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THE FUTURE OF THE NLRB: WHAT NOEL CANNING VS. NLRB MEANS FOR WORKERS, EMPLOYERS, AND UNIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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THE FUTURE OF THE NLRB: WHAT NOEL CANNING VS. NLRB MEANS FOR WORKERS, EMPLOYERS, AND UNIONS

Wednesday, February 13, 2013
U.S. House of Representatives
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:06 a.m., in room 2175, Rayburn House Office Building, Hon. David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Guthrie, DesJarlais, Bucshon, Gowdy, Brooks, Andrews, Holt, Scott, Tierney, Courtney, Polis, and Wilson.

Also present: Representative Kline.

Staff present: Katherine Bathgate, Deputy Press Secretary; Owen Caine, Legislative Assistant; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Barrett Karr, Staff Director; Nancy Locke, Chief Clerk/Assistant to the General Counsel; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Nicole Sizemore, Deputy Press Secretary; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Alexa Turner, Staff Assistant; Aaron Albright, Minority Communications Director for Labor; Mary Alfred, Minority Fellow, Labor; Tylease Alli, Minority Clerk; John D'Elia, Minority Labor Policy Associate; Brian Levin, Minority Deputy Press Secretary/New Media Press Coordinator; Celine McNicholas, Minority Senior Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Deputy Staff Director.

Chairman ROE. A quorum being present, Subcommittee on Health, Employment, Labor, and Pensions will come to order. And we have held up just a little bit because we have got one of our witnesses hung up in a line outside trying to get in. So, we will—but we will get started.

Good morning and welcome to the first hearing of the Health, Employment, Labor, and Pensions Subcommittee in the new Congress. I would like to welcome our members and thank our witnesses for being with us today.

During the 112th Congress oversight of the National Labor Relations Board was a leading priority for this committee. Whether through hearings, letters, or legislation, we have tried to ensure the rights of workers and their employers are protected.

I realize this reveals some deep differences on the committee. However, as a member of Congress we are obligated to act whenever an agency may be harming our job creators and workforce. And we will be neglecting our duty if we simply looked the other way.

The power of the board affects almost every private workplace. Rest assured, the committee will continue to keep a close eye on the NLRB and do what is necessary to promote the best interests of the American people. This hearing is part of that effort. The board has recently taken steps to skew the balance of power even further toward union leaders, and such action demands our attention.

For example, the board is making it increasingly difficult for employers to investigate possible misconduct and employee complaints. Whether it is a worksite accident, allegation of theft, or other charge of wrongdoing, employers must be able to gather the facts and hold employees accountable. The safety and security of the workplace depend on it.

In Banner Health and Piedmont Gardens, the board restricted the ability to keep internal investigations confidential while allowing unions to obtain sensitive statements provided by witnesses. To conduct a confidential investigation, employers will have to qualify with one of several narrow exceptions dictated by the board. Internal investigations will be stymied, business costs will rise, and employees will be harmed as potentially dangerous and illegal behavior is left unresolved.

The board has also begun chipping away at the right of workers not to fund union lobbying. In 1988, the U.S. Supreme Court held in Communications Workers v. Beck that workers forced to pay union dues do not have to finance a union's political activities. The board's Kent Hospital decision walks further away from this standard, forcing workers to cover lobbying expenses unions claim related to collective bargaining.

The rights of workers, as well as the opinion of the nation's highest court, are being eviscerated by an activist labor board. Today's NLRB will go to great lengths to undermine employers, marginalize workers, and empower Big Labor. The board has even ruled that policies promoting a courteous and friendly work environment can run afoul of the law.

While the board's pro-union agenda is troubling, the fate of these and other decisions are now in question. A year ago, President Obama installed three recess appointments to the board while Congress was meeting regularly in pro forma session. A U.S. federal appeals court ruled in Noel Canning v. NLRB that these so-called recess appointments are unconstitutional. As we examine the ramifications of the court's rulings, two important points must be raised.

First, President Obama's recess appointment scheme was unprecedented. Presidents have been making intrasession recess appointments for decades, but while Congress was actually in recess. Com-

paring President Obama's intrasession recess appointments to the past is inaccurate.

Second, partisan politics created this crisis. As 2011 came into a close, the board was on the verge of losing a quorum and falling into disarray. This could have been prevented if the president had worked with the Senate to seat qualified nominees. He did not. Instead, the president nominated two individuals just the day before—days before the quorum was set to expire, which is hardly enough time for the Senate to offer its advice and consent.

Furthermore, the nomination of a Republican candidate languished in the Senate for a year; no hearing, no debate, no vote. This one individual would have allowed the board to continue its business. Senate Democrats failed to act, crisis emerged, and the president responded with an unconstitutional power grab.

Workers, employers and unions must now live with the consequences of these unfortunate events. Any recent or future decision is constitutionally suspect and open to challenge in court.

Countless individuals are left in legal limbo and the rights of workers are hampered by a dysfunctional board. This is not what the law anticipates or what the American people deserve. It is my hope the president will right this wrong so the board can continue to do its work in a more responsible manner.

Again, I would like to thank our witnesses for joining us. I will now recognize my distinguished colleague, Rob Andrews, the senior Democratic member of this subcommittee, for his opening remarks.

Mr. Andrews?

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Good morning and welcome to the first hearing of the Health, Employment, Labor, and Pensions Subcommittee in the new Congress. I'd like to welcome our members and thank our witnesses for being with us today.

During the 112th Congress, oversight of the National Labor Relations Board was a leading priority for this committee. Whether through hearings, letters, or legislation, we have tried to ensure the rights of workers and their employers are protected. I realize this revealed some deep differences on the committee. However, as members of Congress we are obligated to act whenever an agency may be harming our job creators and workforce. We would be neglecting our duty if we simply looked the other way.

The power of the board affects almost every private workplace. Rest assured, the committee will continue to keep a close eye on the NLRB and do what is necessary to promote the best interests of the American people. This hearing is part of that effort. The board has recently taken steps to skew the balance of power even further toward union leaders, and such actions demand our attention.

For example, the board is making it increasingly difficult for employers to investigate possible misconduct and employee complaints. Whether it's a worksite accident, allegation of theft, or other charge of wrongdoing, employers must be able to gather the facts and hold employees accountable. The safety and security of the workplace depend upon it.

In Banner Health and Piedmont Gardens, the board restricted the ability to keep internal investigations confidential while allowing unions to obtain sensitive statements provided by witnesses. To conduct a confidential investigation, employers will have to qualify for one of several narrow exceptions dictated by the board. Internal investigations will be stymied, business costs will rise, and employees will be harmed as potentially dangerous or illegal behavior is left unresolved.

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ard, forcing workers to cover lobbying expenses unions claim relate to collective bargaining.

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While the board's pro-union agenda is troubling, the fate of these and other decisions are now in question. A year ago, President Obama installed three recess appointments to the board while Congress was meeting regularly in pro forma session. A U.S. federal appeals court ruled in Noel Canning vs. NLRB that these so-called recess appointments are unconstitutional. As we examine the ramifications of the court's ruling, two important points must be raised.

First, President Obama's recess appointment scheme was unprecedented. Presidents have been making intrasession recess appointments for decades, but while Congress was actually in recess. Comparing President Obama's intrasession recess appointments to the past is inaccurate.

Second, partisan politics created this crisis. As 2011 came to a close, the board was on the verge of losing a quorum and falling into disarray. This could have been prevented if the president had worked with the Senate to seat qualified nominees. He didn't. Instead, the president nominated two individuals just days before the quorum was set to expire, which is hardly enough time for the Senate to offer its advice and consent.

Furthermore, the nomination of a Republican candidate languished in the Senate for a year—no hearing, no debate, and no vote. This one individual would have allowed the board to continue its business. Senate Democrats failed to act, a crisis emerged, and the president responded with an unconstitutional power-grab.

Workers, employers, and unions must now live with the consequences of these unfortunate events. Any recent or future decision is constitutionally suspect and open to challenge in court. Countless individuals are left in legal limbo and the rights of workers are hampered by a dysfunctional board. This is not what the law anticipates or what the American people deserve.

It is my hope the president will right this wrong so the board can return to its work in a more responsible manner. Again, I'd like to thank our witnesses for joining us, and I will now recognize my distinguished colleague Rob Andrews, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. ANDREWS. Mr. Chairman, thank you. It is always a privilege to share time with you and our colleagues around the committee. I appreciate your continuing courtesies and fairness.

The title of this hearing is "What Noel Canning v. NLRB Means for Workers, Employers and Unions." Here is what it means. It means that abuse of the doctrine of advise and consent has paralyzed the ability of the National Labor Relations Board to do anything. It means that the executive branch has had its hands tied in a way that really stems not from a principled constitutional difference, but from a difference over the policies coming out of the NLRB.

One of the areas where there is greatest disagreement in our country and on this committee is what the labor laws mean and what they should mean. This is always a topic of hotly-debated controversy. I would suggest, though, that the resolution of that controversy should go through the three mechanisms that exist to deal with it.

The first is elections. Those who are disquieted by the rulings of the NLRB had the chance to elect a president who would appoint members to the board who would see things their way. The public decided a different way.

The second is legislation. This committee has jurisdiction to amend the National Labor Relations Act or other relevant statutes, and alter the course of decisions through the statutory process. The

committee has not attempted to do so. We have not marked up one bill or advanced one bill to the floor since the new majority took over that would accomplish that goal.

And then the third way is through litigation. And litigation is in fact pending. The Noel Canning case has been decided at the appellate level. Whether it will go further is a matter for the Supreme Court to decide. It may or it may not.

Differences over policy should not be carried out by paralyzing executive branch agencies. If the issue were the constitutionality of these appointments, the issue would have been raised before. On four occasions President George W. Bush made intrasession appointments to the National Labor Relations Board.

Many of us, frankly, disagreed with some of the decisions that those board members supported. But we never questioned the legitimacy of their appointment. We argued with the substance of their opinions. That is the proper course to follow.

I would suggest, respectfully, a different title for this hearing, which is not about the effect of the Noel Canning decision on the NLRB, but the effect of collective bargaining on the United States of America because that is really what is at issue here.

Some of us believe that collective bargaining helps to create and produce a strong middle class, and a strong middle class helps produce a strong American economy. Others believe that collective bargaining perhaps has a less positive or even negative role.

Here is the facts. In 2012 workers represented by a union made about $10,000 a year more than workers not represented by a union, $943 a week versus $742 a week. Workers represented by a union were 71 percent more likely to have health insurance provided by their employer than employees who did not work for a union employer. Seventy-one percent of unionized workers had a company pension plan. Forty-three percent of nonunionized workers had a company pension plan.

Now, you may agree or disagree with that as economic policy for the United States. We think that strong collective bargaining yields a strong middle class which yields a strong America. But even if you disagree with us, if you take a different view, the venue to litigate that view is in the statutory legislative process.

Change the law if you do not like it. It is in the electoral process. Elect a president who will appoint members to the board that you agree with, if you do not like it. And if you think a decision is invalid, take it up through the courts has been the case here. But it is not legitimate, it is not consistent with our constitution to paralyze the decisions of any agency simply because you disagree.

This hearing never took place when the majority was in power before 2007 when George W. Bush—President George W. Bush made intrasession appointments. I suspect that is because the majority agreed with the people who were appointed.

Let us not confuse a principled, constitutional difference with a good faith difference over public policy. Let us enact an agenda that strengthens collective bargaining, strengthens America's middle class. That is what I believe we should be doing.

And I thank the chairman.

Chairman ROE. I thank the gentleman.

Pursuant to Committee Rule 7(c) all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for the official record.

It is now my pleasure to introduce our distinguished panel of witnesses.

Mr. Lorber, welcome. I know you had to go through a gauntlet to get here. We all do that. We should have brought you through the garage. That is what I did this morning, so. And Mr. Lorber is a member of the Proskauer law firm here in Washington, D.C. And welcome.

Mr. Raymond LaJeunesse is the Vice President of Legal and Director of the National Right to Work Legal Defense Foundation in Springfield, Virginia. Welcome.

Ms. Elizabeth Reynolds is a member of the Allison, Slutsky & Kennedy PC law firm in Chicago, Illinois. Welcome.

And Mr. Roger King is counsel at the Day Jones law firm in Columbus, Ohio. He is testifying on behalf of the Chamber of Commerce of the United States of America, and the Coalition for a Democratic Workplace.

Before I recognize you—many of you have testified here before. But before I recognize you for your testimony, let us briefly go through the lighting system.

You have 5 minutes to present your testimony. When you begin the light in front of you will turn green. With 1 minute left it will turn yellow. And when your time is expired it will turn red. At that point I will ask you to wrap up your remarks as best you are able. And after everyone has testified members will each have 5 minutes for questioning.

Now I will go ahead, and Mr. Lorber, if you would begin your testimony.

STATEMENT OF LAWRENCE Z. LORBER, MEMBER OF THE FIRM, PROSKAUER

Mr. LORBER. It is on. Chairman Roe and members of the committee, I am delighted to be here and to testify on this very important topic. My colleagues on this panel will discuss some of the specifics of Noel Canning in great detail.

However, because of my background I thought that I might add to the dialogue by discussing some decisions of the January 4th recess board, which suggests that this board may have misunderstood the role the NLRB plays and the NLRA in the interface between the myriad labor and employment laws which employers must deal with.

In particular, I will discuss the implications of the Banner Health Care System decision and the Fresenius Manufacturing decision. Both of these decisions show a surprising disregard of the necessity for the NLRB to interpret the NLRA in a manner consistent with its own purposes, but at the same time consistent with the related employment, labor, and governance laws which impact the employment relationship.

The NLRA is one of a multitude of federal, state, and local statutes which regulate various aspects of the employment relationship. Indeed, the Supreme Court has long made it clear and on multiple occasions that the National Labor Relations Board must be cognizant of other employment and labor related statutes when it interprets the NLRA.

As far back as 1942 in the Southern Steamship case, the Supreme Court stated frequently the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Other Supreme Court decisions, including Hoffman Plastics parroted that holding of the court and indeed in a case in 1979, the Detroit Edison case, the Supreme Court refused to apply standard NLRB board jurisprudence when it did not acquiesce in the provision to unions of employment test scores and the employment test in order to preserve the confidentiality of the tests and the confidentiality of the individuals who took those tests.

I would note that the multiplicity of statutory employment mandates was made quite clear to Congress when the Congress passed and it had to implement the Congressional Accountability Act in 1995, which applied then 11 and now 12 laws to the Congress, employment laws.

I was one of the first board of director members appointed by the leadership of Congress, and our task was not only to adopt the various regulations. But also to work with the congressional offices so that they might understand the interplay between all of these laws and how, for example, they had to deal with both the FMLA and the ADA. They had to deal with OSHA and the Federal Labor Relations Act. There was complexity then. That complexity is certainly there and then some in the private sector.

Let me begin by talking about Banner Health Systems. Banner was decided by the panel of Member Hayes who was confirmed by Congress, and Members Griffin and Block, who were part of the recess appointment package on January 4, 2012. In that decision the board interpreted Section 7, which protects concerted activity through mutual aid to preclude an employer from not establishing a mandatory, but establishing a policy of keeping ongoing investigations confidential until such time as those investigations were concluded.

The board found that such a policy in effect constituted almost a per se violation of Section 7. Instead the board suggested, but did not enunciate several grounds for keeping an ongoing investigation confidential. However, and perhaps most confusing, the board further required that such individual determinations be made at the outset of an investigation, before any evidence is adduced and before the full scope of the issue being investigated is clearly articulated.

The Banner Health—excuse me—decision is remarkable in several aspects. First, and perhaps most troubling is that the board, including two recess members, cavalierly established new precedent and created new rights without any attempt to address the

significant conflict this holding would have on sister employment, labor, corporate governance, and related laws.

Second, this decision was issued without reference to longstanding board precedents, which seemingly recognize that employers had multiple obligations to conduct investigations, and that those investigations require discretion and confidentiality. As articulated by the board in IBM Corp., the possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also increases the likelihood that employees with information about sensitive subjects will not come forward.

There is no question that Banner conflicts with policies promulgated by sister agencies to the NLRB. For example, the EEOC has long stated that confidentiality is a critical requirement in conducting investigations, particularly involving harassment. It has issued guidance to small businesses to that effect. In addition, the ADA requires that investigations be confidential. And as my testimony indicates, several other statutes, including Sarbanes-Oxley, does the same.

These standards also are not unexceptional since the NLRB casehandling manual itself provides that such investigations and such evidence be kept confidential. And the board argued in the Robbins Tire case that a case-by-case showing is neither required nor practical.

Let me note at this point that Member Griffin, one of the recess appointees, and on the panel which issued the Banner holding, spoke at the ABA meeting in November in Atlanta. He stated "I am willing to listen to real justification for a requirement of employee confidentiality, but not empty rhetoric." Perhaps Member Griffin might reconsider the statutory or regulatory obligations imposed on employers by other laws as empty rhetoric.

Let me briefly discuss the——

Chairman ROE. Mr. Lorber, if you could wrap up——

Mr. LORBER. Yes, okay.

Chairman ROE [continuing]. After a few minutes.

Mr. LORBER. Well, the Fresenius decision follows this. In that case and individual in a decertification contest sent scurrilous, sexually demeaning, threatening correspondence to female—to other employees. The ALJ found that this activity was not protected by Section 7, and upheld the discharge of that employee.

The board reversed the ALJ, incredibly, finding that there was in any election campaign that there would be some sort of heated rhetoric. Nevertheless, this language, what he used was not in a section, in an NLRA, in a decertification context would have mandated that employer to investigate and terminate that employee because of the EEOC rules.

Member Hayes pointed out that the board's decision simply precluded other agencies from carrying out their function. Thank you.

[The statement of Mr. Lorber follows:]

Prepared Statement of Lawrence Z. Lorber, Partner, Proskauer Rose LLP

Mr. Chairman, Members of the Subcommittee, I am delighted to appear before you today on this very important topic—The Future of the NLRB: What Noel Canning vs. NLRB Means for Workers, Employers, and Unions. I am Lawrence Lorber, currently a partner in the Proskauer law firm and co-chair of the firm's Washington

Labor and Employment practice. During my career I have held several positions which have enabled me to deal with the interplay between these laws. I was a lawyer in the Solicitor's Office at the US Department of Labor and then Executive Assistant to the Solicitor. This was a time when there was a flurry of additions to the labor and employment law catalogue including the passage of OSHA, ERISA, the enhanced treatment of the affirmative action and other obligations for government contractors and the enactment of the Rehabilitation Act. In 1975 I was appointed Deputy Assistant Secretary of Labor and Director of the Office of Federal Compliance Programs. Since I have been in private practice, I have dealt with a variety of labor and employment issues, many of which dealt with enforcement and compliance with various statutes as well as investigating charges brought by employees or the government agencies. In 1991 I was counsel to the Business Roundtable in the discussions which lead to the passage of the Civil Rights Act of 1991. And in 1995, I was one of the five attorneys appointed by the Congressional Leadership to the first Board of the Office of Compliance, which was charged with the establishment of the Congressional Accountability Act. For the past five years I have served as the Chair of the EEO Subcommittee of the Labor Committee of the US Chamber of Commerce. My testimony today is solely my own and I do not represent my firm, its clients or any organization with which I have affiliations.

My colleagues on this panel will discuss some of the specifics of Noel Canning in great detail. However, because of my background, it was thought that I could add to the dialogue by discussing some decisions of the January 4th Recess Board which suggest that this Board may have misunderstood the role the NLRB plays and the NLRA in the interface between the myriad labor and employment laws which employers must deal with. In particular, I will discuss the implications of Banner Health System d/b/a Banner Estrela Medical Center and James A. Navarro and Fresenius USA Manufacturing and International Brotherhood of Teamsters, Local 445. Both of these decisions show a surprising disregard of the necessity for the NLRB to interpret the NLRA in a manner consistent with its own purposes but at the same time consistent with the related employment, labor and governance laws which impact the employment relationship.

The National Labor Relations Act is but one of a multitude of federal, state and local statutes which regulate various aspects of the employment relationship. Indeed, the Supreme Court has made it clear on multiple occasions that the National Labor Relations Board must be cognizant of other employment and labor related statutes when it interprets the NLRA. In Southern Steamship Co. v NLRB, 316 US 31(1942), the Court stated that "* * * the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. "(Emph. added) It is this holding, repeated in various cases following Southern Steamship such as Boys Market v Retail Clerks, Local 770 (1970) and Hoffman Plastic Compounds v NLRB, 535 US 137 (2002) which should establish the framework for the NLRB to fulfill its statutory mandate. Too, the Supreme Court has refused to uphold a rote application of standard NLRA Board jurisprudence when it would interfere with legitimate concerns based upon professional standards or other statutory commands such as the requirement that professional standards for employment selection tests be respected, and confidentiality of tests and scores be honored, see Detroit Edison Co. v NLRB 440 US 301 (1979).

Indeed, the multiplicity of statutory employment mandates was made clear to the Congress when it was faced with the implementation of the Congressional Accountability Act, 2 USC 1301, et. seq. The Accountability Act brought to Congress and Congressional Entities 12 civil rights, labor and workplace safety laws.[1] As an appointed member of the first Board of Directors of the Office of Compliance charged with implementing the Accountability Act, we were faced with the task of not only adopting implementing regulations but also assisting the Congress with understanding and complying with these laws, all at the same time. The frequent overlap

[1] The twelve civil rights, labor, and workplace safety laws applied by the CAA include the Occupational Safety and Health Act of 1970; the Federal Labor Relations Act; Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act; the Rehabilitation Act of 1970; the Family and Medical Leave Act; the Fair Labor Standards Act; the Age Discrimination in Employment Act; the Worker Adjustment and Retraining Act; the Employee Polygraph Protection Act; and veterans' employment and reemployment rights at Chapter 43 of Title 38 of the U.S. Code. The Act was amended in 1998 to include the provisions of the Veterans Employment Opportunities Act.

between these laws, such as complaints under OSHA and the interface with the FLRA or the wage regulation found in the FLSA with the non-discrimination requirements of Title VII or the interface between the FMLA and the ADA made it clear that a key task we faced in the implementation stage was to attempt to harmonize the statutes and bring the Congress into compliance. This was not an easy task since none of the laws were given primacy over the others.

