years later, at which time it sent the case back to an ALJ for a further factual hearing prompted by the court's decision.203 Apparently, a new bargaining order was never issued. Thus, the Board's ability to enforce its chosen remedy for an employer's unfair labor practice was frustrated. Unfortunately, such a result is not exceptional; in at least two other cases, the D.C. Circuit has remanded affirmative bargaining orders back to the NLRB for further explanation based on Chenery.204 Faced with these remands, the Board in one case dug in its heels, "reaffirm[ing] [its] longstanding policy of issuing an affirmative bargain-

198. Id. at 906 (Silberman, J., dissenting).
199. Id. (citation omitted)
200. Id. (citing cases relied upon by the panel majority in which the NLRB also issued affirmative bargaining orders).
202. Id. at 910. Judge Silberman added that: "It is often difficult for us to draw that line in practice, and, in any given case, a judge's conclusion that an agency's explanation is inadequate may depend a great deal on his or her view of the substantive law applied by the agency." Id.
204. See Charlotte Amphitheater Corp. v. NLRB, 82 F.3d 1074, 1080 (D.C. Cir. 1996) ("[T]he Board's justification falls short of its obligation to clearly articulate why a bargaining order is needed... "); Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243, 1248 (D.C. Cir. 1994) ("[W]e remand the remedial aspect of the case for the Board to explain its imposition of the bargaining order.").
ing order as the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union and subsequent refusal to bargain” and stating that “we have considered and balanced the critical statutory policies and rights relevant to the affirmative bargaining remedy and find no need to engage in a case-by-case factual analysis to justify its future imposition.” In the other case, the Board chose not to reissue its order, settling instead for less controversial—and presumably less effective—remedies.

V. EVALUATING THE D.C. CIRCUIT'S APPLICATION OF THE CHENERY DOCTRINE TO NLRB ORDERS

The D.C. Circuit's aggressive practice of remanding NLRB decisions on the basis of *Chenery* is contrary to Supreme Court jurisprudence, and leads to precisely the waste of resources and unnecessary delay that the Court has warned against in its decisions. Although defenders of the D.C. Circuit's approach maintain that remands are more protective of agency authority than reversals, it is not at all clear that this is the case. In practice, the court has used *Chenery* remands to prod and cajole the Board into agreeing to the court's substantive policy preferences—"giv[ing] rise to cynical suspicion that *Chenery* has become a tool permitting a reviewing court to do whatever it pleases." To avoid such judicial interference with agency decision-making, the D.C. Circuit should apply a harmless-error test before remanding any agency decision based on *Chenery*, an approach that has already been adopted by a number of other circuits and accords with Supreme Court jurisprudence.

The clearest examples of the D.C. Circuit's misuse of the *Chenery* doctrine as a means of expressing its policy disagreement with the Board are the bargaining order cases, like *Sullivan Industries, Inc. v.*

205. Exxel-Atmos, Inc., 323 N.L.R.B. 888, 888 (1997). In the *Exxel/Atmos* litigation, the NLRB not only reissued its bargaining order on remand, but also issued a new bargaining order. *Id.* at 888 (affirming bargaining order on remand); Exxel-Atmos, Inc., 323 N.L.R.B. 884 (1997) (issuing second bargaining order). The D.C. Circuit eventually enforced this second bargaining order, but only because the employer “never contested the propriety of the bargaining order in the proceedings before the Board,” therefore “waiv[ing] any right it had to object to the order before [the] court.” Exxel/Atmos, Inc. v. NLRB, 147 F.3d 972, 978 (D.C. Cir. 1998).

206. See *Charlotte Amphitheater Corp.*, 331 N.L.R.B. 1274, 1274–76 (2000) (abandoning affirmative bargaining order as “likely . . . unenforceable” after D.C. Circuit's remand for inadequate explanation of reasoning and substituting alternative remedies such as requiring employer to provide employee names and addresses to union and allowing union representatives access to workplace bulletin boards).