I bring these cases and the experience of implementing the Accountability Act in the context of this hearing as prelude to the discussion of certain decisions reached by the January 4th NLRB and how that body, whether properly constituted or not nevertheless has clearly and perhaps arrogantly refused to acknowledge its basic task which is to administratively interpret the NLRA in a manner consistent with the other equally compelling workplace mandates while at the same time insuring that its prime task in interpreting the NLRA itself in a reasonable fashion is met.

Indeed, a close review of two decisions in particular will illuminate the fact that this Board in particular has failed to adhere to the Supreme Court's admonition in 1942 that it not "ignore other and equally important Congressional objectives". Southern Steamship Co.

Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro 358 NLRB 93 (2012)

Banner Health was decided by the panel of Member Hayes,[2] Member Griffin,[3] and Member Block.[4]

In that decision, the Board interpreted the Section 7 rights of employees to engage in concerted activity for their mutual aid and protection to prohibit an employer's policy of attempting to keep ongoing investigations confidential until the investigation is concluded. Member Hayes dissented in part noting that there was no hard rule prohibiting the discussion of the ongoing investigation and therefore that the Board's ruling was not supported by the facts. The Board however held that any policy which purported to require ongoing investigations be confidential even if such policy was intended to protect the integrity of the investigation as found by the Administrative Law Judge ran a foul of the dictates of Section 7. Instead, the Board suggested but did not enunciate several grounds for keeping an ongoing investigation confidential including whether any witness needed protection, whether evidence was in danger of being destroyed, or whether there was a need to prevent a cover-up. However, the Board further required that such individual determination be made at the onset of an investigation, before any evidence is adduced and before the full scope of the issue being investigated is clearly articulated.

The Banner Health decision is remarkable in several aspects. First, and perhaps most troubling is that the Board, including the two recess members cavalierly established new precedent and created new rights without any attempt to address the significant conflict this holding would have on sister employment, labor, corporate governance and related laws. Second, this decision was issued without reference to long standing Board precedence which seemingly recognized that employers had multiple obligations to conduct investigations and that those investigations required discretion and confidentiality. As articulated in IBM Corp, 341 NLRB 1288 (2004):

"The possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also increases the likelihood that employees with information about sensitive subjects will not come forward." Id. at 1293.

There is no question that the Banner holding conflicts with policies promulgated by sister agencies to the NLRB. For example, the EEOC has long stated that confidentiality is a critical requirement in conducting investigations, particularly involving harassment. The potential for adverse consequences against an employee who raises harassment issues or who cooperates in an investigation are significant. Indeed, the EEOC's regulations make this clear:

An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. See Vinson, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protec-

[2] Confirmed by Congress—June 29, 2010
[3] Recess Appointment January 4, 2012
[4] Recess Appointment January 4, 2012

tion of victims and witnesses against retaliation. 29 C.F.R. § 1604.11(f). (emph added)

The EEOC has issued similar guidance in its Q & A to Small employers on Harassment by Supervisors. The issue is not only relevant to harassment investigations under Title VII. The ADA requires that medical information gathered from employees for purposes of determining whether a reasonable accommodation is appropriate or in investigating an ADA complaint has validity must be kept confidential. 42 USC § 12112(d)(3)(B). Similarly information gathered in course of compliance with the FMLA which includes investigating harassment or retaliation claims under that statute must be kept in separate confidential records and cannot be disclosed. 29 CFR § 825.500(g).

And outside of the employment context, the Sarbanes-Oxley Act requires that covered employers with audit committees establish clearly articulated procedures for "(the) receipt, retention, and treatment of complaints * * * and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." 15 USC § 78j-1(m)(4)(B) (emph. added).

Remarkably, these standard and heretofore unexceptional precepts for conducting investigations have been long followed by the NLRB itself. The NLRB Case Handling Manual provides: "In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his or her attorney or designated representative." Case3 Handling Manual, Section 10060.9. And in NLRB v Robbins Tire and Rubber Co. 437 US 214 (1978), the NLRB argued that that "a particularized case-by-case showing is neither required not practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure while a hearing is pending." Id. at 222.

There is nothing unique about these requirements regarding conducting investigations under these other statutes or the NLRB's own case handling procedures. What is unique is the decision in Banner Health System where the panel in that case decided to establish separate rules for the handling of complaints under the NLRB and establish that an employer will be deemed to violate the NLRA if it follows these other statutory mandates and good investigatory practice by asking that the investigation be treated as confidential until the process is completed. Too, the "lifeline" suggested by the panel that the employer must undertake a case by case analysis before starting the investigation is completely without any logic. Until the investigation is under way, facts found and witnesses identified, it would be extremely difficult to determine what should or should not be kept confidential.

However what may be logical and self apparent is apparently not so to the NLRB. Member Griffin, a member of the Banner Health panel spoke recently at the ABA Labor Section meeting in Atlanta. The report of the meeting included the following:

"Griffin told the ABA audience Banner Estrella did not hold that an employer rule or requirement for confidentiality could never be enforced. He added, however, that an employer must provide some demonstration of a business necessity for confidentiality. * * * Griffin said employers with similar rules (confidentiality of investigations) or policies that failed to identify a specific business need can expect that their requirements also "can be struck down as violative of Section 8(a)(1)" of the NLRA.

"I'm willing to listen to real justification" for a requirement of employee confidentiality, Griffin said, "but not empty rhetoric". Bloomberg BNA Daily Labor Report November 5, 2012.

Perhaps Member Griffin might reconsider calling the statutory or regulatory obligations imposed on employers by other laws "empty rhetoric."

Another decision issued by the same panel also deserves mention. In Fresenius USA Manufacturing, Inc. and International Brotherhood of Teamsters, Local 445 358 NLRB 138 (September 19, 2012, the NLRB was faced with the situation where an employee during a decertification campaign sent union Newspapers into an employee break room which contained admitted scurrilous, sexually demeaning language and also language which could have reasonably been construed as threatening. Upon receiving complaints from female employees, the company investigated the situation, as it was required to do under Title VII, to determine who sent the newspapers and what was the intent. During the investigation several female employees came forward and filed statements that they found the newsletter writings vulgar, offensive, and threatening. After first denying that he had anything to do with the distribution of the newsletter, the employee subsequently admitted that he sent the newsletter but that he did not intend the recipients to react in the manner they did. The Administrative Law Judge noted that while election campaigns can often engender harsh or heated language, anonymous and facially demeaning and threatening language does not rise to the level of protected activity. Therefore, the Administrative Law Judge found that the discharge of the employee did not violate the NLRA.

Incredibly, a majority of the panel, members Griffin and Block reversed the ALJ and found the language and activities of the employee sending anonymous improper language was protected activity. Again, this Board has elevated the rights conferred by § 7 to outweigh the other protections afforded employees and obligations placed upon employers. As Member Hayes stated in partial dissent:

"Taken as a whole, these pronouncements confer on employees engaged in Section 7 activity a degree of insulation from discipline for misconduct that the Act neither requires nor warrants. * * * Notwithstanding their disavowals, my colleagues thereby impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules nondiscriminatorily prohibiting abusive and profane language, sexual harassment, and verbal, mental, and physical abuse."

The issue raised in these two decisions, as well as others by the Board consisting of a majority of members appointed on January 4, 2012, seems to suggest a view that the NLRA is not part of a mosaic of labor and employment laws designed to deal with sophisticated employment issues but rather that it stands alone, not impacted by these other laws and unaffected by judicial precedent or frankly common reason.

Chairman ROE. Mr. LaJeunesse?

STATEMENT OF RAYMOND J. LAJEUNESSE, JR., VICE PRESIDENT AND LEGAL DIRECTOR, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

Mr. LAJEUNESSE. Chairman Roe and members, under the National Labor Relations Act employees who do not want union representation must accept the bargaining agent the majority of the employees in the bargaining unit select. Then, if not in a right-to-work state, and their employer and the union agree, the law forces them to pay fees equal to union dues for that unwanted representation, or be fired.

Union dues are spent for politics and other non-bargaining purposes. In Communications Workers vs. Beck, the Supreme Court ruled that under the act employees cannot be compelled to subsidize unions' political and other non-bargaining activities. Employees must overcome many hurdles to exercise that right, hurdle sanctions or erected by the National Labor Relations Board.

My written statement details how the board and its general counsels have failed to process expeditiously and procedurally impeded charges of Beck violations. Here I address the worst instances of the board's refusal to follow judicial precedent.

The most significant procedural hurdles to workers' exercise of Beck rights are union requirements that objections be submitted during short window periods and be renewed annually, obstacles approved from the board's first post-Beck decision. Thus, many employees' objections are rejected as untimely.

Affirmative consent, not objection to political funding, should be required, as the Supreme Court recently held in Knox v. SEIU as to special assessments. At a minimum, Beck objections should be continuing.

After three courts so held, the board reconsidered. But instead of finding annual objection requirements per se unlawful, it decided to evaluate them union-by-union. A board majority upheld the UAW's annual objection requirement without even considering its purported justifications, finding that the burden on non-members was de minimis.

Another hurdle non-members face is finding out how the union spends their fees so they can decide whether to object. In Teachers Local 1 v. Hudson, the Supreme Court held that "potential objectors must be given sufficient information to gage the propriety of the union's fee."

Yet, the board ruled that unions need not disclose any financial information until after non-members object. Although the D.C. Circuit reversed, the board continues to follow its own holding.

Hudson also specified that "adequate disclosure surely would include verification by an independent auditor." Yet, unions often do not give objecting non-members and auditors verification. The current recessed board recently approved that practice, despite the D.C. circuit's earlier contrary holding.

The board majority argued that union's conduct under Beck is properly analyzed under the duty of fair representation, not a heightened First Amendment standard, as in public sector cases such as Hudson. But the D.C. Circuit had previously ruled that Hudson's holdings apply "equally to the statutory duty of fair representation."

The board also refuses to follow binding precedent as to what activities are lawfully chargeable. In Beck, the court concluded that the forced fee provisions of the National Labor Relations Act and the Railway Labor Act are "statutory equivalents." Moreover, Beck ruled that decisions limiting forced fees under the Railway Labor Act are "controlling" under the National Labor Relations Act.

In Ellis v. Railway Clerks the Supreme Court held that union organizing is not lawfully chargeable under the RLA. In Beck the Fourth Circuit followed Ellis in ruling that organizing expenditures were not allowable charges.

Despite the Supreme Court's clear mandate that RLA decisions concerning forced union fees control under the NLRA, the Board held that organizing within the same competitive market is chargeable to non-members because of differences as to other aspects of the two statutes.

The current board went even further. A majority holding chargeable, as the chairman mentioned, lobbying for goals that are germane to collective bargaining in that majority's view.

Worse, it proposed a rebuttable presumption of germaneness for bills that would directly affect subjects of collective bargaining. The majority again ignored the Supreme Court's holding that RLA decisions are controlling.

Machinists v. Street was the first Supreme Court case to limit forced union fees. Where Street held that the RLA does not authorize unions to use objecting employees' exacted funds to support political causes, a footnote listed lobbying as a use of union funds for political purposes.

In Knox the union contended, like the board majority, that expenditures to defeat a ballot proposition were germane because the proposition would have affected bargaining agreements.

The Supreme Court disagreed. "If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities." In an RLA case the D.C. Circuit similarly rejected the same argument as the lobby.

The board majority also ignored NLRA precedent. The D.C. Circuit has held that under the act the "Beck and Ellis holdings foreclosed the exaction of mandatory agency fees for legislative activities."

In some the problem is systemic. The board has abysmally failed to protect workers' Beck rights. Indeed, the current board seems bent on totally eviscerating those rights.

Non-members' Beck rights are first amendment type interests. As such they deserve effective protection. Experience since Beck demonstrates that only statutes that prohibit compulsory union fees, i.e., right to work laws, effectively protect employees from being forced to subsidize union, political and other non-bargaining activities.

Thank you very much.

[The statement of Mr. LaJeunesse follows:]

Prepared Statement of Raymond J. LaJeunesse, Jr., Vice President & Legal Director, National Right to Work Legal Defense Foundation, Inc.

CHAIRMAN ROE AND DISTINGUISHED MEMBERS OF THE COMMITTEE: Thank you for the opportunity to testify today.

My name is Raymond LaJeunesse. I am Vice President and Legal Director of the National Right to Work Legal Defense Foundation. Since the Foundation was founded in 1968, it has provided free legal aid to workers in almost every case litigated concerning the rights of workers not to subsidize union political and other nonbargaining activities. The most famous of these cases is Communications Workers v. Beck.[1]

I have worked for the Foundation for more than forty years. I have represented tens of thousands of employees in cases like Beck, many of which were class actions. I was the lead counsel for the plaintiff workers in three such cases that I argued in the United States Supreme Court.

I commend you for investigating the adequacy of the National Labor Relations Board's enforcement of the individual worker rights Beck recognized as intended by Congress. Implementation of Harry Beck's victory in the Supreme Court is a serious problem. Many American workers are forced, due to a unique privilege Congress granted unions in the National Labor Relations Act, to contribute their hard-earned dollars to political and ideological causes they oppose.

At issue are union dues and agency fees collected from workers under threat of job loss. These monies, under federal election law, are lawfully used for registration and get-out-the-vote drives, candidate-support among union members and their families, independent expenditures concerning for or against candidates directed to the general public, administration of union political action committees, lobbying, and issue advocacy. These political expenditures by unions that must file financial reports with the Department of Labor amount to more than a billion dollars in a two-year election cycle.[2]

Under the National Labor Relations Act, employees who never requested union representation must accept the bargaining agent selected by the majority in their bargaining unit. Then, if not in a Right to Work state, and their employer and monopoly bargaining agent agree, the law forces these employees to pay fees equal to union dues for that unwanted representation, or be fired.

The evil inherent in compelling workers to subsidize a union's political and ideological activities is apparent. As Thomas Jefferson eloquently put it, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'"[3] Preventing that evil, however, is difficult under current law.

In dissenting from the Supreme Court's first ruling on this problem, in Machinists v. Street, the late Justice Hugo Black articulated the difficulty well. To avoid constitutional questions, the Court held that the Railway Labor Act prohibits the use of forced union dues and fees for political and ideological purposes.

However, the Court's majority held that the employees' remedy was merely a reduction or refund of the part of the dues used for politics. Justice Black exposed that remedy's fatal flaw:

It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic an-

swer from the voluminous and complex accounting records of the local, national, and international unions involved. It seems to me * * * however, that * * * this formula with its attendant trial burdens promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.[4]

Following Street, the Supreme Court's later Beck decision ruled that employees covered by the National Labor Relations Act also cannot lawfully be compelled to subsidize unions' political, ideological, and other nonbargaining activities. That decision should have paved the way for all private-sector employees to stop the collection of dues for anything other than bargaining activities.

However, like Street, Beck is not self-enforcing. Experience shows that Justice Black was correct. Without the help of an organization like the Foundation, no employee, or group of employees, can effectively battle a labor union and ensure that they are not subsidizing its political and ideological agenda. Even with the rulings in Beck and related cases, the deck is stacked against individual employees. And, even with the help of the Foundation, which cannot assist every worker who wants to exercise Beck rights, complicated and protracted litigation often is necessary to vindicate those rights.

Employees must overcome many hurdles to exercise their Beck rights.

Unfortunately, many of those hurdles have been sanctioned or, worse, thrown up by the National Labor Relations Board. To be blunt, the NLRB has failed to enforce Beck vigorously, both in processing cases and applying judicial precedent.

That problem has gotten even worse under the current Board, which the D.C. Circuit last month held in Noel Canning v. NLRB does not have a constitutionally valid quorum.[5]

Since the Supreme Court decided Beck in 1988, the NLRB's General Counsel, its Regional Offices, and the Board have failed to process expeditiously unfair labor practice charges of Beck violations.

Significantly, in 1994 the General Counsel's Office instructed all Regional Directors to dismiss immediately Beck charges they found unworthy, and not to issue complaints on worthy Beck charges, but to submit them to the Division of Advice in Washington, D.C.[6] That was circumstantial evidence that the then

General Counsel intended to delay the processing of Beck charges or spike as many as possible. As recently as 2011, current Acting General Counsel Lafe Solomon instructed Regional Directors that several Beck issues must be submitted to the Division of Advice, "because there is no governing precedent or * * * [they] involve a policy issue in which I am particularly interested."[7]

The Board delayed for eight years before it issued its first post-Beck decision, California Saw & Knife Works.[8] Many other Beck cases languished before the Board for similar lengthy periods. The then NLRB Chairman admitted that at the end of July 1997 the sixty-five oldest cases then before the Board included twenty-one Beck cases.[9] The Board later issued decisions in some of those cases only after the objecting workers petitioned for mandamus from the D.C. Circuit.[10]

Many Beck cases do not even reach the Board. The General Counsel has settled many Beck charges with no real relief for the employees. The Board's Regional Directors have refused to issue complaints and dismissed many other charges at the General Counsel's direction.

In 1998, the then Acting General Counsel set up yet another roadblock. He instructed Regional Directors that Beck charges must be dismissed unless the nonmember "explain[s] why a particular expenditure treated as chargeable in a union's disclosure is not chargeable * * * and present[s] evidence or * * * give[s] promising leads that would lead to evidence that would support that assertion."[11] Regional Directors follow this instruction to this day.[12]

It is impossible for nonmembers to provide evidence or leads to evidence at the charge stage, because nonmembers do not have access to the union's financial and other records. The General Counsel's rule is also contrary to the Supreme Court's admonition that "the union bears the burden of proving what proportion of expenditures went to activities that could be charge to dissenters * * *."[13]

The Board itself has given workers little protection and relief when it finally decides Beck cases, in many instances refusing to follow what should be controlling Supreme Court and U.S. Court of Appeals precedent.

Unions have a legal duty to inform workers that they have a right not to join and, if they do not join, a right not to subsidize the union's political and other nonbargaining activities.[14] One major obstacle to the exercise of Beck rights is the obscure manner in which the NLRB permits unions to notify employees of their rights not to join and not to subsidize union political activity.

When unions give such notice, they often hide it in fine print inside union propaganda that dissenting workers find offensive and, therefore, do not read. An egre-

gious, but typical, example of that practice was approved by the Board in the very first post-Beck case it decided, California Saw.[15] In that case the Machinists union published its notice of Beck rights "on the sixth page of [an] eight-page newsletter." The first page of that newsletter was "largely occupied by an article about Democratic Presidential hopefuls." The newsletter also contained "a number of other political articles * * *, all with a strong Democratic bias."[16] That is hardly notice designed to come to the attention of employees who oppose the union's political activities, yet the Board still follows this outrageous ruling today.

Workers who do not want their compulsory dues and fees used for political purposes must negotiate technical procedural hurdles that unions have errected.

The most significant are the requirements, imposed by most unions, that Beck objections be submitted during a short "window period"—typically a month or less—and be renewed every year. In California Saw, the NLRB approved both of these obstacles to the exercise of Beck rights.[17] As a result, many employees are forced to pay for union political activities, because their objections are considered untimely under union rules.

Why should constitutional rights be available only once a year? Employees should be free to stop subsidizing union political activity whenever they discover that the union is using their monies for purposes they oppose, not just during a short, arbitrary "window period." Indeed, as the Supreme Court recently asked in Knox v. SEIU Local 1000, "[o]nce it is recognized * * * that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?"[18] Affirmative consent to such funding should be required, not objection, as the Knox Court held with regard to special assessments.

Certainly, if objection is required at all, workers should be free to make Beck objections that continue in effect until withdrawn, just as union membership continues until a resignation is submitted. After three federal courts declined to follow the Board on this issue,[19] the Board reconsidered. But, instead of finding that annual objection requirements are per se unlawful, the Board decided to evaluate those requirements on a union-by-union basis "to determine 'whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.'"[20]

Applying that loose standard, a Board majority upheld the UAW's annual objection requirement in 2011 without even considering the union's purported justifications for it, finding that the burden that the requirement imposed on nonmembers was "de minimis."[21] However, as Member Hayes said, dissenting, the burden of objection under the UAW's scheme "is plainly and decidedly not de minimis," because objecting employees still must undertake the affirmative task of writing and mailing a statement of continued objection each year; they must remember to do so before their 1-year objector term expires; and, if they fail to timely renew their objection, they will automatically incur the obligation of paying a full agency fee, including funds for expenditures * * * for nonrepresentational purposes, for some period of time."[22]

Another procedural hurdle nonmembers face is finding out how the union spends their fees so that they can intelligently decide whether to object. In Teachers Local 1 v. Hudson, the Supreme Court held that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee."[23] Yet, the NLRB ruled in the Penrod case that unions need not disclose any financial information to nonmembers until after they object.[24] Despite being reversed by the D.C. Circuit, the Board continues to follow its Penrod ruling.[25]

The Supreme Court also specified in Hudson that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor."[26] Yet, when unions give objecting employees financial disclosure, they often do not give them an auditor's verification. The current Board approved that practice in United Nurses & Allied Professionals, in which the union merely told objecting nonmember Jeanette Geary that a certified public accountant had verified its major categories of expenses.[27]

The Board majority in United Nurses explicitly declined to follow a directly contrary holding of the Ninth Circuit, Cummings v. Connell.[28] The majority, including two purported Members whose appointments were held invalid in Noel Canning, argued that unions' conduct under Beck "is properly analyzed under the duty of fair representation," not "a heightened First Amendment standard" as in public-sector cases such as Hudson and Cummings.[29] However, the D.C. Circuit had already that argument in an earlier Board case.

In Ferriso v. NLRB, the D.C. Circuit reversed the Board's ruling that unions need not provide an objecting nonmember "with an independent audit of their major categories of expenditures."[30] The Ferriso court explicitly reaffirmed its earlier holding

in Abrams v. Communications Workers that Hudson's holding on notice and objection "procedures applies equally to the statutory duty of fair representation."[31] Regrettably, it is the Board's practice "to ignore precedent from federal appellate courts in favor of its own interpretations" of the law.[32]

In reversing the Board in Ferriso, the D.C. Circuit explained why "[b]asic considerations of fairness"[33] require disclosure to objecting employees of an independent audit of a union's calculation of its chargeable expenses: "nonmembers cannot make a reliable decision as to whether to contest their agency fees without trustworthy information about the basis of the union's fee calculations, and * * * an independent audit is the minimal guarantee of trustworthiness."[34]

The Board also has refused to follow Supreme Court precedent as to what activities are lawfully chargeable to objecting nonmembers. In Beck, the Court concluded "that § 8(a)(3) [of the NLRA], like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,'" quoting Ellis v. Railway Clerks.[35] Moreover, Beck ruled that decisions in this area of the law under the RLA are "controlling" under the NLRA.[36]

In Ellis, the Supreme Court held that union organizing is not lawfully chargeable under the RLA, because it has only an "attenuated connection with collective bargaining."[37] In Beck itself, the Fourth Circuit followed Ellis in ruling that organizing expenditures "were not allowable charges against the objecting employees."[38] Despite the Supreme Court's clear mandate in Beck that decisions concerning forced union fees under the RLA are controlling under the NLRA, the Board has held that "organizing within the same competitive market" is chargeable to objecting nonmembers under the NLRA because of differences as to other aspects of the two statutes.[39]

The current Board further eviscerated employees' Beck rights in United Nurses. There the majority held that "[s]o long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors," even if the bills lobbied "would not provide a direct benefit to members of the" objectors' bargaining unit.[40] Worse, the majority, two of whom were unconstitutionally appointed, proposed a "rebuttable presumption of germaneness" for legislation, such as minimum wage legislation, that "would directly affect subjects of collective bargaining."[41]

The United Nurses majority thus again ignored the Supreme Court's Beck holding that decisions concerning forced union fees under the RLA are controlling under the NLRA. Street was the very first case to decide what limits the RLA imposes on forced union fees. At the very point at which the Supreme Court held that the RLA does not authorize unions to use objecting employees' "exacted funds to support political causes," the Court inserted a footnote that lists "lobbying purposes, for the promotion or defeat of legislation," as a "use of union funds for political purposes."[42]

In Miller v. Airline Pilots Ass'n, the union, like the Board majority in United Nurses, contended that under the RLA lobbying government agencies concerning "issues that animate much of its collective bargaining * * * should be regarded as germane to that bargaining."[43] The D.C. Circuit emphatically rejected that argument: "if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world."[44]

The Supreme Court made the same point itself last year in Knox. There a state employee union contended that its expenditures to defeat a ballot proposition were "germane" because the proposition would have affected future implementation of its bargaining agreements The Court rejected that argument: "If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities."[45]

The United Nurses Board majority also ignored what should have been dispositive precedent under the NLRA. In Abrams v. Communications Workers, the D.C. Circuit noted that the union's Beck notice to nonmembers "lists 'legislative activity' and 'support of political candidates' as non-chargeable expenses." The court agreed that the "Beck and Ellis holdings foreclose the exaction of mandatory agency fees for such activities" and, consequently, held that the notice was inadequate because it contained other "language which might lead workers to conclude that such activities are chargeable."[46]

In sum, there is a systemic problem. Since Beck was decided in 1988, the National Labor Relations Board has dismally failed to protect adequately the statutory rights of workers not to subsidize union political, ideological, and other nonbargaining ac-

tivities. Indeed, the current Board, despite its lack of a constitutional quorum, seems bent on totally eviscerating those rights.

As the D.C. Circuit has recognized, nonmembers' Beck rights are "First Amendment-type interests."[47] As such, they deserve effective protection. The only federal labor statutes that effectively protect those fundamental rights are the Federal Labor Relations Act and the statute that covers postal employees, both of which prohibit agreements that require workers to join or pay union dues to keep their jobs.[48] The National Right to Work Act, S. 204, introduced by Senator Rand Paul on January 31, 2013, would provide the same effective protection for employees covered by the National Labor Relations Act.

ENDNOTES

[1] 487 U.S. 735 (1988).
[2] *http://nilrr.org/files/Big%20Labor%20Political%20Spending%20in%20the%202010%20Election%20Cycle.pdf.*
[3] Quoted in Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977).
[4] 367 U.S. 740, 795-96 (1961).
[5] 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).
[6] NLRB Mem. OM 94-50 (June 13, 1994).
[7] NLRB Mem. GC 11-11 (Apr. 12, 2011).
[8] 320 N.L.R.B. 224 (1995), enforced sub nom. Machinists v. NLRB, 133 F.3d 1012 (7th Cir.1998).
[9] Letter from Chairman Gould to Rep. Tom Lantos (Oct. 15, 1997), at 3.
[10] E.g., In re Weissbach, No. 98-1301 (D.C. Cir. Nov. 24, 1998).
[11] NLRB Mem. GC 98-11, at 5 (Aug. 17, 1998).
[12] E.g., Teamsters Local 974, No. 18-CB-082853. letter from Regional Director Osthus to Foundation Staff Attorney John Scully (July 27, 2012), at 1.
[13] Ellis v. Railway Clerks, 466 U.S. 435, 457 n.15 (1984).
[14] See Marquez v. Screen Actors Guild, 525 U.S. 33, 43 (1998).
[15] 320 N.L.R.B. at 234-35.
[16] Machinists v. NLRB, 133 F.3d 1012, 1018 (7th Cir. 1998).
[17] 320 N.L.R.B. at 235-36.
[18] 132 S. Ct. 2277, 2290 (2012) (5-4 decision).
[19] Seidemann v. Bowen, 499 F.3d 119, 124-26 (2d Cir. 2007); Shea v. Machinists, 154 F.3d 508 (5th Cir. 1998); Lutz v. Machinists, 121 F. Supp. 2d 498 (E.D. Va. 2000).
[20] UAW Local #376, 356 N.L.R.B. No. 164, slip op. at 1 (2011) (2-1 decision) (quoting Machinists Local Lodge 2777, 355 N.L.R.B. No. 174, slip op. at 1 (2010) (3-2 decision)).
[21] Id., slip op. at 3.
[22] Id., slip op. at 4.
[23] 475 U.S. 292, 306 (1986) (emphasis added).
[24] Teamsters Local 166, 327 N.L.R.B. 950, 952 (1999), petition for review granted sub nom. Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); see California Saw, 320 N.L.R.B. at 233.
[25] E.g., United Food & Commercial Workers Local 700, No. 25-CB-8896, JD-14-08, slip op. at 6 (Mar. 7, 2008).
[26] 475 U.S. at 307 n.18 (emphasis added).
[27] 359 N.L.R.B No. 42, slip op. at 1-4 (Dec. 14, 2012) (3-1 decision).
[28] 316 F.3d 886 (9th Cir. 2003).
[29] 359 N.L.R.B. No. 42, slip op. at 2-3.
[30] 125 F.3d 865, 866-70 (D.C. Cir. 1997).
[31] 59 F.3d 1373, 1379 & n.7 (D.C. Cir. 1995); accord Ferriso, 125 F.3d at 868-70.
[32] Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980).
[33] Hudson, 475 U.S. at 306.
[34] 125 F.3d at 869-70 (citations omitted).
[35] 487 U.S. at 762-63 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)) (emphasis added).
[36] Id. at 745 (emphasis added).
[37] 466 U.S. at 451-53.
[38] Beck v. Communications Workers, 776 F.2d 1187, 1211 (1985), aff'd on other grounds en banc, 800 F.2d 1280 (4th Cir. 1986), aff'd, 487 U.S. 735 (1988).
[39] United Food & Commercial Workers Locals 951, 7 & 1036, 329 N.L.R.B. 730, 733-38 (1999) (4-1 decision), enforced in pertinent part, 307 F.3d 760 (9th Cir. 2002).
[40] 359 N.L.R.B. No. 42, slip op. at 5-8.
[41] Id., slip op. at 9.
[42] Machinists v. Street, 367 U.S. 740, 769 & n.17 (1961).
[43] 108 F.3d 1415, 1422 (D.C. Cir. 1997), aff'd on other grounds, 523 U.S. 866 (1998).
[44] Id. at 1422-23.
[45] 132 S. Ct. at 2294-95; accord id. at 2296-97 (Sotomayor, J., concurring in pertinent part).
[46] 59 F.3d 1373, 1380 (D.C. Cir. 1995) (emphasis added).
[47] Miller, 108 F.3d at 1422.
[48] See 5 U.S.C. § 7102 (guaranteeing federal employees the right to refrain from "form[ing], join[ing], or assist[ing] any labor organization"); 39 U.S.C. § 1206(c) (same for postal employees).

Chairman ROE. Thank you.
Ms. Reynolds?

STATEMENT OF N. ELIZABETH REYNOLDS, MEMBER OF THE FIRM, ALLISON, SLUTSKY AND KENNEDY, P.C.

Ms. REYNOLDS. Chairman Roe, Ranking Member Andrews and members of the committee and the subcommittee, thank you for your invitation to appear here today. My name is Elizabeth Reynolds, and I am a shareholder in the law firm of Allison, Slutsky & Kennedy, P.C. in Chicago, Illinois.

Since joining the firm in 1998 I have represented unions and workers in diverse industries from hospitality to trucking, including numerous cases at the National Labor Relations Board. I am honored to be asked to talk to our congressional representatives about the board. But I am sorry that this opportunity comes in the context of a sustained series of attacks on the board by special interests who do not have the wellbeing of American workers at heart.

As a citizen I am troubled that this committee and subcommittee have held a total of nine oversight hearings concerning the NLRB in 2 years, spending the public's time and resources on those hearings when all the agency has done is fulfill its statutory duty.

The NLRB is a small, independent agency responsible for enforcing the National Labor Relations Act. Its main functions are administering representation election to determine whether employees want or do not want to be represented by a union and investigating and prosecuting charges against both employers and employees when they violate the NLRA.

The NLRB by statue has five members. Their terms are staggered so that one expires each year. The Supreme Court ruled in 2010 that the NLRB cannot act without a quorum of three members.

Some in the Senate have responded to that ruling by blocking all nominations to the board for the stated purpose of shutting it down. These tactics further the agenda of powerful special interests who would rather not have the nation's labor laws enforced at all.

On January 3, 2012 the expiration of a board member's term left the NLRB with only two members, a Democrat and a Republican, and thus with no quorum. The next day President Obama recess appointed three new members, two Democrats and one Republican, following the long bipartisan tradition of filling the board with three members of the president's party and two members of the other party.

From 1980 to present there have been 29 recess appointments to the NLRB. Under the D.C. Circuit's interpretation of the recess appointments clause in the Noel Canning decision, 25 of those appointments would be invalid; 14 by Republican presidents and 11 by Democratic presidents.

In fact, President George H.W. Bush's appointment of Alan Greenspan to the Federal Reserve Board would be invalid according to the D.C. Circuit's reasoning. Where was the outrage when President Carter, President Reagan, President Bush, President Clinton and President Bush made those 25 recess appointments to the NLRB, as well as hundreds of recess appointments to other positions?

Three other federal courts of appeals have held that recess appointments under such circumstances are valid, but since the D.C.

Circuit's decision in Noel Canning, some in Congress are now contending that the board should cease operations. That is like suggesting that the police should stop enforcing the law because one court has held it unconstitutional when three other courts have already held the law as constitutional.

The board has a statutory responsibility to enforce the National Labor Relations Act. The board is following its longstanding policy of continuing to apply its ruling in order to maintain a uniform national labor policy when the circuit courts disagree and the Supreme Court has not yet spoken.

One panel of judges cannot shut down an agency created by Congress and leave employees and employers with no one to enforce the rights and the laws that protect them. But predictably parties are seeking to avoid compliance with board orders by taking advantage of the Noel Canning decision to put their cases on indefinite hold in the D.C. Circuit.

As a local labor lawyer I am very concerned about the results that this delay will have on real people. One such case that the D.C. Circuit has put on hold was handled by our firm. The board found unanimously, including Republican member Brian Hayes, said that the employer illegally discriminated against a longtime printing company employee for his union activities and fired him on a pretext.

The employee, Marcus Hedger, was a union steward, which meant that he assisted his coworkers with their grievances and he sat on the union's bargaining committee. During some contentious negotiations the employer's vice president told Mr. Hedger that he was tired of this "union circus" and that "we are watching you, we are going to catch you and we are going to fire you." Shortly after, Mr. Hedger was fired.

The unanimous board, including Republican member Hayes ruled that the firing was illegal and ordered the company to reinstate Mr. Hedger with lost earnings.

This is a straightforward case where the board agreed across party lines. But now while the board's decision sits on hold, Mr. Hedger is working an entry-level job at a fraction of what he used to earn, and he has lost his house. Scenarios like this will be repeated around the country as a result of the Noel Canning decision.

I will be happy to address the board's recent decisions during the question period if the committee members wish. But since my time is just about out I would like to conclude by saying that the workers are worried about their jobs and the board is not part of the problem. The board is part of the solution.

After the National Labor Relations Act was passed, our nation enjoyed decades of prosperity because collective bargaining allowed workers to negotiate for good, middle class jobs. Those who seek to shut down the board—and that is what this hearing is about; make no mistake—are serving the narrow interests of the 1 percent. Without job security and fair pay for the 99 percent, our nation cannot prosper as a whole. Thank you.

[The statement of Ms. Reynolds follows:]

TESTIMONY
BEFORE THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS
UNITED STATES HOUSE OF REPRESENTATIVES

February 13, 2013

"The Future of the NLRB: What *Noel Canning v. NLRB* Means for Workers, Employers, and Unions."

N. Elizabeth Reynolds
Allison, Slutsky & Kennedy, P.C.
Chicago, Illinois

Chairman Roe, Ranking Member Andrews and Members of the Subcommittee, thank you for your invitation to appear here today. My name is Elizabeth Reynolds and I am a shareholder in the law firm of Allison, Slutsky & Kennedy, P.C. in Chicago, Illinois. Our firm and its predecessor firm have been representing labor organizations and workers for over 50 years. Since joining the firm in 1998, I have represented a variety of labor organizations and workers in the private and public sectors, including among others hotel and gaming workers; truck drivers and package handlers; printing industry employees; postal service employees; and teachers. My work has included extensive proceedings before the National Labor Relations Board, as well as federal and state court litigation, arbitrations, and providing advice and guidance to our clients. I am active in the American Bar Association Section of Labor and Employment Law. I graduated from Yale University in 1990, earned my law degree in 1997 from the University of Texas School of Law where I served as Chief Articles Editor of the *Texas Law Review*, and clerked for Chief Justice Thomas R. Phillips of the Texas Supreme Court before joining Allison, Slutsky & Kennedy, P.C. as an associate.

Introduction

I am honored to be asked to talk to our elected representatives about the National Labor Relations Board ("Board" or "NLRB"). I am sorry that this opportunity comes in the context of a sustained series of attacks on the Board by special interests who do not have the well-being of American workers at heart. These attacks go well beyond the current dispute over President Obama's recess appointments.

Ever since President Obama made his first appointments to the NLRB in 2010, virtually every action taken by the Board to promote effective enforcement of the rights afforded to workers under the National Labor Relations Act has been loudly condemned by opponents of the Board. Even as modest a step as requiring employers to post notices of employee rights under the Act, as they are already required to do under OSHA, the Fair Labor Standards Act, and many other employment laws, has been greeted as a catastrophe in some circles. Now, an extreme decision by a three-judge panel of a single

court of appeals, which would invalidate not just the recess appointments of the three individuals appointed to serve on the Board in January of 2012, but literally hundreds of recess appointments made by Presidents going back to Andrew Johnson, has those who would like to turn back the clock to pre-NLRA days demanding that these members resign, leaving the Board unable to function. Voices that were silent when President George W. Bush made seven separate recess appointments to the NLRB—every one of which would be considered invalid under the reasoning of the court in *Noel Canning*[1]—are suddenly full of indignation at President Obama's exercise of the same constitutional power.

The hostility and rage that I hear in these attacks on the Board do not reflect what I hear from practitioners on all sides of the labor bar. In Chicago, we have two labor-management committees that meet a couple of times a year to discuss current issues of practice and procedure before the NLRB. One of those committees is under the auspices of the American Bar Association and the other is led by the Regional office of the NLRB. I have attended meetings of both of those committees within the past year. The employer community is well represented at those meetings – in fact, they tend to be the majority of those in attendance – and I have not heard any of this outrage from them. None of them appear to believe that the sky is falling on employers as a result of the Board's recent decisions. Instead, our discussions at these joint labor-management meetings focus on the everyday work of the Board. I remember one of those committee meetings a couple of years ago where a management attorney made a request for the NLRB Regional office to print ballots for union representation elections in other languages for non-English-speaking employees. All the practitioners in the room, regardless of whom we represented, agreed that ballots ought to be provided in the languages of the workers. We all encouraged the NLRB Regional Director to start doing so, which he did shortly after that meeting. This is an example of how, in the real world, the NLRB is not some rogue agency; it is an agency that employers, unions, and employees all turn to for resolution of their important workplace disputes and concerns.

The Work of the National Labor Relations Board

The NLRB is a small, independent agency tasked with protecting the rights of employees and employers under the National Labor Relations Act ("NLRA").[2] Its two principal functions are administering representation elections and investigating and prosecuting unfair labor practice charges. During fiscal year 2012, 21,629 unfair labor practice charges and 2,484 election petitions were filed with the Board. The Board obtained offers of reinstatement for 1,241 who were terminated in violation of the NLRA, and recovered $44,316,059 on behalf of employees as backpay or reimbursement of fees, dues and fines.[3] A party who is aggrieved with a decision of the Board may seek review in the federal courts of appeals.

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[1] Noel Canning v. NLRB, Case Nos. 12-1115, 12-1153 (D.C. Cir. Jan. 25, 2013).
[2] 29 U.S.C. sec. 151 *et seq.*
[3] NLRB Performance and Accountability Report, FY 2012, at 34, 40. Available at http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2012_par_508.pdf.

Congress vested the NLRB with exclusive jurisdiction to enforce the NLRA. As a result, the NLRB is the only place private-sector employers, employees, and unions can go for a government-supervised election to determine whether employees want to become represented by a union, or to stop being represented by a union. If a union or an employer commits certain unlawful acts that violate the National Labor Relations Act, the Board is the only place where the victim can file a charge. The Board investigates and prosecutes charges by employers against unions, charges by unions against employers, and charges by individual employees against both.

The NLRB, by statute, has five members who serve five-year terms.[4] The terms are staggered so that one Board member's term expires each year. There is no holdover provision allowing Board members to continue to serve until their successor is confirmed. Thus, vacancies are constantly occurring and need to be filled.

The Supreme Court ruled in 2010 that the NLRB does not have the authority to act without a quorum of three members.[5] As a result of that ruling, hundreds of non-controversial decisions that had been issued by a two-member Board consisting of one Democrat and one Republican from 2008 to 2010 were voided. When the Board reached a quorum again, it faced a huge backlog of unresolved cases, leaving the parties to endure years of uncertainty and delay.

Instead of responding to this lack of a quorum by confirming Presidential nominees so that the Board could get back to work, some in the Senate seized on it to advance the agenda of powerful special interests who would prefer not to have this nation's labor laws enforced at all. Less than a month before President Obama made the recess appointments involved in *Noel Canning*, Senator Graham publicly "reaffirmed … he will continue to place an indefinite Senate hold on nominations to the NLRB."[6] Noting that the Board was on the verge of losing its quorum, he stated, "the NLRB as inoperable could be considered progress."[7] On the day of the recess appointments, Senator Graham issued a press release repeating his pledge to block all nominees to the Board.[8] Partisan obstructionism made Senate confirmation of a full Board impossible.

Even though the National Labor Relations Act calls for a five-member Board, during the first three years of the Obama administration, there was only a two-month period when the NLRB had a full complement of five members (June 22-August 27, 2010).[10] Employers and employees faced the prospect of an NLRB without a quorum

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[4] 29 U.S.C. §153.
[5] New Process Steel, LLP v. NLRB, 130 S.Ct. 2635 (2010).
[6] Senator Lindsay Graham (R-SC), Press Release, "Graham Calls for Investigation into NLRB-Union Cooperation," December 9, 2011, available at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0.
[7] *Id.*
[8] Senator Lindsay Graham (R-SC), Press Release, "Graham on President Obama's Recess Appointments to the NLRB," January 4, 2012, available at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=aac16239-802a-23ad-42d9-6c23be9a334b&Region_id=&Issue_id=.
[10] http://nlrb.gov/members-nlrb-1935

again when the third Board member's term expired on January 3, 2012, leaving only 2 members—Chairman Pearce (D) and Member Hayes (R). The next day, January 4, 2012, President Obama used his recess powers and appointed three new members to the Board, following the decades-long bipartisan tradition of filling the Board with three members of the President's party and two members of the other party:

1. **Sharon Block** (Democrat) – Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor, and a former NLRB and Senate HELP committee attorney, and former attorney with Steptoe & Johnson.
2. **Terence F. Flynn** (Republican) – Former management attorney, Chief Counsel to NLRB Member Brian Hayes and previously Chief Counsel to former NLRB Member Peter Schaumber.[11]
3. **Richard Griffin** (Democrat) – General Counsel for International Union of Operating Engineers and previously counsel to NLRB Members.