207. Friendly, supra note 17, at 212.
in which the court's remands for inadequate explanation of reasoning frustrate the Board's ability to rely on its chosen remedy. Simply put, although the D.C. Circuit states that its only purpose in remanding is "for a clear statement of [the Board's policy] choices and the reasons for them," it is not at all clear that there is any rationale that the NLRB could provide that would satisfy the court—even though the court acknowledges that "[i]t is up to the Board, not the courts, to make labor policy" in this area. Such use of Chenery remands to do battle with the NLRB's policy decisions utterly disregards Justice Frankfurter's warning that, "[b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." Such an "open-ended manner [of] apply[ing] the requirement of reasoned decisionmaking" represents a judicial end-run around Supreme Court precedents requiring deference to agency policymaking and permits a reviewing court to mask its substantive disagreement with an agency's permissible construction of its governing statute with procedural objections that frustrate the ability of the agency to pursue its chosen policy course.

Although the bargaining order cases are the most high-profile example of the D.C. Circuit's interference with NLRB prerogatives, more routine remands risk interference with Board policymaking as well. Such remands create the risk that the NLRB will acquiesce in the court's preferred policy position, not because of reflection and reliance on agency expertise, but to preserve the Board's ability to have its orders enforced by the court generally and avoid "a nigh endless game of battledore and shuttlecock." In the remand that resulted from the D.C. Circuit's decision in McDonnell Douglas Corp. v. NLRB for example, the NLRB made an exception from its general policy "against deferral of representation issues which can only be resolved through application of statutory policy" and complied with the court's preferred result of allowing the case to go to arbitration, not on the

210. Id.
211. Phelps-Dodge v. NLRB, 313 U.S. 176, 194 (1941).
212. Richard J. Pierce, Jr., The Role of the Judiciary in Implementing An Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1265 (1989). Pierce suggests, for example, that "[i]t is . . . highly probable that judges who used inadequate procedures as a pretext for rejecting policy decisions inconsistent with their policy preferences before Vermont Yankee, [now] use inadequate reasoning to serve the same purpose." Id.
basis of the Board's own reasoned consideration, but because of "the fact of the court's remand." Such a result runs diametrically counter to the holdings of the original SEC v. Chenery cases: to ensure that an agency relies upon "its special administrative competence" in reaching its decisions while guarding against the reviewing court "enter[ing] the province that belongs to the Board." The D.C. Circuit's repeated remands of NLRB orders also have a cumulative effect on the efficiency of the Board's administrative processes and the agency's ability to effectively enforce the nation's labor laws. Wasteful remands exacerbate the NLRB's pre-existing problems with timely adjudication, a problem that the D.C. Circuit and other courts have elsewhere criticized, and risk "convert[ing] judicial review of agency action into a "ping-pong game" and a "formality." The D.C. Circuit's demands for a more thorough explanation of even the most routine NLRB orders also undermines recent Board efforts to streamline its decision-making processes in order to dispose of non-controversial cases more quickly. In MacMillan Publishing Co. v. NLRB, for example, the D.C. Circuit's Chenery remand led the Board to reassign the case for a new hearing before an ALJ so that all of the objections to the election could be considered, rather than just the one objection relating to the employer's anti-union leaflet that the NLRB had previously held dispositive. When the case reached the court again, however, the D.C. Circuit found that the leaflet objection alone was sufficient to resolve the case, even commenting that the em-

216. SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 92, 94 (1943) (quoting Phelps Dodge, 313 U.S. at 197).
218. Southwest Merchandising Corp. v. NLRB, 943 F.2d 1354, 1358 (D.C. Cir. 1991) (characterizing NLRB's four-and-a-half year delay in deciding case as "deplorable"); William B. Gould IV, Labored Relations: Law, Politics, and the NLRB—A Memoir 290–91 (listing cases in which courts of appeal have criticized NLRB and refused to enforce Board orders because of lengthy delays in issuing decisions).
220. See Truesdale, supra note 217, at 13–14 (discussing procedures "used primarily to expedite . . . relatively simple or non-controversial cases"); Gould, supra note 218, at 61–62 (discussing attempts to implement various streamlining reforms, including strict deadlines for the issuance of Board decisions in non-controversial cases).
221. 194 F.3d 165 (D.C. Cir. 1999).
ployer's action "constitut[ed] classic coercive conduct." The cost of whatever marginal improvement in NLRB administrative process resulted from this remand was high—a four and a half year delay in the enforcement of the Board's original order, during which time the employees who had voted for a union were denied representation. Surely, this was a case in which a remand was unnecessary, since there was no significant chance that the NLRB would reach a different result.