History of Recess Appointments to the NLRB, 1980-Present

President Obama was following a frequent practice of the last five Presidents when he made these recess appointments to the Board.

Since 1980, when Republicans first used the filibuster to block a nominee (career Board employee John Truesdale) from being confirmed as a member of the NLRB, the confirmation process for NLRB nominees has become increasingly polarized and contentious. As Professor Joan Flynn describes, "the Senate has not only frequently blocked the President's nominees or would-be nominees, but has insisted that the President acquiesce to certain of its choices—or more specifically, those of [the Senate leadership of the opposing party]—as the price of getting any of his Board nominees confirmed."[12]

As a result, every President since President Carter has made recess appointments to the NLRB. From 1980 to present, there have been a total of 29 recess appointments to the Board, only four of which would be considered valid under the reasoning of the D.C. Circuit in the Noel Canning case. Of the 25 others that the court would consider invalid—either because they were intrasession appointments or because, although they were made between sessions, they were to positions that became vacant prior to the recess in which the appointment was made—President Carter and President George H.W. Bush each made one, President Clinton and President Obama each made 5, President Reagan made 6 and President George W. Bush made 7. The breakdown, showing the date of each nominee's appointment, is shown in Table 1:

[11] Member Terrence Flynn resigned from the Board, effective Tuesday, July 24, 2012.
[12] Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L. J. 1361, 1429 (2000), available at http://moritzlaw.osu.edu/students/groups/oslj/files/2012/03/61.4.flynn_.pdf

Table 1 [13]

Recess Appointments to the NLRB

Appointments that would be considered valid under the reasoning of the D.C. Circuit in *Noel Canning* ("qualifying" intersession appointments) are in italics. All non-italicized appointments would be invalid under the D.C. Circuit's view (intrasession and "non-qualifying" intersession appointments).

President Carter: 1 recess appointment (intrasession)

John C. Truesdale	10/23/80	(intrasession)

President Reagan: 6 recess appointments (4 intrasession, 2 non-qualifying intersession)

John R. Van de Water (chair)	08/13/81	(intrasession)
Robert P. Hunter	08/13/81	(intrasession)
Wilford W. Johansen	08/29/88	(intrasession)
John E. Higgins Jr.	08/29/88	(intrasession)
John C. Miller (chair)	12/23/82	(intersession but vacancy arose 12/16/82 while Congress in session)
Dennis R. Devaney	11/22/88	(intersession, vacancy arose 7/31/88)

President G H.W. Bush: 3 recess appointments (1 non-qualifying intersession, *2 qualifying intersession*)

Clifford R. Oviatt	12/14/89	(intersession, vacancy arose 8/28/88)
Dennis R. Devaney	*12/14/89*	*(intersession, vacancy arose same recess=valid under Noel Canning)*
John N. Raudabaugh	*12/22/92*	*(intersession, vacancy arose same recess=valid under Noel Canning)*

President Clinton: 7 recess appointments (2 intrasession, 3 non-qualifying intersession, *2 qualifying intersession*)

Sarah M. Fox	1/19/96	(intrasession)
John E. Higgins	08/30/96	(intrasession)
John C. Truesdale	01/24/94	(intersession, vacancy arose 12/16/92)
John C. Truesdale (chair)	12/04/98	(intersession, vacancy arose 8/27/98)
Dennis P. Walsh	12/29/00	(intersession, vacancy arose 8/27/00)
John C. Truesdale	*12/23/94*	*(intersession, vacancy arose same recess=valid under Noel Canning)*

[13] The dates of appointment listed are from the Congressional Research Service memorandum of Feb. 4, 2013 found here: http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf. The dates on which the positions became vacant are from this chart on the NLRB's website: http://www.nlrb.gov/who-we-are/board/board-members-1935.

Sarah M. Fox	*12/17/99*	*(intersession, vacancy arose same recess=valid under Noel Canning)*
President G.W. Bush: 7 recess appointments (4 intrasession, 3 non-qualifying intersession)		
Peter C. Hurtgen (chair)	08/31/01	(intrasession)
Peter C. Schaumber	08/31/05	(intrasession)
Peter N. Kirsanow	01/04/06	(intrasession)
Dennis P. Walsh	01/17/06	(intrasession)
Michael J. Bartlett	01/22/02	(intersession, vacancy arose 8/27/00)
William B. Cowen	01/22/02	(intersession, vacancy arose 10/1/01)
Ronald E. Meisburg	12/23/03	(intersession, vacancy arose 8/21/03)
President Obama: 5 recess appointments (all intrasession)		
Mark G. Pearce	03/27/10	(intrasession)
Craig Becker	03/27/10	(intrasession)
Terence R. Flynn	01/04/12	(intrasession)
Richard Griffin	01/04/12	(intrasession)
Sharon Block	01/04/12	(intrasession)

Where was the outrage when Presidents Carter, Reagan, Bush, Clinton, and Bush made these recess appointments to the Board? The absence of any significant outcry or legal challenges shows that both the legislative and executive branches, as well as the parties who appear before the Board and the public at large, have shared an understanding for a long time of what the President's recess appointment power allows.

If the D.C. Circuit's restriction on the recess appointment power is applied to the 25 Republican and Democratic recess appointments that the D.C. Circuit would deem invalid under *Noel Canning* (Table 1), it would mean that there were large periods of time during each of the last five administrations when the Board operated without a quorum of what the D.C. Circuit would consider legally appointed Board members—that is, members who were either confirmed by the Senate or recess-appointed during an intersession recess to a seat that became vacant during that recess. This includes a period of some 5 months during the Reagan administration, 10 months in the George H.W. Bush administration, 21 months in the Clinton administration, 26 months in the George W. Bush administration, and 20 months so far in the Obama administration.

Table 2 shows the composition of the Board during those periods, with recess appointees serving under appointments that the *Noel Canning* court would consider to be invalid indicated in bold:

Table 2[14]

Periods in Which the NLRB Operated Without a Valid Quorum as Defined by the D.C. Circuit in *Noel Canning v. NLRB*

Board Members serving under recess appointments that would have been invalid under *Noel Canning* are shown in bold.

Reagan administration

1. 08/29/88 to 11/21/88, 2 of 4 (James Stephens, Mary Cracraft, **Wilford Johansen, John Higgins**)
2. 11/22/88 to 01/20/89, 3 of 5 (Stephens, Cracraft, **Johansen, Higgins, Dennis Devaney**)

Bush 1 administration

3. 01/20/89 to 06/15/89, 3 of 5 (Stephens, Cracraft, **Johansen, Higgins, Devaney**)
4. 06/16/89 to 11/22/89, 2 of 4 (Stephens, Cracraft, **Higgins, Devaney**)

Clinton administration5. 05/28/93 to 11/26/93, 1 of 3 (Stephens, Devaney, **John Raudabaugh**)

6. 01/24/94-03/03/94, 1/24/94 (Stephens, Devaney, **John Truesdale**)
7. 09/03/96 to 02/28/97, 2 of 4 (William Gould, Margaret Browning, **Sarah Fox, John Higgins**)
8. 03/01/97 to 11/13/97, 2 of 3 (Gould, **Fox, Higgins**)

Bush 2 administration

9. 08/31/01 to 10/01/01, 2 of 4 (John Truesdale, Wilma Liebman, **Peter Hurtgen, Dennis Walsh**)
10. 10/02/01 to 12/20/01, 2 of 3 (Liebman, **Hurtgen**, **Walsh**)
11. 01/22/02 to 08/01/02, 3 of 4 (Liebman, **Hurtgen, Michael Bartlett, William Cowen**)12. 08/02/02 to11/22/02, 2 of 3 (Liebman, **Bartlett, Cowen**)
14. 08/31/05 to 01/03/06, 1 of 3 (Liebman, Robert Battista, **Peter Schaumber**)
15. 01/04/06 to 01/16/06, 2 of 4 (Liebman, Battista, **Schaumber, Peter Kirsanow**)
16. 01/17/06 to 08/02/06, 3 of 5 (Liebman, Battista, **Schaumber, Kirsanow**, **Dennis Walsh**)
17. 12/17/07 to 12/31/07, 2 of 4 (Liebman, Schaumber, **Kirsanow, Walsh**)

Obama administration

18. 03/27/10 to 06/21/10, 2 of 4 (Liebman, Schaumber, **Mark Pearce, Craig Becker**)
19. 8/28/11 to 01/03/12, 1 of 3 (Pearce, Brian Hayes, **Becker**)
20. 01/09/12 to 07/24/12, 3 of 5 (Pearce, Brian Hayes, **Richard Griffin, Sharon Block, Terence Flynn)**

[14] Information is taken from this chart on the Board's website: http://nlrb.gov/members-nlrb-1935.

21.	07/25/12 to 12/16/12, 2 of 4 (Pearce, Hayes, **Griffin, Block**)
22.	12/17/12 to ____, 2 of 3 (Pearce, **Griffin, Block**)

The D.C. Circuit's Decision in *Noel Canning* Is an Outlier

The D.C. Circuit disregarded this history of NLRB appointments, and the history of recess appointments in general, when it made its decision in *Noel Canning*. The court invalidated the recess appointments of Members Block and Griffin on two grounds. It first held that the Recess Appointments Clause refers only to *intersession recess* (between two formal sessions of Congress) and does not include *intra-session* breaks or adjournments. The D.C. Circuit also held that the Recess Appointments Clause covers only vacancies that first arise during the same recess when the appointment is made (meaning that a seat vacant before recess begins cannot be filled during recess).

The D.C. Circuit's analysis went against the decisions of three other federal courts of appeals in the past fifty years that have held recess appointments under such circumstances valid. In 2004, the Eleventh Circuit upheld President Bush's *intra-session* recess appointment of Judge William H. Pryor. *Evans v. Stephens*, 387 F.3d 1220 (2004) (en banc). The Second and Ninth Circuits both refuse to limit the President's appointment powers to vacancies that *arise* during a recess. *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1982); *United States v. Allocco*, 305 F.2d 704 (2nd Cir. 1962).

The *Noel Canning* decision would virtually eliminate the recess appointment power as it has been used and accepted in practice by both parties and by all three branches of government. Recess appointments to the NLRB are only a tiny fraction of the total recess appointments made by the past five Presidents. From the Reagan administration through the current administration, there were a total of approximately 329 intrasession recess appointments to various offices – three-quarters of them by Republican Presidents.[15] Every one of those appointments would have been invalid according to the D.C. Circuit's analysis in *Noel Canning*, including President George H.W. Bush's appointment of Alan Greenspan to chair the Federal Reserve Board.[16] During the same period, there were another 323 intersession recess appointments – mostly by Republican Presidents – many or most of which would also have been invalid according to *Noel Canning*, if the vacancies did not arise during the particular recess when the appointments were made.[17]

[15] The *Noel Canning* Decision and Recess Appointments Made from 1981-2013, Congressional Research Service Memorandum (Feb. 4, 2013), at 4, Table 1.
[16] Id. at 13.
[17] Id. at 4, Table 1.

Consequences of the *Noel Canning* Decision

Some members of Congress contend that the D.C. Circuit's decision in *Noel Canning* means the Board should cease operation. That is like suggesting that the police should stop enforcing a law because one court holds it unconstitutional when three other courts have already upheld the law. The Board has a statutory responsibility to administer the National Labor Relations Act. The D.C. Circuit's new limitations on the recess appointment power are contrary to three other federal circuit courts. There is a split in the circuit courts, with the D.C. Circuit's radical decision in the minority. The Supreme Court has already rejected an effort to shut down injunction litigation by the Board based on the *Noel Canning* decision.[18]

While we are all waiting for the Supreme Court to rule, the Board must keep operating. The D.C. Circuit does not have sole authority to review decisions of the NLRB; the other eleven federal circuit courts also have jurisdiction to review and enforce Board decisions,[19] and to date, three of them disagree with the D.C. Circuit's view of the recess appointment power. In continuing to operate, the Board is following its longstanding policy of nonacquiescence with adverse court of appeals decisions where the Supreme Court has not yet spoken, for the sake of maintaining uniform national labor policy where the circuit courts disagree.[20] One panel of judges cannot shut down an agency created by Congress and leave employees and employers with no one to enforce the laws that protect them.

There is a grave concern, however, that parties will take advantage of forum shopping to file petitions for review in the D.C. Circuit and put their cases on indefinite hold. Every party who is found to violate the National Labor Relations Act – employer or union – could use this tactic to delay remedying its unlawful actions until the Supreme Court has resolved this case. Employers could potentially ignore every election of a union to represent their employees, no matter how clear the vote, by challenging the Board's certification of the results in the D.C. Circuit. The D.C. Circuit has already placed dozens of pending petitions for review on hold.[21] Even if the Supreme Court takes up this issue promptly and decides it during its next term, this could mean enforcement will stop for a year and a half in perhaps hundreds of cases *where the Board has found that the law was violated*, or where *the Board has certified the results of an employee election.* As a local labor lawyer, I am very concerned about the effects of this delay on real people.

The Board is a law enforcement agency. It has exclusive authority to enforce most provisions of the National Labor Relations Act. As part of enforcing the law, the Board has to interpret the law, and at times, those interpretations cause controversy. But

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[18] Healthbridge Management, LLC, *et al.* v. Kreisberg, 12A769 (S. Ct. Feb. 6, 2013), available at http://www.supremecourt.gov/orders/courtorders/020613zr_8ok0.pdf.
[19] 29 U.S.C. sec. 158(e), (f).
[20] See generally Baker Electric, 351 NLRB No. 35, n.42 (2007) (citing cases).
[21] Mike Scarcella, "After NLRB Decision, a Waiting Game for Employers, Workers," in *The BLT: The Blog of LegalTimes*, February 8, 2013, available at http://legaltimes.typepad.com/blt/2013/02/after-nlrb-decision-a-waiting-game-for-employers-workers.html

the vast majority of the Board's day-to-day work is simply enforcing the law as it already stands. In fact, over 90% of the meritorious unfair labor practice charges filed with the Board are resolved by settlement.[22] Of the cases that go to hearing, most do not involve any novel legal issues. The D.C. Circuit plunges even these routine cases into legal limbo.

One of the dozens of pending cases that the D.C. Circuit has already put on hold was handled by our firm.[23] The Board found unanimously, including Republican Board Member Brian Hayes, that the employer illegally discriminated against a long-time printing company employee for his Union activities and fired him on a pretext. Marcus Hedger was a union steward, which meant that he assisted his coworkers at the printing plant with their grievances and sat on the union's bargaining committee for contract negotiations. During some contentious negotiations, the employer's senior vice president told Mr. Hedger that he was tired of this "union circus" and that "we're watching you, we are going to catch you, and we are going to fire you." Shortly after that threat, he was fired. The Board unanimously found that the firing was illegal and ordered the Company to reinstate the employee and pay him his lost earnings. This is a straightforward case where the Board agreed across party lines that an employee was illegally fired. But now no one knows how long the Board's decision will sit on hold. In the meantime, Mr. Hedger is working an entry-level job at around one-third of the pay he used to earn, and he has lost his house.

The *Noel Canning* case itself is another example of a routine case. In *Noel Canning*, the Company and the Union had a longstanding collective bargaining relationship. After months of bargaining, the negotiators shook hands on a deal for a new contract, but subsequently a dispute arose over what had been said about a particular term, and the Company refused to sign a written agreement. The Board investigated and held a hearing. A panel of two Republicans and one Democratic Board member found unanimously that the evidence supported the Union's account of the negotiations and that the Company was bound by its oral agreement.[24] *The D.C. Circuit agreed the Board's decision was correct*[25] – but refused to enforce it because two of the three Board members were recess appointments. This is an example of the work the Board does every day, resolving disputes that the parties have tried and failed to resolve themselves. Until there is a final resolution to that case, the Noel Canning Company and the Union do not know whether they have a legally enforceable contract or not. The rights and duties of the employees and the Company are uncertain. What appears to have been a long-time, functioning relationship cannot function. This scenario will be repeated over and over around the country if the Board cannot issue enforceable orders.

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[22] NLRB Performance and Accountability Report, FY 2012, at 40, 49. Available at http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2012_par_508.pdf

[23] Fort Dearborn Co., 359 NLRB No. 11 (Sept. 28, 2012), *petition for review pending*, Case Nos. 12-1430, 12-1438 (D.C. Circuit).

[24] Noel Canning, 358 NLRB No. 4 (Feb. 8, 2012).

[25] Noel Canning v. NLRB, slip op. at 4-9 (D.C. Cir. Case Nos. 12–1115, 12–1153, January 25, 2013).

Recent Decisions of the NLRB

Some members of the management bar and anti-labor special interest groups have mischaracterized a number of recent decisions of the Board. Despite the posturing by some advocates, there is nothing remotely radical in these decisions. In *Kent Hospital (United Nurses)*, 359 NLRB No. 42 (2012), the Board has not even made a final decision in the case yet. The Board ruled that lobbying expenses should not be *categorically* excluded from the expenses that are chargeable to union dues objectors, and that instead, the Board will perform a case-by-case determination of whether the particular lobbying expenses are germane to collective bargaining, contract administration or grievance adjustment. The Board has requested additional briefing so that it can make that determination in the *Kent Hospital* case. In *Piedmont Gardens*, 359 NLRB No. 46 (2012), the Board applied the Supreme Court's standard for determining whether a union is entitled to potentially confidential information, specifically witness statements and names of witnesses. The Board ruled that the union's need for relevant information must be balanced against legitimate confidentiality interests and an appropriate accommodation reached to protect all parties' rights. That is the same approach that courts use every day in civil litigation. In *WKYC-TV*, 359 NLRB No. 30 (2012), the Board brought the treatment of dues checkoff (payroll deduction of union dues for employees who choose that method of payment) in line with the treatment of other terms and conditions of employment, including other types of payroll deductions, by holding that the employer must continue the status quo after contract expiration while the parties bargain. The Board's *Bethlehem Steel*[26] line of cases which previously carved out an exception for dues checkoff was rejected three times by the Ninth Circuit in ten years.[27] In *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), the Board determined that the duty to bargain before changing terms and conditions of employment for union-represented employees – a duty that the Supreme Court unanimously recognized over fifty years ago in *NLRB v. Katz*[28] – applies to employee terminations, suspensions and demotions in the limited (and indeed, fairly rare) situation where the parties have not negotiated a grievance procedure for discipline cases. In recognition of the practical realities of employee discipline, the Board held that bargaining *to impasse* is not required before the discipline is imposed, but instead, bargaining may be completed after the employee is disciplined.

Conclusion

As a citizen, I am troubled that our elected representatives are spending the public's time and resources on a hearing attacking the NLRB. I am even more troubled that this is the ninth such hearing by the full Committee or this Subcommittee in the past two years, when all the agency has done is its statutory duty. Employers and workers are worried about jobs, but this House has repeatedly taken actions that hurt workers – from

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[26] 136 NLRB 1500 (1962), *remanded on other grounds*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

[27] **Error! Main Document Only.**Local Joint Executive Board of Las Vegas v. NLRB (Hacienda Hotel), 657 F.2d 685 (9th Cir. 2011); 540 F.3d 1072 (9th Cir. 2008); 309 F.3d 578 (9th Cir. 2002).

[28] 369 U.S. 736 (1962).

playing politics with the debt ceiling, to opposing equal pay legislation, to trying to strip prevailing wage requirements from government public works contracts.[29]

The Board is not part of the problem. The Board is part of the solution. Congress created the National Labor Relations Board in 1935, in the middle of the Great Depression. In Section 1 of the NLRA, Congress made a finding that "[t]he inequality of bargaining power between employees … and employers … tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners."[30] Those words ring truer than ever today, with stagnant and falling wages a drag on the economy. History shows that when more workers are represented by unions, income inequality falls, and when more workers have to fend for themselves without union representation, income inequality spirals out of control.[31] After the National Labor Relations Act was first passed, our nation enjoyed decades of prosperity thanks to relatively harmonious, or at least functional, collective bargaining relationships that allowed workers to negotiate for good middle class jobs. Those who seek to shut down the Board are serving the narrow interests of the 1%. Without job security and fair pay for the 99%, our nation cannot prosper as a whole.

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[29] Working Families Report Card: Grading the Republican House on Job Creation and Job Quality at 2, 6 (House Committee on Education and the Workforce Democrats, August 2012).
[30] 29 U.S.C. sec. 151.
[31] See graph in Working Families Report Card, *supra*, at 8.

Chairman ROE. Thank you, Ms. Reynolds.
Mr. King?

STATEMENT OF G. ROGER KING, OF COUNSEL, JONES DAY, TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE AND THE COALITION FOR A DEMOCRATIC WORKPLACE

Mr. KING. Thank you, Chairman. I appreciate the opportunity to again appear before this committee. Ranking Member Andrews, it is nice to see you again. Chairman Kline, we appreciate you sitting in on the committee hearing today also.

As noted, I appear here today on behalf of the Chamber of Commerce of the United States and the Coalition for Democratic Workplace. Those organizations go well beyond the so-called 1 percent.

They represent millions of businesses throughout this country, many small and independent business entities, millions of workers, millions of people that keep this economy moving every day. They certainly are not small special interest groups. They are at the heart of this economy and this country.

With me today are colleagues from my firm that have been deeply involved in representing the Chamber and the CDW, Noel Francisco, James Burnham, Scott Metzger and Anthony Dick. We are quite involved in this case, the Noel Canning decision I am going to talk about today, Mr. Francisco successfully argued the case before the D.C. Circuit.

I would like to make one thing clear right at the outset. Yes, we are talking about the National Labor Relations Board. But we are also talking about the United States Constitution.

The fundamental principle, separation of powers, I would submit, must prevail over any peripheral concern of a government efficiency. We may have our differences here about the board, but the Constitution does not yield to the efficiencies of government the Constitution should control.

Now, I want to talk about the Noel Canning case in a little different manner. Many observers have not really focused on the facts of this case. What this president did is unprecedented.

No president, Democrat or Republican has ever made a recess appointment to any agency or a court within a 3-day period where the Senate has been in a brief hiatus. No president anywhere at any time has done that.

In fact, what the D.C. Circuit held was consistent with the position that Senator Ted Kennedy took on a judgeship that was contested in the 11th circuit, Judge Pryor. So, let us be clear about this. This cuts across Democrat/Republican lines. This is a constitutional issue of great consequence.

Here the Senate was continually in session. It was gaveling in and out every 3 days. In fact, the day before the president made the recess appointments that are being contested, the Senate had gaveled in for purposes of the 20th amendment to convene the second session of the 112th Congress.

Further, during this same contested period, the Senate passed the extension of the payroll tax reduction, or temporary tax reduction. So, the Senate is clearly doing business during this time period.

Now, this so-called 3-day situation goes back really to Senator Robert Byrd, in part. And I would submit that he perhaps is the father of this so-called pro forma session. I happened to be working

in the Senate at the time as a young lawyer and I really admired Senator Byrd, albeit I was working for Senator Taft at the time.

And what Senator Byrd did is clearly point out to both his colleagues in the legislative branch and the executive branch that while the Senate is in session, and particularly during a 3-day brief hiatus, that the president, at that point President Reagan, had no authority under the Constitution to make a recess appointment.

The Department of Justice, the president's legal advisors, President Reagan at the time, the Senate at the time all agreed. That concept of constitutional restraint, executive restraint and check and balance by the Senate was then carried further by Senator Harry Reid.

You may recall that Senator Reid utilized the same procedure to keep the Senate in session, to prohibit President George W. Bush from making certain recess appointments. Senator—excuse me, President Bush did not contest that in the courts.

So, this excessive litigation attack is just without foundation. This again cuts across both party lines here. This is a fundamental constitutional question.

Now, it is also interesting to note that President Obama, at that time Senator Obama, was very active in the Senate Democratic Caucus with Senate Majority Leader Reid. The president knew very well or should have known of this constitutional restraint.

And to emphasize that point, and we have this in our testimony, advisors to the president when this issue came up as potential recess appointments in January of 2012 asked for an opinion of the Department of Justice Office of Legal Counsel, the OLC. And I am quoting now from the OLC memorandum that was released after these recess appointments were made.

"The question is a novel one, and the substantial arguments on each side create some litigation risks for such appointments." Further quoting: "there is little judicial precedent addressing the president's authority to make intrasession recess appointments."

The president was being advised at that time that there were difficulties. So, I know that we have questions coming here. I would like just to summarize the point that my clients would like this committee and hopefully the administration to consider.

Let us get on with having the Supreme Court decide this case of Noel Canning. Putting it off does not help anyone. It hurts unions. It hurts employees. It hurts the business community.

We are going to have excess litigation costs. We are going to have delay, et cetera. There already is a split in the circuits on this issue. This case could be filed for cert by the government today, and the union that was adversely impacted.

Finally, Mr. Chairman, hopefully the White House will have a constructive dialogue with the Senate so we can identify neutral, nonpartisan board members and also a nonpartisan general counsel.

Thank you very much.

[The statement of Mr. King follows:]

Prepared Statement of G. Roger King, of Counsel, Jones Day, on Behalf of the U.S. Chamber of Commerce and Coalition for a Democratic Workplace

Good morning Committee Chairman Roe, Ranking Member Andrews, and Members of the U.S. House Committee on Education and the Workforce's Subcommittee

on Health, Employment, Labor, and Pensions. It is an honor and pleasure to appear again before the Committee as a witness. My name is G. Roger King,[1] and I am Of Counsel in the Jones Day law firm. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers, with a mix of union and non-union workforces. I have been a member of various committees of The American Bar Association, The Society for Human Resource Management ("SHRM") and The American Society of Healthcare Human Resources Association ("ASHHRA") and I also participate in the work of other trade and professional associations that are active in labor and employment matters. A copy of my CV is attached hereto as Appendix A.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, I am testifying this morning on behalf of The Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace ("CDW").[2] The Chamber is the world's largest federation of businesses, representing 300,000 direct members and having an underlying membership of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. The fundamental activity of the Chamber is to develop and implement policy on major issues affecting businesses, including on labor issues and the activities of the National Labor Relations Board ("NLRB" or "the Board"). Because the Chamber represents employers in every industry covered by the National Labor Relations Act ("NLRA" or "the Act"), it is particularly qualified to articulate the business community's concerns with the NLRB's recent activity.

The Coalition for a Democratic Workplace is a broad-based coalition that represents employers and associations and their workforces in traditional labor law issues. The Coalition consists of hundreds of members, who represent millions of employers. CDW was formed to give its members a voice on labor issues, specifically, the Employee Free Choice Act. More recently, CDW has advocated for its members on a number of labor issues including non- employee access, an employee's right to have access to organizing information from multiple sources, unit determination issues, and the validity of rules and regulations promulgated by the Board.

The Current NLRB Has Failed To Follow Sound Public Policy, Overturned Important Precedent, And Faces An Uncertain Future

The Composition of The National Labor Relations Board—Quorum and Recess Appointment Issues

By statute, the National Labor Relations Board consists of five Members, each nominated by the President for five-year terms subject to the advice and consent of the Senate or, in the case of an appointment to fill a vacant seat, the length of time remaining in unexpired term of the Member who previously held the seat. See 29 U.S.C. § 153(a). While the Board is at a full complement with five Members, the NLRA requires that the Board maintain a quorum of at least three Members in order to conduct business. See id.; New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

The NLRB under the current Administration has never reached a full complement of five confirmed Members, nor has there been a confirmed General Counsel of the Board. Indeed, the current Board has consistently relied on recess-appointed Members to issue decisions, engage in rulemaking, and undertake other Board actions.[3] Only one of President Obama's recess appointees to the Board—all of whom were appointed while Congress was in Session (i.e., intrasession appointees)—has been confirmed by the Senate: Chairman Mark Pearce, who was recess appointed on March 27, 2010 and confirmed on June 22, 2010. President Obama's other recess appointees Craig Becker, appointed March 27, 2010, and Richard Griffin, Sharon Block, and Terence F. Flynn, all appointed on January 4, 2012, have never been confirmed. President Obama also nominated former Member Brian Hayes, who was confirmed on June 22, 2010.

Beginning on January 20, 2009—the date of President Obama's inauguration—the Board's composition has consisted of the following Members (Boards with a valid quorum are in bold):

January 20, 2009 through March 26, 2010: Two confirmed Members (Liebman & Schaumber); all decisions invalidated by New Process Steel

March 26, 2010 through June 21, 2010: Two confirmed Members (Liebman & Schaumber) and two intrasession recess appointees (Pearce & Becker)

June 22, 2010 through August 27, 2010: Four confirmed Members (Liebman, Schaumber, Pearce, & Hayes) and one intrasession recess appointee (Becker)

August 28, 2010 through August 27, 2011: Three confirmed Members (Liebman, Pearce, & Hayes) and one intrasession recess appointee (Becker)

August 28, 2011 through January 3, 2012: Two confirmed Members (Pearce & Hayes) and one intrasession recess appointee (Becker)

January 3, 2012 through January 9, 2012: Two confirmed Members (Pearce & Hayes)

January 9, 2012 through July 24, 2012: Two confirmed Members (Pearce & Hayes) and three intrasession recess appointees (Griffin, Block, & Flynn)

July 25, 2012 through December 16, 2012: Two confirmed Members (Pearce & Hayes) and two intrasession recess appointees (Griffin & Block)

December 17, 2012 to present: One confirmed Member (Pearce) and two intrasession recess appointees (Griffin & Block)

Restraint Exercised by Previous Boards in Overturning Precedent

As I have previously testified before this Committee, past Boards—during both Democrat and Republican administrations—have exercised considerable restraint in overturning precedent when acting with less than a full complement of five Members. The Board has noted its institutional "well-known reluctance to overrule precedent when at less than full strength (five Members)." See Teamsters Local 75 (Schreiber Foods), 349 N.L.R.B. 77, 97 (2007) (emphasis added). The author of that quote—former Chairman Liebman—addressed the Board's proper role with less than five Members in an open letter to this Committee dated February 25, 2011. In the letter, she noted that "[t]he Board's tradition * * * is not to overrule precedent with fewer than three votes to do so," citing to Hacienda Resort Hotel & Casino, 355 N.L.R.B. No. 154, at *2 n.1 (Aug. 27, 2010). Hacienda admittedly stands for that proposition, but includes the important qualifier that the Board will reverse precedent on the vote of three Members "where there was a unanimous vote to do so." Id. (emphasis added).

A certain degree of policy oscillation by the Board is to be expected given the tradition that three of the five statutory positions on the Board are filled by the political party that controls the White House, while the remaining two positions are filled by the other party. There are undoubtedly examples of Boards under both Republican and Democrat administrations proceeding to overrule precedent without a full Board. However, the current Board has exercised no restraint and indeed has pursued an aggressive agenda of overturning decades of precedent and greatly expanding the reach of the Act. Proceeding in such a manner raises significant public policy issues regarding how our nation's labor policy should be established and labor laws should be enforced.

In addition to the Board's tradition of refraining from reversing precedent without either a full Board or three unanimous votes for reversal, the Board has also previously exhibited restraint when operating with a quorum of questionable validity. In December 2007, the Board consisted of confirmed Members Liebman and Schaumber and recess-appointed Members Kirsanow and Walsh, whose terms would expire at the end of the year. The Board attempted to delegate decision-making authority to Members Liebman and Schaumber so that they could issue two-Member decisions until a third Member could be confirmed. The minutes of the meeting during which the Board delegated its decision-making authority to two Members included a discussion of the legality of the Board operating with less than two Members.[4]

Members Liebman and Schaumber, Democrat and Republican nominees, respectively, reached an informal agreement that while acting as a two-Member Board, they would refrain from deciding contentious issues then pending before the Board. See, e.g., Steven Greenhouse, Labor Panel Is Stalled By Dispute on Nominee, N.Y. Times, Jan. 14, 2010, at A16. Member Schaumber noted that, as a result, the Board produced decisions in which "two people who ideologically differ have reached a decision about imperatives under the statute." Id. When those two-Member decisions were invalidated by the Supreme Court's New Process Steel decision, a properly constituted three-Member panel of the Board was required to revisit each decision. However, because the decisions had been unanimously decided by Members with opposing philosophical views, the Board was able to expeditiously affirm the two-Member decisions in the vast majority of the Board cases that were subject to reconsideration after the Supreme Court decision in New Process Steel.

The Board was faced with a similar issue when recess-appointee Becker's term expired at the end of the First Session of the 112th Congress (2011). President Obama's decision to recess appoint Members Block, Griffin, and Flynn gave the Board two confirmed Members (Pearce & Hayes) and three recess appointees. While Member Flynn's nomination to the Board had been pending in the Senate since

early 2011, President Obama did not refer the nominations of Members Block and Griffin to the Senate for consideration until December 15, 2011 and subsequently recess appointed all three Members less than three weeks later on January 4, 2012. Indeed, Members Block and Griffin were recess appointed before the Senate Committee on Health, Education, Labor & Pensions had the opportunity to vet the nominees, including by performing routine background checks.

We now know that these intrasession recess appointments were invalid. The D.C. Circuit's January 25, 2012 decision in Noel Canning v. NLRB,—F.3d——, 2013 WL 276024, held that recess appointments are only lawful if the appointment is made during an intersession recess of the Senate and fills a position that became vacant during the same intersession recess. See id. at *8-16. Because the appointments of Members Block, Griffin, and Flynn were intrasession appointments, the appointments were invalid and the Board lacked the requisite three-Member quorum to act. Id. at *23.

While the D.C. Circuit concluded that the appointments were invalid because they were intrasession appointments, the appointments were instantly dubious in light of the fact that the Administration took the unprecedented step of making the appointments while the Senate was convening every three days pursuant to a unanimous consent agreement reached on December 17, 2011. See 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The Senate conducted important business during these sessions, including passing a temporary extension of the payroll tax cut on December 23, 2011. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). Additionally, the Senate convened on January 3, 2012—the day immediately before the recess appointments were made—to fulfill its Constitutional obligation to begin its annual meetings "at noon on the 3d day of January." See U.S. Const. am. XX § 2. The Chamber and CDW immediately questioned the validity of the appointments. See Obama defies lawmakers with recess appointments to labor board, The Hill, (Jan. 4, 2012), available at *http://thehill.com/business-a-lobbying/202407- obama-recess-appoints-his-nominees-to-controversial-labor-board* (last visited Feb. 11, 2013).

Even the Administration recognized the questionable nature of the recess appointments of Members Griffin, Block, and Flynn. Counsel to the President asked the Department of Justice's Office of Legal Counsel ("OLC") whether the President had the authority to make the appointments between January 3 and January 23. OLC noted that "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." Memorandum Opinion for the Counsel to the President at 4, available at *http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf* (last visited Feb. 11, 2013).

OLC also recognized that "there is little judicial precedent addressing the President's authority to make intrasession recess appointments." Id. at 8. Nonetheless, OLC concluded that the President had the authority to make the recess appointments. Id. at 1.

Challenges to the recess appointees were also made to the Board as early as March 2012, when an employer argued that the Board lacked a quorum because Members Griffin, Block, and Flynn were not validly appointed. See Ctr. For Social Change, Inc., 358 N.L.R.B. No. 24 (Mar. 29, 2012). The Board "declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act." Id. at *1.

In light of the clear challenges to the Board's quorum, the Board under the current Administration should have exhibited restraint in proceeding with a majority of its Members subject to challenge. The Board's tradition of not reversing precedent without a full Board or, at a minimum, three unanimous votes to do so, and the Board's prior prudence of avoiding controversial issues while acting as a two-Member Board, all respected the sound public policy of protecting the enforcement of the nation's labor laws and the promulgation of national labor policy. The Board under the current Administration should have undertaken a similar approach.

To the contrary, however, the Board and its Acting General Counsel continued on their prior activist agenda in case decisions, rulemaking initiatives (including delegations of authority), enforcement initiatives, and Regional Director appointments. Relying on recess appointees, the improperly-constituted Board worked to bring about significant departures from precedent and expanded the reach of the Act in an unprecedented manner, especially regarding employer policies and procedures. In nearly all such cases, these initiatives and decisions operated to the disadvantage of America's employers—particularly small and mid-sized businesses.

The Board's Activist Agenda—Recent Decisions

A number of Board decisions issued since January 4, 2012 either explicitly reversed precedent or amounted to a significant departure from the Board's interpretation of the National Labor Relations Act, despite the fact that the Board had nei-

ther a full complement of Members nor three unanimous votes for reversing precedent. For example:

WKYC-TV, Inc., 359 N.L.R.B. No. 30 (Dec. 12, 2012)—The Board overturned 50 years of its case law to hold that an employer no longer has the unilateral right to stop withholding union dues from employee paychecks after expiration of the collective bargaining agreement. It has been longstanding law that an employer's obligations under dues deduction clauses were like union security and arbitration clauses which become ineffective after contract expiration. In WKYC—TV, Inc., however, the Board found, over the dissent of Member Hayes, that dues deduction clauses should be treated like other provisions of the agreement that relate to mandatory subjects of bargaining and be subject to a "status quo" obligation after contract expiration. As a result of this new decision, an employer may stop deducting dues after the expiration of a collective bargaining agreement only after participating in potentially protracted negotiations which result in "impasse" unless the collective bargaining agreement in question included an explicit waiver by the union of its right to negotiate over this issue (i.e., the union clearly and unmistakably waived its right to negotiation on this issue).[5]

Piedmont Gardens, 359 N.L.R.B. No. 46 (Dec. 15, 2012)—The Board overturned 30 years of case law to hold that an employer may need to furnish to the union relevant witness statements made during the course of an investigation unless the employer proves the existence of a "legitimate and substantial confidentiality interest" that outweighs the union's need for the information. In adopting this approach, the Board overruled Anheuser-Busch, in which it held that witness statements obtained during an employer's investigation of workplace misconduct were exempt from the employer's pre-arbitration disclosure obligations. The Board in Piedmont held, over the dissent of Member Hayes, that there is no fundamental difference between witness statements and other types of information typically disclosed such that a blanket exemption is warranted. Instead, where an employer argues that it has a confidentiality interest in protecting witness statements from disclosure, the Board apparently will now engage in a subjective analysis and consider the sensitivity and confidentiality of the information at issue based on the specific facts on a case-by-case basis. Under this approach, an employer may not refuse to furnish the requested information but must timely raise any confidentiality concerns and seek an accommodation from the union. This decision, taken together with other recent Board decisions, will make it more difficult for an employer to get written statements from witnesses. When the witnesses realize that their identity will be disclosed and their statements provided to the union, which will in turn share the statements with the employee being disciplined, it is unlikely that witnesses will be as forthcoming.

Further, the Board's new subjective standard will undoubtedly result in more litigation and corresponding expense to employers in their attempt to ascertain what their new obligations are in this area under the NLRA.

Alan Ritchey, Inc., 359 N.L.R.B. No. 40 (Dec. 14, 2012)—The Board found that after the union has been selected as the employees' bargaining representative, but before the first contract has been agreed to, the employer must bargain over discretionary discipline before it is imposed. Employers negotiating first contracts will now need to carefully analyze whether a suspension, demotion, or discharge involves any discretion, and if so, unless there are exigent circumstances, the employer must notify the union it is considering imposing discipline and allow the union to request bargaining over the decision to discipline. The practical operational problems with this decision are self evident, including the potential for considerable delay in an employer applying its work rules and ultimately negotiating an initial collective bargaining agreement.

The Finley Hospital, 359 N.L.R.B. No. 9 (Sept. 28, 2012)—The Board held that an employer was obligated to continue giving wage increases despite that the collective bargaining agreement providing the wage increases had expired. The hospital and union entered into a one-year contract with a provision stating that "for the duration of this Agreement, the Hospital will adjust the pay for Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement, will be three (3) percent." Chairman Pearce and Member Block, over Member Hayes's dissent, held that the hospital, pursuant to a new "dynamic status quo" doctrine, was required to continue giving wage increases after the contract expired until a new agreement had been reached. As a result, the employer was required to continue providing increases long after it had completed its agreement to give each employee an annual 3% increase during the life of the agreement.[6]

Fresenius USA Manufacturing, Inc., 358 N.L.R.B. No. 138 (Sept. 19, 2012)—A Board majority consisting of recess appointees Griffin and Block held, over the dis-

sent of Member Hayes, that an employer violated the Act when it terminated an employee who lied during an internal investigation. Fresenius received complaints that someone was writing threatening and harassing messages on newsletters circulated during a decertification campaign. The employer had reason to believe that employee Grosso wrote the statements and questioned him about them. While he denied making the statements, he admitted that they could be viewed as improper.

Grosso subsequently unwittingly admitted his role in writing the statements. Fresenius discharged Grosso both for writing the statements and for his false denials. The Board held that the statements could be protected activity in support of the union. The Board also found that Grosso's lies could not be a basis for discipline. The Board wrote that "Fresenius' [sic] questioning of Grosso put him in the position of having to reveal his protected activity, which Board precedent holds that an employee may not be required to do where, as here, the inquiry is unrelated to the employee's job performance or the employer's ability to operate its business. As a result, although Fresenius had a legitimate interest in questioning Grosso and lawfully did so, Grosso had a Sec. 7 right not to respond truthfully. We therefore find that Grosso's refusal to admit responsibility for the comments cannot be a lawful basis for imposing discipline." (Emphasis added, internal citation omitted). The Fresenius case puts employers in a quandary. Title VII of the Civil Rights Act of 1964 holds employers liable for sexual harassment in the workplace if they know of the harassment and fail to take steps to eliminate the harassment. Unfortunately, under Fresenius, employers who attempt to comply with Title VII may run afoul of the Board's current interpretation of the NLRA.

Banner Estrella Medical Center, 358 N.L.R.B. No. 93 (July 30, 2012)—The Board, consisting of recess appointees Griffin and Block, held that an employer violated Section 8(a)(1) of the Act by asking for confidentiality during company investigations.