The D.C. Circuit's strict insistence that the NLRB distinguish prior precedent is another burdensome aspect of the court's demand for more thorough agency explanation, especially for an agency which has accumulated seventy years of "numbingly detailed ALJ decisions" and "fact-laden Board decision[s]" in interpreting "one of the aging New Deal-era laws." As D.C. Circuit Judge Bazelon once noted: "The Board cannot be expected, on pain of reversal, to anticipate and distinguish every marginally relevant case that a litigant might uncover in preparing a petition for review." The Supreme Court made clear in Chevron that the requirement to distinguish precedent cannot be applied so strictly so as to prevent an agency from reconsidering "the wisdom of its policy on a continuing basis," including occasionally overruling its own precedent. Unfortunately, the D.C. Circuit's aggressive use of Chenery to remand NLRB orders for failure to adequately distinguish precedent has had precisely this inhibiting effect. The example of Randell Warehouse v. NLRB, in which the D.C. Circuit's refusal to enforce the Board's overruling of its own precedent because of the agency's supposed failure to adequately distinguish a single case, is representative. It is easy to imagine the puzzlement the NLRB must have felt when it received the court's decision accusing it of a "silent departure from precedent," since the Board majority had—after soliciting amicus curiae briefs and holding oral argu-

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223. Flynn, supra note 4, at 416, 416 n.120 (discussing the difficulty of judicial review of NLRB decision making).
224. Brudney, Famous Victory, supra note 8, at 942.
225. Teamsters Local Union, 769 v. NLRB, 532 F.2d 1385, 1392 (D.C. Cir. 1976) (Bazelon, C.J.). Cf. Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385, 1400 (1992) (noting, in the context of formal rulemaking, that "[a]lthough not especially burdensome in theory, [reasoned explanation] requirements invite abuse by [regulated parties] who hire consultants and lawyers to . . . launch blunderbuss attacks on every detail of the legal and technical bases for the agencies' rules" and that "agencies cannot afford to allow any of the multifaceted attacks to go unanswered for fear that courts will remand to them to respond to particular comments").
227. 252 F.3d 445 (D.C. Cir. 2001).
228. Id. at 448 (quoting Cleveland Constr., Inc. v. NLRB, 44 F.3d 1010, 1016 (D.C. Cir. 1995)).
ment—explicitly overturned one precedent and declined to overturn another. This sense of bewilderment—or perhaps of frustration—likely explains why the Board waited so long to issue a new decision in the case, for “it seem[ed] difficult to imagine how more words or different words could further illuminate its purpose or its determination.”

Supporters of the D.C. Circuit’s approach to *Chenery* argue that remands are more protective of agency authority than reversals. Judge Wald, for example, once suggested that:

Remand on the basis of “inadequate agency rationale” provides a kind of nice comity among different branches of government. It says “No” to the agency, yet gives it a second chance with the court’s guidance to reach the result it thinks proper. And it should help to silence the more raucous charges that the courts are usurping agency policymaking prerogatives. There is no question that this technique engenders some delay, but in pioneering and popularizing a more subdued approach to judicial oversight of agency policymaking, the D.C. Circuit has tried to contain the ever-present tension between agency independence and judicial review of agency compliance with legislative intent.

Similarly, Professor Ronald Levin suggests that an appealing feature of the D.C. Circuit’s approach is that it gives judges “the option of being able to have it both ways: remanding without vacation enables them to enforce high standards of rigorous analysis without causing serious disruption to an agency’s program.”