Banner Estrella had a policy of routinely asking employees who complained to human resources, and thereby triggered a company investigation, to refrain from discussing the matter with coworkers while the investigation was ongoing. The Board majority, over the dissent of Member Hayes, held that an employer seeking to prohibit employees from discussing ongoing investigations bears the burden of showing that it has "a legitimate business justification that outweighs employees' Section 7 rights." The Board noted that to meet this burden, an employer may show that (a) a witnesses needs protection, (b) evidence is in danger of being destroyed, (c) testimony was in danger of being fabricated, or (d) there was a need to prevent a cover up. The Board rejected a "blanket approach" to confidentiality as clearly failing to meet the new Banner Estrella test. As a result of the Board's decision in Banner Estrella, employers' ability to conduct an efficient, effective investigation may be significantly limited. The Board's case-by-case approach for determining whether confidentiality may be required, or even suggested, as was the case in Banner Estrella, provides employers with no guidance regarding potential liability under the NLRA.

These decisions—issued by a Board on notice of its questionable validity—not only created greater uncertainty in the law for employers, employees, and unions, but also incurred significant legal fees by both private parties and the government to litigate contentious issues that must now be revisited by a differently constituted Board. That Board will, at a minimum, be required to again expend the time and effort to carefully consider the record and analyze the issues that were unnecessarily decided by a quorumless Board. The Board's decision to proceed in this manner, contrary to Board tradition, has resulted in a significant, needless amount of controversy, confusion, and waste.

The Board's post-January 4, 2012 conduct is but a continuation, albeit an egregious one, of its prior disregard for Board restraint when acting with less than a full complement of five Members or, at a minimum, three unanimous votes to reverse precedent. In addition to these decisions, the Board, including recess-appointee Becker, and its Acting General Counsel have initiated a results-oriented trend of focusing on employers' policies and, by tortured reading of the policies, finding that the policies violate the National Labor Relations Act. Under the Board's decision in Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004), a five-Member Board held that "an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." Id. at 646.

Workplace rules or policies are unlawful under Lutheran if they explicitly restrict Section 7 activity or if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

The Lutheran majority was concerned about whether a "reasonable employee" reading an employer's rules would interpret the rules as prohibiting Section 7 activity. Id. The Board majority noted that "[w]here * * * the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach." Id. (emphasis added). The Board further noted that "[w]ork rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law. We will not require employers to anticipate and catalogue in their work rules every instance in which, for example, the use of abusive or profane language might conceivably be protected by * * * Section 7." Id. at 648.

The current Board and its Acting General Counsel have failed to follow the Lutheran majority test and have formulated a subjective climate of uncertain labor law which even experienced practitioners are having difficulty explaining to their clients. For example, over Member Hayes's dissent, a Board majority relying on recess appointee votes found unlawful a policy stating that employees were expected to be "courteous, polite and friendly" to customers, vendors, suppliers and co-workers and should not be "disrespectful or use profanity or any other language which injuries the image or reputation" of the employer. See Knauz BMW, 358 N.L.R.B. No. 164, at *1 (Sept. 28, 2012).

Among countless other policies, the Board through the votes of its recess appointees and its Acting General Counsel have also found unlawful policies:

Prohibiting "walking off the job and/or leaving the premises during working hours without permission," Ambassador Servs., Inc., 358 N.L.R.B. No. 130, at *1-2 (Sept. 14, 2012);

Prohibiting "any type of negative energy or attitudes," The Roomstores of Phoenix, LLC, 357 N.L.R.B. No. 143, at *1 (Dec. 20, 2011); and

Requiring employees to agree to arbitrate employment-related claims individually, rather than in court or as part of a class proceeding, D.R. Horton, Inc., 357 N.L.R.B. No. 184 (Jan. 3, 2012); 24 Hour Fitness, Case No. 20-CA-35419 (N.L.R.B. Div. of Judges Nov. 6, 2012).[7]

Employers, especially small- and medium-sized entities, are having great difficulty attempting to draft policies that will comply with the Board's recent decisions. The above recent Board decisions and others make it very difficult to determine what is the state of the law. This leads to the unfortunate conclusion that the current Board, through the votes of its recess appointees, is engaging in a subjective, overreaching, and results-oriented campaign to find both union and non-union employers guilty of violations of the National Labor Relations Act.

The Board's Activist Agenda—Rulemaking Initiatives

While the Board should have refrained from addressing such significant issues until the validity of the recess appointees could be resolved, its failure to do so is not surprising for those who have been watching the Board during the current Administration. As I have previously testified before the U.S. House Committee on Education and the Workforce, the current Board's rulemaking efforts revealed the agency's intent to rush its initiatives to completion, regardless of policy or legal concerns to the contrary.

The Board's Final Rule on Representation Case Procedures was published on December 22, 2011—just days before recess-appointee Member Becker's term expired. See 76 Fed. Reg. 80,138 (Dec. 22, 2011). The Board rushed the entire rulemaking proceeding by failing to comply with Executive Order 13,563's directive that the Board "shall seek the views of those who are likely to be affected * * * before issuing a notice of proposed rulemaking." For example, the Board failed to solicit input from common sources of review and advice, such as the American Bar Association's bipartisan Committee on Practice and Procedures Under The NLRA, or the Board's own Standing Rules Revision Committee.

Further, the Board, over the objection of a number of employer groups, including the Chamber, CDW, HR Policy Association, SHRM, and others, required all interested parties to file comments regarding the proposed rule changes within only a 60-day period and refused to extend the comment period. The 60-day period—the minimum amount of time under EO 13,563—was woefully inadequate given the extensive and technical nature of the proposed rule changes.

The Board also rushed the final decision-making process by attempting to implement eight controversial changes, mostly designed to unsettle long-standing election hearing proceedings by limiting the scope of such hearings solely to "questions of representation," restricting pre-election appeals to the Board, prohibiting litigation

of individual eligibility issues to pre-election hearings, and most importantly, substantially shortening the time between the petition for an election and the holding of an NLRB election, thereby depriving employees of the opportunity to learn of the issues associated with unionization.

The Board's haste has, at least temporarily, resulted in the failure of its election rulemaking. On May 14, 2012, a federal district court judge invalidated the rule on procedural grounds, finding that the Final Rule was published without being voted on by Member Hayes and, because only two Members voted, the Board failed to satisfy its quorum requirement.

Chamber of Commerce v. NLRB, No. 11-2262, 2012 WL 1664028, at *8-9 (D.D.C. May 14, 2012).[8] That decision is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit. Of course, in light of the D.C. Circuit's decision in Noel Canning, it appears that the rule is also invalid because Member Becker—an intrasession recess appointee—who was a Member of the Board at the time, could not have been validly serving and thus the Board had only two lawfully-seated Members and could not, pursuant to New Process Steel, lawfully conduct any business.

Legal, Policy, And Practical Consequences Of The D.C. Circuit's Noel Canning Decision

The Overturning of Approximately 1,000 Board Decisions Since August 27, 2011

In response to the D.C. Circuit's Noel Canning decision, Chairman Pearce indicated that the decision "applies to only one specific case, Noel Canning" and that "similar questions have been raised in more than a dozen cases pending in other courts of appeals." As a result, he stated that the Board "will continue to perform [its] statutory duties and issue decisions." See Statement by Chairman Pearce on recess appointment ruling (Jan. 25, 2013), available at *http://www.nlrb.gov/news/statement-chairman-pearce-recess-appointment-ruling*. Chairman Pearce's comments on behalf of the Board were, at best, ill-advised.

The Chamber and CDW are well aware of the Board's policy of administrative non- acquiescence under which it ignores circuit court decisions that disagree with Board law, thereby allowing the Board to maintain its position in other circuits until the issue is addressed by the Supreme Court.[9] That policy, however, is particularly ill-advised when, as here, the unfavorable decision comes from the D.C. Circuit, which has jurisdiction over all petitions for review of Board orders. See 29 U.S.C. § 160(f). As a result, Noel Canning has a clear impact on virtually every decision taken by the Board because any party adversely impacted by a Board order can appeal to the D.C. Circuit, which will apply Noel Canning to invalidate quorumless actions. The Board's policy of ignoring unfavorable court decisions is also inappropriate where, as here, the decision addresses a matter as fundamental as the Board's ability to function.

Notwithstanding Chairman Pearce's statements and similar statements from the White House, the Board faces a number of practical consequences from the Noel Canning decision. For instance, any Board decision made with less than three valid, confirmed Members stands to be invalidated in light of Noel Canning. By our initial estimates, there may be nearly 1,000 invalid decisions since former Chairman Liebman's term expired on August 27, 2011.

Invalid Delegations of the Board's Section 10(j) Injunction Authority

Noel Canning also has potential reach beyond the Board's case law. For example, Section 10(j) of the NLRA gives the Board authority to seek injunctive relief from violations of the Act. When the Board is operating with a quorum, the General Counsel is authorized to, upon approval of the Board, institute litigation in federal court seeking injunctive relief under Section 10(j) of the Act. However, when the Board has anticipated a loss of membership that results in the loss of quorum, the Board has often given the General Counsel the ability to institute Section 10(j) litigation without Board approval. See, e.g., 66 Fed. Reg. 65,998-99 (Dec. 21, 2001); 67 Fed. Reg. 70,628 (Nov. 25, 2002). Those delegations of authority, however, are temporary and explicitly state that the "delegation shall be revoked whenever the Board has at least three Members." 66 Fed. Reg. 65,998-99; 67 Fed. Reg. 70,628 ("shall cease to be effective whenever the Board has at least three Members.").

The current Board attempted to delegate its Section 10(j) authority to Acting General Counsel Solomon on November 9, 2011. See 76 Fed. Reg. 69,798 (Nov. 9, 2011). However, because the Board lacked a valid quorum at the time, that order appears to be invalid. As a result, the Acting General Counsel must find some other authority for instituting Section 10(j) proceedings without the approval of a valid Board, as he has done four times in January 2013.[10] However, the next most recent delega-

tion of authority was made when the Board anticipated losing quorum in December 2007. That delegation specifically noted that it "shall be revoked when the Board returns to at least three Members following the adjournment of the 1st Session of the 110th Congress."[11] As a result, the delegation would have been revoked on June 22, 2010 when the Board had four confirmed Members (Liebman, Schaumber, Pearce, and Hayes).

Invalid Appointments of Regional Directors By Quorumless Boards

Noel Canning may also impact the authority of the Board's Regional Directors, who are responsible for overseeing the Board's 28 Regional Offices. Since the early 1960s, the Board has delegated its appointment power to the General Counsel's office, allowing the General Counsel to appoint, transfer, demote, or discharge employees in the Board's field offices.

However, each delegation notes that "[t]he appointment, transfer, demotion, or discharge of any Regional Director or of any Officer-in-Charge of a Subregional office shall be made by the General Counsel only upon the approval of the Board." See, e.g., 77 Fed. Reg. 45,696 (Aug. 1, 2012) (emphasis added).[12] A list of potentially affected Regional Directors is attached as Appendix D.

The Potential Impact on Other Periods of NLRB History

Noel Canning's impact may also affect other periods of the Board's history. For example, a chart maintained by the NLRB reflecting the Board's composition since 1935 shows that the Board frequently relied on recess appointees to maintain a three-Member quorum. Noel Canning may render invalid some of those recess appointments and, if the invalid appointment deprives the Board of a quorum, the corresponding actions taken by the quorumless Board. A chart attached as Appendix E shows all changes in Board composition since December 30, 2000 and, where recess appointees were seated on the Board, addresses whether the appointment was intersession or intrasession and if the appointment was intersession, whether the vacancy "happened" during the same recess.[13] While Noel Canning certainly brings into question the validity of Board actions since August 27, 2011, other periods of Board activity may also be affected.

The Impact of the Noel Canning Decision on Other Federal Agencies

It is important to note that impact of Noel Canning is not limited to the National Labor Relations Board. Rather, it calls into question every recess appointment made during an intrasession recess or that was used to fill a vacancy that did not arise during an intersession recess.

The Board undoubtedly would like to proceed with its important work of enforcing the Act. However, its actions since the Noel Canning decision, including, as of February 10, 2013, issuing 26 published and unpublished decisions, authorizing two Section 10(j) lawsuits, and appointing one Regional Director, only exacerbates the uncertainty surrounding the Board.

The Administration Should Seek Certiorari To Resolve These Important Issues

At present, it remains unclear whether the Administration will either appeal the Noel Canning decision to the en banc D.C. Circuit or seek certiorari to the U.S. Supreme Court. In a White House Press Briefing on January 25, 2013, White House Press Secretary Jay Carney made clear that the White House "disagree[s] strongly" with the decision. See Press Briefing by Press Secretary Jay Carney (Jan. 25, 2013), available at *http://www.whitehouse.gov/the-press- office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013.* However, the Administration, like the Board, maintains the untenable and mistaken position that the decision only affects "one case, one company, one court." Id.

Given the Board's position that it will continue to operate on a "business as usual" basis, the validity of recess appointees Block and Griffin must be resolved. In the interim, the Board's interested stakeholders are left to wonder about the validity of virtually all Board actions.

Chamber President and CEO Thomas J. Donohue has outlined a number of important questions that parties before the Board face while the administration continues to ignore Noel Canning. A copy of President Donohue's opinion piece published on February 5, 2013 in Politico is attached as Appendix F.

As President Donohue noted, the Administration should seek certiorari now, rather than waiting for a more favorable decision from another appeals court. The issues in the case are clear and the Court should address them now, at the earliest available opportunity. A failure to do so only increases the uncertainty faced by all parties to Board proceedings—employers, employees, and unions alike. Such stakeholders during this great period of uncertainty must continue to comply with the Board's actions, thereby resulting in an unnecessary waste of time and litigation

costs. Finally, there will continue to be a substantial "legal taint" on all of the Board's actions and its legitimacy until this issue is resolved.

The Uncertain Future Of The National Labor Relations Board

Despite efforts by the NLRB and the current Administration to suggest that Noel Canning is only one case about one company, the decision has placed a dark cloud not only over the NLRB, but over every agency that relies on recess appointees to carry out the important work of the federal government. As noted above, countless Board actions are now of dubious validity, including Board decisions, rules, delegations of authority, official appointments, and many other Board actions.

While the Board must be mindful of the impact of Noel Canning on its past, the Board and Congress must also focus on the agency's highly uncertain future. Chief Judge Sentelle's opinion in Noel Canning noted the fragile nature of the Board's composition, with the Board often facing a virtual shutdown by the loss of quorum when Congress and the Executive are unable to reach agreement over the qualification of nominees. Indeed, Noel Canning leaves Chairman Pearce as the only valid current Member of the Board. His term expires in just over six months on August 27, 2013.

In short, the Board finds itself in the same position it has repeatedly found itself during the last decade: its ability to perform its statutory duty of enforcing the nation's labor laws and promoting industrial stability is in doubt. Many interested stakeholders, including the Executive and the Board, could have taken actions to minimize, or perhaps prevent, this stain on the Board's reputation. Going forward, I encourage this Committee, Congress, the Administration, and the Board to ensure that the Board's future is not called into further doubt and that this unnecessary uncertainty is brought to an end.

Conclusion

In conclusion, Mr. Chairman, I would be happy to take any questions the Committee might have regarding my testimony.

ENDNOTES

[1] Mr. King, who is a member of Jones Day's Labor & Employment Practice Group, can be reached at rking@JonesDay.com. He would like to acknowledge R. Scott Medsker, an Associate in the Jones Day Labor & Employment Practice Group, for his assistance in the preparation of this testimony.

[2] Jones Day represents these organizations in the Noel Canning litigation. See Noel Canning v. NLRB,—F.3d——, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). Mr. King is one of the counsel of record in this litigation along with Noel Francisco and James Burnham, also of the Jones Day firm, and Gary Lofland of Lofland and Associates in Yakima, Washington. A copy of the joint brief for Noel Canning, the Chamber, and CDW is attached hereto as Appendix B. A copy of the court's decision in Noel Canning is attached as Appendix C.

[3] The Board has also had to rely on an Acting General Counsel to carry out the chief enforcement actions of the Board, many of which have engendered the Board in controversy. Lafe Solomon has been serving in an "Acting" capacity since his appointment on June 21, 2010.

[4] The minutes of the December 20, 2007 meeting are attached to the brief of Petitioner New Process Steel, L.P., filed in New Process Steel, L.P. v. NLRB, Case No. 08-1457, and may be found online at *http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief 08-1457 1.pdf.*

[5] The Board virtually never finds that a union has "clearly and unmistakably" waived its right to bargain on an issue.

[6] Jones Day represents The Finley Hospital in its petition for review of the Board's Order. That appeal is pending in the U.S. Court of Appeals for the D.C. Circuit.

[7] Jones Day represented the Chamber as amicus curiae in 24 Hour Fitness.

[8] Jones Day represented the American Hospital Association, the American Society for Healthcare Human Resources Administration, the American Organization of Nurse Executives, HR Policy Association, and the Society for Human Resource Management as amici curiae in the litigation.

[9] See, e.g., John L. Radder, Agency Nonacquiescence: Implementation, Justification, And Acceptability, 42 Wash. & Lee L. Rev. 1233, 1246-50 (1985).

[10] See Blossom View Nursing Home & Rehab. Ctr., Case No. 3-CA-89876 (authorized Jan. 29, 2013); Santa Fe Tortilla Co., 28-CA-87842 (authorized Jan. 29, 2013); Nova Servs., Inc., 8-CA-87640 (authorized Jan. 24, 2013); Colossal Contractors, Inc., 5-CA-88965 (authorized Jan. 10, 2013).

[11] This delegation was also recorded in the minutes of the Board's December 20, 2007 meeting. See Br. of Petitioner New Process Steel, L.P., Case No. 08-1457, available at *http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief 08-14571.pdf.* This delegation may also be invalid because only two confirmed Members participated along with two recess appointees.

[12] This most recent codification of the regulation may be invalid because it was issued by a quorumless Board on August 1, 2012. Prior Boards have, however, issued the same regulation many times, including on October 9, 2002 (67 Fed. Reg. 62,992). The requirement of Board approval was originally promulgated in 1955 (20 Fed. Reg. 2,175 (Apr. 6, 1955)), then revoked in 1959 (24 Fed. Reg. 6,666 (Aug. 15, 1959)), and finally restored again in May 1961 (26 Fed Reg. 3,911 (May 4, 1961)). It has remained in place ever since.

[13] The Board's membership data is maintained on the Board's website at *http://www.nlrb.gov/members-nlrb-1935.* Each row denotes a change in Board composition, including adding Members, losing Members, and the confirmation of previously recess-appointed Members. The "from" and "to" columns indicate the dates those Members served on the Board beginning from taking their oath of office. Thus, the date does not necessarily reflect the date that they were recess appointed. For example, while the chart shows that Members Block, Griffin, and Flynn began serving on January 9, 2012, they were recess appointed on January 4, 2012. Each recess appointment has been classified as intersession or intrasession relying on the February 4, 2013 Congressional Research Service Report entitled The Noel Canning Decision and Recess Appointments Made from 1981-2013, available at *http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf* (last visited Feb. 11, 2013).

[Appendices to Mr. King's statement may be accessed at the following Internet address:]

http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT78694/pdf/CPRT-113HPRT78694.pdf

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Chairman ROE. I thank the panel. And I am going to yield to our chairman who has another obligation.

Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman. I very much appreciate the courtesy. And I apologize to my colleagues for jumping to the head of the line.

Ms. Reynolds, I just want to make sure I have got this right for the record. Is it your testimony that Chairman Roe and I and others who have expressed concerns about the NLRB acting right now when their constitutionality is challenged are "serving the narrow interests of the 1 percent." Is that—is that your testimony?

Ms. REYNOLDS. Well, Mr. Kline——

Mr. KLINE. I would prefer a yes or no.

Ms. REYNOLDS. Yes, Mr. Kline——

Mr. KLINE. Thank you.

Ms. REYNOLDS [continuing]. That is serving those interests——

Mr. KLINE. Thank you. Reclaiming my time. Extraordinary.

Mr. King, a couple of quick questions. Could you tell us why it was that President Bush—was unable to use recess appointments to fill vacancies at the NLRB between 2008 and 2011?

Mr. KING. Yes, Chairman Kline. Senate was in session. Senate was gaveling in and gaveling out every 3 days at a minimum and conducted business. The Senate was available for business. So, constitutionally the president was prohibited from making recess appointments during those time periods.

Mr. KLINE. So, that would be similar to the circumstance we have just been in where President Obama decided to make these recess appointments. Is that correct?

Mr. KING. Yes, sir. You are exactly correct.

Mr. KLINE. So, the claim that we have heard a number of times, that these recess appointments have been made by multiple presidents year after year, do not account for the fact that the Senate was in pro forma session, is that correct, the intra-recess appointments?

Mr. KING. That is correct. Those are all red herrings. Those are diversions from the constitutional principles that we should be talking about here. Total red herrings what President Clinton, President Carter, first President Bush, others have done. That does

not have any bearing at all on the facts of this case. I wish people would pick that up.

Mr. KLINE. Thank you. I think we just did.

I want to get this right. So, I have got a note here to make sure that I have got the numbers right. I have got, according to my notes here over 27 months, again, Mr. King, starting in 2008 the NLRB issued approximately 600 rulings in unfair labor practice and representation cases with two members.

On June 18, 2010 in a New Process Steel, L.P. v. NLRB the U.S. Supreme Court held that the NLRB must maintain a membership of at least three members to constitute a quorum, the heart of this whole discussion. What happened to the rulings those two members issued?

Mr. KING. Chairman Kline, they all had to come back and be reconsidered. But an important point that you raised is that then Chairman Liebman of the NLRB, a Democrat, and the other member, the second member, Member Schaumber, Peter Schaumber, they agreed to not decide controversial cases. They agreed not to overturn precedent.

They showed great restraint. The cases they did issue they issued unanimously. So, when those cases came back they were fairly easily processed, albeit there was that delay.

Contrast that, Mr. Chairman, with what we have today. We have an NLRB going full speed ahead, according to the chairman, with two recess appointees that are now highly questionable from a constitutional perspective. We have expedited election rulemaking going forward. We have no restraint at all.

So what this board has done is totally opposite of what a Democrat and Republican board member scenario did prior to the New Process Steel. It is very unfortunate, bad public policy.

Mr. KLINE. So then these dealings are actually much more controversial is your point I believe, than those that were made—got overturned in the past. And so whether you are the 1 percent or 5 percent or 10 percent, if you are in business out there and you are now trying to decide about the constitutionality, the legality, the effectiveness of the rulings of the NLRB, you have got to have some concern. If they were overturned in the past, why wouldn't they be here?

So, those of us who have called for the NLRB to stop activity until the membership can be constitutionally reestablished are concerned about workers, unions, employers, the economy because there is great uncertainty out there. And it is very difficult for employers and employees and unions and all those to make a decision with any confidence that that decision based on an NLRB ruling will stand. And that is our concern here.

And with all apologies to our witness, it is not just because we are concerned about the special interests of the 1 percent. Thank you. I yield back.

Chairman ROE. Thank the gentleman for yielding.

Mr. Andrews?

Mr. ANDREWS. I thank the panelists for their preparation. We have heard some very diverging views about what various policies should be of the National Labor Relations Board. That leaves me the conclusion that we would all be well served by having a func-

tioning board that has a full quorum that can decide these issues and let the process run its course.

This morning President Obama nominated Sharon Block and Richard F. Griffin to the National Labor Relations Board. He filed those appointments this morning.

Now, I know that some of you will oppose those nominations. I suppose others of you will support the nominations. Who among the panelists think that the Senate should be encouraged to take an up or down vote on each of those two nominations?

What do you think, Mr. Lorber?

Mr. LORBER. It is certainly up to the Senate and its consideration.

Mr. ANDREWS. But what is your opinion? Do you think there should be an up/down vote or not?

Mr. LORBER. Senate should consider the qualifications of the nominees.

Mr. ANDREWS. Should they put them up for a vote or not?

Mr. LORBER. It would be up to the committee and then the Senate——

Mr. ANDREWS. You do not have an opinion on that?

Mr. LORBER. No.

Mr. ANDREWS. Mr. LaJeunesse, did I pronounce your name correctly? LaJeunesse?

Mr. LAJEUNESSE. Yes.

Mr. ANDREWS. I apologize; make sure I got it right. Should the Senate put these two nominees for an up/down vote?

Mr. LAJEUNESSE. I think these two nominees should be defeated. They have proven that they are willing to go well beyond the boundaries of the act.

Mr. ANDREWS. But you——

Mr. LAJEUNESSE. Failed to follow Supreme Court precedent, and——

Mr. ANDREWS. If I may——

Mr. LAJEUNESSE [continuing]. I understand——

Mr. ANDREWS. If I may—if I may, do you think they should be put to an up/down vote?

Mr. LAJEUNESSE. I think they should be defeated in whatever way possible.

Mr. ANDREWS. Whatever way possible. That seems rather extraordinary of the democratic process.

If you were a member of the Senate, which you may be some day——

Mr. LAJEUNESSE. I doubt it.

Mr. ANDREWS. I do not wish that on anyone, sir. I assume that you would vote no. But you think that they should not even come up for a vote necessarily?

Mr. LAJEUNESSE. I think the Senate has procedures that are lawfully followed in defeating nominations and defeating legislation, which involve the filibuster. I think that is perfectly fine.

Mr. ANDREWS. Do you think there is any limits on the filibuster? You think that the Senate should be able——

Mr. LAJEUNESSE. Well, I am not an expert on it, sir, so I am not going to go into——

Mr. ANDREWS. So, you would not be concerned that these nominations were not put up for a vote?

Mr. LAJEUNESSE. That is correct.

Mr. ANDREWS. Ms. Reynolds, what do you think?

Ms. REYNOLDS. I absolutely believe that Member Block and Member Griffin should be put for an up or down vote. And I think it is telling that the responses we are hearing from my co-panelists show that all these laments that we have been hearing about the lack of confirmed nominees on the board are really crocodile tears coming from the same quarters that prevented those nominations from being voted on in the first place.

Mr. ANDREWS. Mr. King, what do you think? Do you think that these nominations should be put to an up/down vote in the Senate?

Mr. KING. We have four vacancies on the board while the fifth vacancy perhaps in August when Chairman Pearce's term expires. We have an acting general counsel who has never been confirmed.

I think all of those positions should have nominations sent to the Senate, have their qualifications fully vetted with the Senate committee and let the committee then determine whether those nominations go forward with—with, and this is so important, with cooperation from both Senate Majority Leader Reid and Senate Minority Leader McConnell. This is a bipartisan process——

Mr. ANDREWS. This question is a little—this question is a little more direct than your answer was. Does this mean that if the committee of jurisdiction in the Senate reports those nominations, the floor of this full Senate should act, in your opinion?

Mr. KING. Not necessarily.

Mr. ANDREWS. Not necessarily. I think this is very illustrative of the—how we got to the point where the case got decided. The power to advise and consent I do not believe was ever intended to be the power to paralyze and obstruct.

If a nominee is put forward and rejected by the full body of the Senate then it is incumbent upon the president to put forth a new nominee to negotiate and try to get the votes to get someone confirmed. I think to summarily refuse to put nominees up for a vote is designed to paralyze an agency. And I think that is frankly acting in bad faith.

Mr. King, I—there certainly must be some limits on the power of advise and consent. Do not you think?

Mr. KING. Certainly.

Mr. ANDREWS. What if the Senate said that we are just never going to consider any nominees of President X ever because we think he or she is a bad person? Is that something they can do under the Constitution?

Mr. KING. That is not sound public policy, and Mr. Andrews, I——

Mr. ANDREWS. That is not what I asked you. Is it something they can do under the Constitution? Are there limits to the power of advise and consent?

Mr. KING. I am not sure there is a limit on the advice and consent of the Senate. I would submit there is public policy that should come into consideration.

Mr. ANDREWS. So you think then that the Senate could say to the president—they may say it—some senators may say it now—'Presi-

dent Obama, we are not going to consider any nominee you put forth for anything because we do not like the fact you got re-elected.' Can they do that out of the Constitution?

Mr. KING. I think they have the right to do it. Whether they should do it is another question. And that is not what they are doing. The Senate just confirmed one of the president's nominees. They are taking up another nominee. But here is the problem, Mr. Andrews. We get these nominations shoved down the throat of the minority. And it cuts both ways. I mean it could be the other way.

Mr. ANDREWS. With all due respect, it is rather ironic that you are talking about things being shoved down the throat of the minority on a panel has three majority witnesses and one minority witness here. I find that to be an ironic circumstance.

You are—the issue here really is the scope of the Constitution, which you argue very eloquently. But I find it odd that you are unwilling to expound on that scope when it—when people do something you agree with to block something.

Chairman ROE. I thank the gentleman for yielding.

I bet Judge Bork would have agreed with an up and down vote. What do you think?

Mr. ANDREWS. I think Judge Bork got one and was rejected by the Senate.

Chairman ROE. I do not think so.

Mr. ANDREWS. I think he got the up/down vote and the Senate wisely rejected——

Chairman ROE. There are many of them.

Let me go over a couple things here. One, the function under the NLRA, the NLRB is supposed to, number one determine whether employers—employees wish to be represented by a union or, two, prevent and remedy employer and union unlawful acts called unfair labor practices.

I have played a lot of ball in my lifetime. And when the ball bounced off the other guy I expected to get it every now and then. I did not expect the striped shirts to always be for the other teams.

I look at the NLRB as a fair arbiter that you come in and the employer and the employee gets a fair hearing in front of that board. And also I want to go back to I think Mr. King—and I want you to expound on this. I think this is a huge constitutional issue. And the reason that I believe that is, is that why wouldn't a president, a Republican or a Democrat, just simply bypass the Senate?

We have three branches of government for a reason. And that reason is so that no one branch has too much power. And as ugly as it looks here and as clumsy as it is, it has worked for 220 years in this country.

And so why wouldn't—I want to just—let us just say a president—this process was not working for secretary of state or the Department of Defense right now that you are hearing. Why could not the president just make a recess appointment when we are in intrasession and put whomever he or she ever would want in that position?

Mr. KING. That is the point, Mr. Chairman. In fact, the D.C. Circuit Court of Appeals noted that. If you accepted the government's position, the NLRB's position in the Noel Canning case, the president could recess someone over the lunch period of the Senate, or

over a holiday, or over a weekend. And when the government's attorney was pressed in oral argument to give the court a bright line or a standard, the government could not do so.

Alexander Hamilton in the Federalist Papers noted exactly the point you are making, that the recess appointment authority, Mr. Chairman, is an auxiliary or an exception to the general appointment, advice and consent. Per what Mr. Andrews said, the roles could be reversed.

And we could have just the opposite Republican president obviously trying to get nominations through. This Constitution has worked. This is an important check and balance. And has it been used excessively from time-to-time? That is for public policy to determine. But it is the Constitution and it served us well.

Chairman ROE. And why wouldn't a President Clinton or President Bush make those appointments? The reason they did not I think was that their attorney general recommended that they not do it because it was pushing the limits of the Constitution. So, they chose not to. Am I correct on that?

Mr. KING. Absolutely. President Reagan cooperated with Senate Majority Leader Byrd. President Bush, albeit being frustrated by Senator Reid, did not challenge the 3-day appointment process at all; did not do it; worked together on a bipartisan basis the best that they could. That has not happened here.

One other point, if you would pardon me, Mr. Chairman. These nominees, Sharon Block and Richard Griffin, they were nominated, those individuals were nominated in mid-December of 2011. And about 20 days or so there after then they are recessed. The Senate did not even have their paperwork to vet them. That is incredible.

Chairman ROE. Well, I think we have a little thing now we are dealing with in 2 weeks called sequestration. Republicans hate it. Democrats hate it. Maybe it is not a bad idea, both sides despise it. And I think what you are asking, what the Constitution set up was, you said okay, you do not get exactly who you want. It is advice and consent of the Senate. And that is—I think it is an extremely important constitutional issue.

One of the things I want to bring up, Mr. Lorber, for you, is—and I have dealt with a lot in my medical practice is privacy. When you are dealing with the issue you brought up, whether it is retaliation, whatever, how do you carry out? You cannot carry out an investigation in public. So how with EEOC, you mentioned the Americans with Disabilities Act and on; how do you do that?

Mr. LORBER. Well, it is just simply it is not feasible. The EEOC has, as I said in my testimony, regulations which talk particularly about harassment investigations where they say that these investigations should be confidential. You look to the ADA, which gets even more, raises more confidentiality issues. You look to other laws, Genetic Information Act——

Chairman ROEROE. I want to interrupt you just a second because my time is about expired. I look it in terms of—I have someone in my office who is saying terrible things about what is going on in our office. And if I had it right here or any member did they would get rid of them. They would fire that person.

If you had—I know in my medical practice if my person sitting out front were in everybody's face who showed up we would have

to make a change. This right here says that that person, at least some of the rulings I read said you can say about whatever you wanted to and still maintain your employment.

Mr. LORBER. That is exactly right. I think if you look to the Fresenius decision, which is even worse in several respects than Banner, Fresenius there was outright harassment. There was outright threats, sexually demeaning contact, and the NLRB said this person could not be fired. If that happened at your office and you did not fire that person you would be sued. And frankly you would lose.

Chairman ROE. Well, take my time away. My time is expired.

Dr. Holt?

Mr. HOLT. Thank you, Mr. Chairman. Just a comment on Mr. Andrew's line of questioning about regular order being good policy: the Senate voted to reject Mr. Bork with all 100 senators voting.

Ms. Reynolds, we have heard from other witnesses that the board—well, that this was just unprecedented. Could you elaborate on that? In what sense do you think this was unprecedented? The president did nominate the canonical, the traditional three Democrats and two Republicans and so forth.

Ms. REYNOLDS. Mr. Holt, I do not believe that it was unprecedented at all. To take up on Mr. King's comment about how this could happen during a lunch break or a weekend. That was not what occurred here.

I do not know how it looks inside the beltway, but looking from the rest of the country, if the Senate announces in the middle of December that it is not going to conduct any substantive business for over a month and the senators go home to their districts and one person comes into the chamber and gavels in and gavels out in a matter of a few seconds every 3 days, it does not seem to me that the Senate is in session and available for advise and consent.

And furthermore, around the same time that those nominations were put up in December, in fact shortly before the nominations, there had been a press release by Senator Graham stating that he, to quote—"Graham reaffirmed he will continue to place an indefinite Senate hold on nominations to the NLRB." Those are the words of the senator's press release. So, the hold of one senator was preventing the Senate from fulfilling its constitutional function of advise and consent.

To say that this is a pre——

Mr. HOLT. Let me move on with a couple of points, and I will finish with the comment. What seemed unprecedented to me was the decision.

Mr. King, in Noel Canning did the NLRB find the employer violated the act in a 3-0 decision?

Mr. KING. Yes, it did.

Mr. HOLT. And did not the court of appeals agree in this matter that the NLRB had a reason to basis for the decision?

Mr. KING. Yes. That was the holding of the court, Mr. Holt.

Mr. HOLT. Do you believe the court of appeals erred in saying that?

Mr. KING. I do not believe the court was correct in that part of the decision. I think there was substantial evidence that there was

never a meeting of the minds between the employer and the union as to a renewal clock to a bargaining agreement.

Mr. HOLT. So you acknowledge the Court of Appeals can err in your opinion.

Mr. KING. Mr. Holt, as an attorney, yes, courts err from time to time, certainly.

Mr. HOLT. Mr. King, you said 'recent verbal outcries regarding the board decisions are highly partisan and have the appearance of being part of a coordinated effort to chill and discourage board members from addressing many of the cases before them.' No, you did not say that this morning. You actually said that, I recall, in 2006 during the George Bush administration with regard to the so-called September Massacre. Do you recall saying that?

Mr. KING. I would have to see the context, Mr. Holt, of those comments. I will concede, Mr. Holt, and I think anyone that practices in this area, that looks at the National Labor Relations Act and the board objectively there certainly is going to be policy oscillation.

I would agree with Ms. Reynolds. The president has a right to appoint three of the five, and hopefully have nominees that are acceptable to the Senate. And we have two from the other party.

But our point is here from the Chamber and the CDW. These decisions, Mr. Holt, that we are getting are so far off base. Eighty plus years of precedent were just reversed the other day.

Mr. HOLT. So if you look at the decision here, which was actually quite, quite broad, which would invalidate lots of—lots of appointments I think. Have you and—or your clients prepared a list of decisions that the NLRB made during either of the Bush administrations that you think should be declared invalid at this point, in light of Noel Canning?

Mr. KING. Mr. Holt, we have not gone back that far. We have gone back through March of 2010.

Mr. HOLT. I invite you to go back to those administrations as well and give us a list of the ones that you think should be invalid.

Ms. Reynolds, just in the few seconds remaining, I would like to get back to Mr. Andrews' first point. What this should be about is why we need an NLRB. What does an inoperable board mean for your clients? And I suppose you have maybe 15 seconds. I beg your pardon.

Ms. REYNOLDS. It means there is no board to certify election results. It means there is no board to order employers to comply with the results of an employees' vote. Or it—at least that is the position that employers will be taking when they put their cases on hold in the D.C. Circuit and delay justice.

Mr. HOLT. Thank you, Mr. Chairman.

Chairman ROE. Thank you for yielding. Dr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman. I would like, first of all with Ms. Reynolds, thank you for your opinion about when the Senate is in session. I think that we will have to see what Senator Reid and Senator McConnell think about that.

But this argument is being reframed by your testimony. And this administration has a problem of making end around Congress when they do not agree with what Congress does, and that ap-

proach is definitely meant to paralyze the legislative process, which is what is happening.

So, right now I find it very ironic that the administration and their allies on the committee, as well as your testimony, challenging Republicans about these NLRB appointments based on policy disagreements when really the argument is not about that. If these appointments were consistent with historical constitutional precedent then we would not be having this hearing today.

We not only have to look at Ms. Reynolds' testimony and the administration's recent attack on the First Amendment right to religious freedom to see what the tactic is, and we are on to you. Reframing the discussion will not take this away from the facts that this is a constitutional issue. And we will continue to stand up for the Constitution.

And with that, Mr. Chairman, I want to give the rest of my time to Mr. Gowdy.

Mr. GOWDY. I thank the gentleman.

Ms. Reynolds, who is Miguel Estrada? Have you ever heard of him?

Ms. REYNOLDS. I believe he is a circuit court judge if my recollection is correct.

Mr. GOWDY. I actually do not think so.

Ms. REYNOLDS. I apologize, I may be wrong.

Mr. GOWDY. Well, I think you are. This is why his name entered my mind. When my friend, and he is my friend, Mr. Andrews, was asking you about regular order Miguel Estrada's name went through my mind.

He was someone who was denied a vote for the D.C. Court of Appeals, if I am not mistaken, even though he had plenty of votes to pass in the full Senate. He could not even get a vote. And I was stunned that you were not able to mention that while you all were discussing Mr. Bork. If you would, if you have an opportunity to look up the case of Miguel Estrada, I would be grateful to you.

Do you agree with me that the Constitution means the same thing whether there is a Republican in the White House or whether there is a Democrat in the White House?

Ms. REYNOLDS. I absolutely do.

Mr. GOWDY. Did you object when Harry Reid was having these pro forma sessions when President Bush was in the White House?

Ms. REYNOLDS. Nobody asked my opinion at that time.

Mr. GOWDY. Did you write any law review articles on it?

Ms. REYNOLDS. I am sorry. No, I did not write any law review articles.

Mr. GOWDY. Did you write any columns in any trade magazines on it?

Ms. REYNOLDS. No.

Mr. GOWDY. So, you only give your opinion when it is asked? You do not ever just decide hey, this is wrong, I am going to write a law review article or an op-ed piece and criticize the fact the Senate is engaging in this travesty to thwart appointments?

Ms. REYNOLDS. I am usually too busy practicing law to write op-ed pieces.

Mr. GOWDY. Well, we appreciate you taking time out of your busy practice of law to come today. What is your definition of a recess?

Ms. REYNOLDS. I would prefer not to opine on that. I am a labor lawyer, not a constitutional scholar.

Mr. GOWDY. Well, ma'am, you cannot have it both ways. You cannot come and testify on a hearing about recess appointments and then decline to answer the seminal question which is what is a recess? If they were to take a nap, which happens from time to time in the U.S. Senate, is that a recess?

Ms. REYNOLDS. Well, my understanding was that I was asked not to testify about recess appointments, but to testify about the effect of the Noel Canning decision.

Mr. GOWDY. Who in the world asked you not to testify about something?

Ms. REYNOLDS. No. That I was not asked to testify about that, but that the topic of the hearing is the future of the NLRB, what Noel Canning v. NLRB means for workers, employees, and unions.

Mr. GOWDY. And that very case dealt with recess appointments. So you can understand why I would ask you what is your definition of a recess?

Ms. REYNOLDS. I do not have one to offer at this time.

Mr. GOWDY. But you agree it should be the same thing whether there a Republican in the White House or a Democrat in the White House.

Ms. REYNOLDS. Certainly.

Mr. GOWDY. And would you also agree that when the Senate passes something like the payroll tax extension, did anyone challenge that as being outside the normal course of Senate business, that they were not legally constituted to pass that payroll tax extension?

Ms. REYNOLDS. I am not aware of any challenges to that.

Mr. GOWDY. So, how can you be in session for purposes of passing a bill, but not in session for purposes of making a recess appointment?

Ms. REYNOLDS. I will leave that to the constitutional scholars to argue.

Mr. GOWDY. Well, what is your opinion?

Ms. REYNOLDS. In my opinion the appointments were proper.

Mr. GOWDY. Wow. I am almost out of time. I hope that I will have another chance to go with you through the chronologies of when these appointments were made. Let me just ask you this. I will go ahead and give you a couple of the questions up front so you can think about them.

Do you know who controls the calendar in the Senate?

Ms. REYNOLDS. I am not an expert on Senate procedure.

Mr. GOWDY. Would you be surprised if I told you the Democrats did?

Ms. REYNOLDS. I would not be surprised to hear that. But I am aware that the House prevented the Senate from adjourning more than 3 days at a time during the time that this was occurring.

Mr. GOWDY. That actually was not my question. But we will get back to my question when it is mine next.

Chairman ROE. I thank the gentleman for yielding.

Mr. Scott?

Mr. SCOTT. Thank you.

Mr. King, you have criticized these appointments because in your reasoning they were not made "during a recess" and the gentleman from South Carolina has articulated why he did not think it is a recess. What about the other parts of the decision that whenever the recess, only certain recesses count, those at the end of the session? And that the vacancy has to occur during the recess? What do you think of those parts of the decision?

Mr. KING. Congressman Scott, those are excellent questions.

The D.C. Circuit Court of Appeals, as you know, found that the vacancy has to happen during the recess. And we agree with that. The Chamber and the CDW agree with that. A literal interpretation, which I submit really is where we ought to go on this constitutional question certainly supports that. That is the way the recess appointment clause reads. So, having the vacancy happen during the recess was an appropriate finding.

Mr. SCOTT. And you went to declare that this was in fact not a recess. You had plenty of precedents to support that.

Do you have any precedents in what previous presidents had done during intrasession recesses where a vote was taken to go into recess by both the House and the Senate by resolution, violating the rule—violating by resolution the rule that you've got to be in session once every 3 days. If you do not do that you are in recess, and that is by resolution, if you pass one of those resolutions in the middle of a session and you are in recess, are you saying you cannot make an appointment during that recess?