The difficulty with these “lesser evil” arguments is that, as Judge (now Justice) Stephen Breyer explained, such an approach has a “far greater substantive impact . . . than one might at first realize”:

A remand . . . for more thorough consideration may well mean several years of additional proceedings, with mounting costs, and the threat of further judicial review leading to abandonment or modification of the initial project irrespective of the merits. Courts and agencies alike are aware that these “more thorough consideration” and “hard look” doctrines have substantive impact. To that extent, in examining the attitude with which the courts apply the doctrines, one is, in an important sense, examining the attitude with which they review the wisdom or reasonableness of agency substantive decisionmaking.


230. Wald et al., *supra* note 3, at 529. In more recent years, Judge Wald has acknowledged the imperfections of her preferred approach, stating: “[R]eviewing courts—it must be conceded—do not always fastidiously honor the limited purpose of a remand for inadequate explanation or disguise their own preferred analyses. We should and could do better on that score.” Patricia M. Wald, *The 1993 Justice Lester W. Roth Lecture, Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 640 (1993).


233. *Id.*
The availability of remands, Professor Daniel Rodriguez argues, "promotes judicial activism . . . by empowering the courts to intervene rather than hold back, in the agency decisionmaking process."234 "While it is fair to suggest that agencies may prefer remand without vacatur to the apocalyptic step of simple vacatur," Rodriguez explains, "the choice between the two is truly an illusive one."235 In his analysis, Professor (now Dean) Richard Revesz goes one step further, suggesting that "[i]deological voting is more pronounced with respect to procedural challenges than statutory challenges" since "the Supreme Court very seldom grants certiorari to review decisions of the D.C. Circuit on these questions."236 Such "unreviewed discretion"237 has proved tempting to the D.C. Circuit as a means for the court to signal its disagreement with NLRB policies; in Judge Friendly's colorful phrasing: "If the court doesn't really like an agency decision, it can find something wrong, and it will then pull Chenery out of the hat and remand; if it likes the decision, minor peccadilloes will be forgotten and Chenery also will be."238

VI. CONCLUSION

As Justice Frankfurter made plain in the original Chenery decision, an administrative agency is not required to "exercise [its] administrative discretion in any particular manner or with artistic refinement" and a reviewing court should avoid "sticking in the bark of words."239 Rather than engage in "a nigh endless game of battle-dore and shuttlecock,"240 the D.C. Circuit should engage in more "pragmatic justice,"241 applying a harmless-error test before invoking Chenery—remanding only when "there is a significant chance that but for the error the agency might have reached a different result"242 or where "the agency's path [cannot] reasonably be discerned" from its decision.243

234. Rodriguez, supra note 3, at 601.
235. Id.
236. Revesz, supra note 5, at 1729–30.
237. Id. at 1730.
238. Friendly, supra note 85, at 4.
239. SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 95 (1943).
242. Friendly, supra note 17, at 211.
The D.C. Circuit's aggressive use of the Chenery doctrine to remand NLRB orders not only runs counter to Supreme Court jurisprudence, but comes at great cost to the Board's administrative processes and all who depend on it. Lost in the war of words between the court and the Board are the litigants who await justice, for "the prolonged process of reversal and remand for failure to state reasons adequately and correctly [is] peculiarly painful to individuals needing quick relief and lacking the funds for protracted proceedings."244

The D.C. Circuit is "in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance."245 Instead of competing with the Board to provide the best interpretation of the meaning of ambiguous sections of the NLRA, the D.C. Circuit should recognize that "agencies and courts together constitute a 'partnership' in furtherance of the public interest," each with their proper role.246 By utilizing the Chenery doctrine with restraint and treating the Board's decisions with the deference that, according to Supreme Court precedent, they deserve, the D.C. Circuit and the NLRB should be able to work together to improve the administrative process while preserving the agency's congressionally delegated authority.

244. Friendly, supra note 17, at 216.
246. Id. at 851 (citing Niagara Mohawk Power Corp. v. Fed. Power Comm's, 379 F.2d 153, 160 n.24 (D.C. Cir. 1967)).