Mr. KING. Well, it depends, Congressman Scott, on our definitions here. Our research shows that there has never been a recess appointment during a 3-day period. I think we have established that. There is no authority contra to that.

Second, your question then poses what had been the time limits, what have been the time periods in which intrasession appointments, recess appointments have been made? And they are really all over the place. You could see 11 days in Judge Pryor's case where the Senate was on a brief break. There are 20 days, et cetera. There is no real clear, bright line on intrasession——

Mr. SCOTT. The bright line is a resolution passed by the House and the Senate to go into recess.

Mr. KING. Well, the adjournment clause requires, as you know, the House to agree that the Senate can go into recess for more than 3 days.

Mr. SCOTT. Right.

Mr. KING. That never happened here, by the way.

Mr. SCOTT. Well, I think you raised a question of whether this was in fact a recess. What I am asking is if there is in fact a recess, not at the end of the session but during the session, whether or not you have—what your research has shown as presidents taking advantage of that.

Mr. KING. There can be and have been, as you know, recesses during Congresses that end one session and then we start another session.

Mr. SCOTT. In the August recess.

Mr. KING. That would be the intersession recess appointment——

Mr. SCOTT. Okay. Now——

Mr. KING [continuing]. Window, and we agree with the court's holding on that point.

Mr. SCOTT. Well, are you aware of any appointments being made during August recesses over the years?

Mr. KING. I believe there have been some. Now the question is was it an actual recess or not. And that gets back to whether the Senate was still in session or not.

Mr. SCOTT. Okay.

What is—Ms. Reynolds, what is the status of the NLRB in circuits around the country? Because as I understand it, NLRB is alive and well in some circuits and not in others. Is that accurate?

Ms. REYNOLDS. The party that is aggrieved by an NLRB decision has a choice of where to file its petition for review. The party can file either in the circuit where the case arose—in any of the 11 circuits around the country where the case arose, or in the D.C. circuit.

So, in all the other 11 circuits other than the D.C. circuit there has been no ruling that this board was improperly constituted. And there is no reason to think that those circuits will rule that way. In fact, the 11th Circuit in the case of Judge Pryor, which was previously mentioned, ruled that a recess appointment under just such circumstances was constitutional.

However, because of the fact that employers, or unions for that matter, can choose to file their petitions for review in the D.C. circuit, we do have the potential of this uncertainty spreading throughout the country.

Mr. SCOTT. Thank you.

Yield back, Mr. Chairman.

Chairman ROE. I thank the gentleman for yielding.

Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman.

Ms. Reynolds, Peter Schaumber's term expired August 27, 2010. Do you know when the president nominated Terence Flynn to fill that vacancy?

Ms. REYNOLDS. I believe it was in January of 2011 if I recall correctly.

Mr. GOWDY. Which, help me with math, that would be what, 4, 5 months later?

Ms. REYNOLDS. That sounds about right.

Mr. GOWDY. Would you agree the timeliness of a nomination to replace can be some evidence of the importance of the vacancy itself?

Ms. REYNOLDS. I am sorry. Could you repeat the question?

Mr. GOWDY. The length of time it takes one to propose a replacement, would you agree that that could be evidence of how significant the vacancy was in the first place?

Ms. REYNOLDS. Not necessarily. I assume the president has many things that he is considering.

Mr. GOWDY. So, 5 months is a reasonable amount of time in your judgment to wait to make an appointment to something as important as the NLRB.

Do you know, again, who controls the schedule in the Senate?

Ms. REYNOLDS. I have already stated that I do not.

Mr. GOWDY. Would you disagree with me if I told you it was the Democrats?

Ms. REYNOLDS. I would not disagree.

Mr. GOWDY. Do you know who controls the scheduling of committee hearings in the Senate?

Ms. REYNOLDS. I assume that it would be the majority, but I do not know specifically how that works.

Mr. GOWDY. And the majority would be the Democrats, right?

Ms. REYNOLDS. Correct.

Mr. GOWDY. Do you know when Harry Reid scheduled a vote on Terence Flynn?

Ms. REYNOLDS. No.

Mr. GOWDY. Would you be surprised to know he did not?

Ms. REYNOLDS. I do not know.

Mr. GOWDY. Would you be surprised to know he did not?

Ms. REYNOLDS. I really I do not know whether that occurred or not and——

Mr. GOWDY. You do not know whether you would be surprised or you do not know whether it happened or not? It did happen. So my question to you is, are you surprised that the leader of the Senate never scheduled a vote on one of the NLRB replacement appointees?

Ms. REYNOLDS. I do not know enough about the circumstances to know whether that is surprising or not.

Mr. GOWDY. Wilma Liebman's term expired August 27, 2011. Do you know when the president nominated Richard Griffin to fill her vacancy?

Ms. REYNOLDS. I believe that was in December of 2011. And I would point out that immediately or very shortly after these recess appointments were made, all three of the appointees were nominated again and the Senate still would not allow an up or down vote on them.

Mr. GOWDY. Which kind of gets us back to the Miguel Estrada question, does it not? Whether or not the same tactics are acceptable when there is a Republican administration versus a Democrat administration.

Let me ask you about Craig Becker because it looks like his term expired on January 3, 2012. Do you know when the president appointed Sharon Block to fill that vacancy?

Ms. REYNOLDS. The following day I believe.

Mr. GOWDY. Do you think one day is enough time for the Senate to perform its constitutionally mandated function of advice and consent?

Ms. REYNOLDS. There had been a nomination of Ms. Block the previous month. But the advise and consent——

Mr. GOWDY. Do you think the——

Ms. REYNOLDS [continuing]. Was not—the Senate was not able to fulfill its advise and consent function because of the fact that the nominations were being uniformly put on hold.

Mr. GOWDY. My question to you is says who? I mean who says the Senate was not able? You agree with me not doing something is different from not having the power to do something.

Was there a vote scheduled on any of these three nominees by Democrat leader Harry Reid?

Ms. REYNOLDS. I believe that that was not possible. And I am not—I am not citing myself. I am citing Senator Graham.

Mr. GOWDY. Not possible how?

Ms. REYNOLDS. Senator Graham pledged in his own words to block Senate confirmation of nominees to the board.

Mr. GOWDY. So Senator Graham writing in a press release that he pledged to do something carries just as much weight as the majority leader in the Senate who has control over the calendar, who never once scheduled them for a vote

Ms. REYNOLDS. If one senator can place a hold and prevent a vote from taking place then yes.

Mr. GOWDY. What does the term void ab initio mean?

Ms. REYNOLDS. It means void from the time when it occurred, as if it had never happened.

Mr. GOWDY. If these judges were not constitutionally appointed via recess would you agree that any decisions that they participated in would be void ab initio?

Ms. REYNOLDS. If they were in fact not properly on the board then I mean that will be for the courts to determine. I would not be surprised if the courts reached that conclusion.

Mr. GOWDY. Well, they would have to right? If they were not judges then they do.

Ms. REYNOLDS. Well, board members, yes.

Mr. GOWDY. Last question. What is a recess?

Ms. REYNOLDS. I have already stated I am not prepared to give a definition of that at this time. I am not an expert on congressional procedure——

Mr. GOWDY. Well, what——

Ms. REYNOLDS [continuing]. And I am here as a labor lawyer.

Mr. GOWDY. What do you think would be a fair amount of time? Who gets to decide whether the Senate is in recess or not?

Ms. REYNOLDS. Well, ultimately I suppose it will be the Supreme Court.

Mr. GOWDY. But who—according to the Constitution who decides? Who decides whether or not the bodies are in recess or not?

Ms. REYNOLDS. The—either House has to consent to the other being in adjournment for more than 3 days, which was part of the issue here. But the D.C. Circuit's decision goes far beyond the question of whether these pro forma sessions prevented a recess or not. The D.C. Circuit's decision would invalidate literally hundreds of appointments to all manner of offices by Presidents Reagan, Bush and Clinton. And——

Mr. GOWDY. Well, we will have to disagree on the interpretation of the opinion——

Mr. KING. Congressman——

Chairman ROE. Gentleman's time is expired.

Mr. KING. Congressman, if I may——

Chairman ROE. No, gentleman's time expired.

Mr. Tierney?

Mr. TIERNEY. I am going to just ask maybe a couple of questions and then turn it over to anybody of my colleagues here that might want to ask more questions that been here longer at the hearing. I was delayed at another hearing on that.

But Mr. King, I guess I will start with you. Are you troubled at all by the fact that a member of the minority of the Senate can just make it very clear that they are going to interfere and stop any nominees from being appointed to a particular board, and essentially be successful in that?

And then that the House can sort of conspire in one way or another to make sure there could be no recess or whatever, and therefore delegitimize an entire section of the United States Code. It provides for a board to exist and to perform certain functions.

Mr. KING. Congressman, that is an excellent question. The hold procedure that you are speaking about has long been a policy of the Senate. It works both to the advantage and disadvantage of either party.

I am not prepared here to tell the Senate or testify on what the Senate rules should be. The hold procedure I think on occasion has been used correctly. Perhaps it has been used incorrectly in other occasions. But I am not going to opine further than that.

Mr. TIERNEY. Are you troubled when the House of Representatives makes it unlikely or impossible for the Senate to adjourn for what seems fairly obvious to a lot of people, for ulterior motive of preventing appointments from being filled?

Mr. KING. The Constitution clearly provides under the adjournment clause that the House must agree before the Senate can adjourn for more than 3 days. I support the Constitution provision there.

Mr. TIERNEY. So it does not trouble you that it would be used in that way?

Mr. KING. The Constitution does not trouble me.

Mr. TIERNEY. But the use of the Constitution in that process by the House toward a means like this does not trouble you?

Mr. KING. I think——

Mr. TIERNEY. Because we understand it can be used either way if other people——

Mr. KING. Certainly.

Mr. TIERNEY [continuing]. Wanted to play that game.

Mr. KING. There are checks and balances provided for in the Constitution that I support and I believe my clients would certainly support.

Mr. TIERNEY. In this instance at least, right?

I defer to——

Mr. ANDREWS. I thank my friend for yielding.

Mr. King, what is your understanding of why the purpose of the constitutional provision that requires House consent to Senate adjournment of more than 3 days? Why is that provision in the Constitution?

Mr. KING. As a check and balance to ensure, Mr. Andrews, that the bodies of Congress, the House and Senate are available to do business.

Mr. ANDREWS. Yes——

Mr. KING. I think that is the basic tenet.

Mr. ANDREWS. Right. I think the concern was—I do not know this either, but the logic would tell us that the concern was that the Senate would simply stop doing anything. There has been some precedent for that has there not, colleagues? Would just stop doing

anything and bring the business of the country to a halt. You think that is the constitutional purpose?

Mr. KING. I think that is one objective that the framers in all likelihood had in mind.

Mr. ANDREWS. Can you think of any others?

Mr. KING. With respect to the adjournment clause?

Mr. ANDREWS. The purpose of that clause, the House consent part of it.

Mr. KING. I do not know of any other central objective, Mr. Andrews.

Mr. ANDREWS. I do not either. And it is worth taking a look at.

Now if the purpose of that clause is to prevent the Senate from paralyzing any activity in the government, would not a very fair reading of that clause be that if the purpose of the recess is simply to—or rather the purpose of the pro forma session is simply to say you are in session for the purpose of avoiding presidential appointments, that that would be an invalid exercise of that power?

Mr. KING. No, I do not agree with that.

Mr. ANDREWS. Why do you disagree with that?

Mr. KING. I do not believe it is appropriate whether it be Republican or Democrat to have a president recess appoint anyone over a lunch period, over a 3-day holiday. I do not agree with the previous testimony——

Mr. ANDREWS. Is it a matter of time or is it a matter of whether the pro forma session really is a session or not, whether the Senate is really available to act or not? Because why would the consent clause be necessary and why would it say 3 days if that were not the purpose, vitiating this purpose of the Constitution? Why do we have that provision?

Mr. KING. The fact of the matter is, Mr. Andrews, the Senate was available to do business during the time period we are talking about here. It passed the payroll tax extension, the temporary extension. It would——

Mr. ANDREWS. For the record here, and Mr. Gowdy is not here anymore, but I agree with his historical rendition of this that it was our party that really started this phony 3-day recess stuff. But that does not make it right. And I have my own doubts about the constitutional validity of the payroll tax extension being passed that way. I think that is a very fair line of questioning.

But what I would say to you is that you and I had a dialogue a few minutes ago about the limits of the advise and consent clause. And I think you sort of touched on one here. I think if the purpose of a pro forma session is to avoid presidential appointments that is an invalid exercise of that clause. It is something you ought to think about.

Yield back.

Chairman ROE. I thank the gentleman for yielding.

Dr. DesJarlais?

Mr. DESJARLAIS. Thank you, Mr. Chairman.

Mr. King, the NLRA requires a board quorum consisting of at least three members to perform a number of actions. What board actions require a board quorum?

Mr. KING. Certainly decision making. And we have over 1,000 decisions that are impacted since this whole controversy arose. Fur-

ther board actions required for appointments of regional directors, and we have 18 of the 28 regional directors in doubt, as we state in our testimony, because they were approved by board action when there was not a lawful quorum.

We also have the question of delegation to the acting general counsel for injunction relief. That delegation occurred in November of 2011. That, from our perspective, was not a proper delegation. So that is an action that would be impacted.

And the board also has the authority by statute to engage in rulemaking. This board with only three members in the latter part of 2011, one of whom was a recess appointee, Craig Becker, passed one of the most far-reaching rules on the election process under the National Relations Act ever. So, the board has rulemaking authority. That is an action—that is invalidated we believe after Noel Canning also. That is some examples, if you will, of board action.

Mr. DESJARLAIS. Okay. Thank you.

Mr. King, what is the source of precedence relating to the interpretation of the recess appointments clause?

Mr. KING. There are many, Congressman. The Federalist Papers, comments made by the framers of the Constitution, interpretations by various attorney generals, interpretation by the courts. But at bottom there is very little judicial precedent on this issue that we are discussing today.

And you raise a good question. That is why it is the position of the Chamber and the CDW that the administration should expeditiously seek certiorari. Avoiding this issue will not help anybody. It is going to get to the Supreme Court at some point.

Now, whether the court hears it or not that is discretionary of course. But waiting for other circuit courts, that is a waste of time and money. It hurts employees, it hurts unions, it hurts employers. Let us get on with it.

Mr. DESJARLAIS. Was Noel Canning a case of first impression in the U.S. Court of Appeals for the District of Columbia?

Mr. KING. Yes, sir. On the points we are talking about today I believe that to be true.

Mr. DESJARLAIS. Have any other federal courts of appeal issued decisions relating to the constitutionality of intercession recess appointments?

Mr. KING. There are three other decisions. The 11th, the 2nd and the 9th Circuits have issued opinions in this area on intrasession recess appointments and also the happening during recess issued. I would hasten to add that the facts in each of those cases are different than the facts we have here today.

There were more than 3 days that had passed in each of those cases. There was not a recess appointment during the 3-day period that we have been discussing today. But I would concede that we have three circuits that have a different view of the recess appointments clause.

All the more reason, Mr. Congressman, to get on with it and seek cert today; we do not have to wait for another circuit to issue a decision. This is ripe for certiorari today.

Mr. DESJARLAIS. Thank you, Mr. King.

Mr. LaJeunesse, what advice are you giving employees in the wake of Noel Canning?

Mr. LAJEUNESSE. Well, I am not going to breach attorney-client privilege, Congressman. But generally speaking we advise employees who have cases before the board with unfair labor practice charges against unions and employers, and cases—representation cases to make motions to disqualify the board from acting. And we do that in every case now based on Noel Canning.

We did it before based on the general principles involved, constitutional issues. And on Monday we filed a petition for mandamus or prohibition with the D.C. Circuit, asking the D.C. Circuit to tell the board to stop acting in the Kent Hospital case, which is the case in which this rogue board decided that objecting non-members can be forced to pay for union lobbying.

Ms. REYNOLDS. May I respond?

Mr. DESJARLAIS. Reclaiming my time. Actually I think I am just about out of time.

Mr. LAJEUNESSE. And to finish off my point, where the board has decided cases we advise our clients to go to the D.C. Circuit on petitions for review in unfair labor practice cases.

Mr. DESJARLAIS. I yield back.

Chairman ROE. I thank the gentleman for yielding.

Now I see no other questioners here. I will yield to Mr. Andrews, closing remarks.

Mr. ANDREWS. I thank the chairman. I thank the witnesses who were very thoroughly prepared; I think they did a very good job answering our questions. It is a pleasure to have all of you here.

As a retired adjunct law professor, I found this really fun and interesting, which says a lot about my life.

Mr. KING. You went to the—Mr. Andrews, you went to the right law school. You know that.

Mr. ANDREWS. So did you, Mr. King.

Mr. KING. Thank you.

Mr. ANDREWS. So did you. We are proud of you.

But I think there is a practical problem that has to be addressed here. And that is the board is not functioning because of this political stalemate. And I really do believe the right way to resolve this is to put these two nominations up for a vote in the Senate. And as happened with Judge Bork, if people do not want to support the nomination, vote no. If 51 people vote no it will fail. Then the president has to put someone else up.

And let us get the board functioning again by insisting that the Senate take a vote, an up/down vote on the people who were nominated. If they receive majority support, they will be appointed. They will make decisions. Some of us will like their decisions. Some will not. There are processes through legislation, through litigation, through the political process to change that outcome.

I think that we are here because the Senate I believe has abused the advise and consent clause. I think that there is a difference between using the power of that clause to assert your political point of view and paralyzing the executive branch.

I, by the way, do not think that that abuse has been limited to the Republican Party in these last few years. I think it is been a chronic problem in our government for the last couple of decades. I do think that that problem has metastasized in the last 2 or 3 years. If one looks at the number of filibusters that have been

launched, it qualitatively, qualitatively exceeds any number of filibusters in prior years.

For the record, since we are all pretending to be senators today, I think that one thing the Senate should do is actually require a real filibuster instead of just saying you are going to do one. I think that if Senator Graham or whomever else would want to filibuster these two nominees, that he should have to go to the floor and hold the floor for as long as the others will permit him to do it like Jimmy Stewart did, right? I think that is what really ought to happen rather than just filing a paper and saying oh, by the way, Mr. Majority Leader, you are going to have to get 60 votes for this.

I think some of these nominees might be defeated. And if they are, fine, you find another one. But the practical problem here is not to have nine justices in black robes make this decision. It is to have 100 senators duly elected by the people cast an up or down vote. People either get confirmed or they do not. I think that is the solution.

I thank the witnesses for their time and their preparation.

Chairman ROE. I thank the gentleman for yielding. I also would like to associate myself with Mr. Andrews' remarks. And thank you all for being here. You all were very well prepared. And I am not like him. This is a little different for me being a doctor versus being a lawyer. Thank goodness I am a doctor.

I do—I do think that we absolutely do need a functioning National Labor Relations Board. And the reason we need that is because of the uncertainty that is out there in business now. I mean if I am a business person and I have an issue I do not know what to do with that issue right now because I know that the what, 600 or whatever it was, when both sides agreed the board said you do not have a quorum, those were all overturned. Look at the amount of money, time, energy, resources that were put to that and not job creation. We are right down on the same path. I could not agree more, Mr. King, with you that we need to get this to the Supreme Court.

And Ms. Reynolds, with all due respect, you know the constitutional issue, I did not agree with the Constitution on abortion. I do not agree with the Constitution on health care. But it is the law of the land. We have a court system. We have a system of checks and balances that determine that. And when it is inconvenient and I don't like it that does not make it not constitutional.

So, I think we have a much bigger issue here of the constitutionality of this. And we have a system of checks and balances where one branch of government does not become more powerful than the other. It is clumsy. It is messy. Sometimes it seems like it works in glacial speed. But it has worked for 220 years.

And I think it is extremely important for us to maintain and follow the Constitution of this country, which is the law of the land. That has set us apart from every other nation on this earth, the Constitution. And so I think it is a much bigger issue.

I have enjoyed this so much, listening to all the diverse opinions. I think this is going to continue. I think this discussion will continue, and I certainly hope the board is—the president can appoint people that can be approved and we can get this board functioning and our businesses back to work.

I want to thank you for taking your time. With no further comments, the meeting is adjourned.

[Additional submission of Mr. LaJeunesse follows:]

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
Springfield, VA, February 19, 2013.

Hon. PHIL ROE, *Chairman,*
Subcommittee on Health, Employment, Labor, & Pensions, 2181 Rayburn House Office Building, Washington, DC 20515.

Re: *Hearing on "The Future of the NLRB: What Noel Canning vs. NLRB Means for Workers, Employers, and Unions"*

DEAR CHAIRMAN ROE: Thank you again for inviting me to testify during your Subcommittee's hearing on February 13.

Unfortunately, after I had already submitted my Written Statement for the record, I noticed that I had omitted the word "rejected' on the fourth line of page 12. The paragraph in question should read (footnotes omitted):

The Board majority in United Nurses explicitly declined to follow a directly contrary holding of the Ninth Circuit, Cummings v. Connell. The majority, including two purported Members whose appointments were held invalid in Noel Canning, argued that unions' conduct under Beck "is properly analyzed under the duty of fair representation," not "a heightened First Amendment standard" as in public-sector cases such as Hudson and Cummings. However, the D.C. Circuit had already rejected that argument in an earlier Board case.

I would appreciate it if this errata letter could be included in the record of the hearing.

Sincerely yours,

RAYMOND J. LAJEUNESSE, JR.

[Whereupon, at 11:37 a.m., the subcommittee was adjourned.]