

# HEARING ON NATIONAL LABOR RELATIONS BOARD NOMINEES

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## HEARING OF THE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE NOMINATIONS OF KENT YOSHIHO HIROZAWA, OF NEW  
YORK, AND NANCY JEAN SCHIFFER, OF MARYLAND, BOTH TO BE A  
MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

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JULY 23, 2013

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Printed for the use of the Committee on Health, Education, Labor, and Pensions



Available via the World Wide Web: <http://www.gpo.gov/fdsys/>

U.S. GOVERNMENT PUBLISHING OFFICE

20-524 PDF

WASHINGTON : 2016

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## HEARING ON NATIONAL LABOR RELATIONS BOARD NOMINEES

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TUESDAY, JULY 23, 2013

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:06 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Casey, Franken, Bennet, Baldwin, Murphy, Warren, Alexander, Enzi, Isakson, Hatch, and Scott.

### OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Committee on Health, Education, Labor, and Pensions will please come to order.

Today's hearing is the result of a bipartisan agreement that was reached to allow for a fully confirmed National Labor Relations Board for the first time in over a decade. A fully confirmed, fully functional Board will be a huge step forward for workers and employers in our country. Indeed, I hope that this agreement brings a new beginning for the Board so that we can ratchet down the political rhetoric that seems to surround this agency and instead let the dedicated public servants who work there do their jobs.

The NLRB is an agency that is absolutely critical to our country and to our economy and our middle class. Over 75 years ago, Congress enacted the National Labor Relations Act guaranteeing American workers the right to form and join a union and to bargain for a better life. For both union and non-union workers alike, the Act provides essential protections and gives workers a voice in the workplace, allowing them to join together and speak up for fair wages, good benefits, and safe working conditions.

These rights ensure that the people who do the real work in this country see the benefits when our economy grows. The National Labor Relations Board is the guardian of these fundamental rights. Workers themselves cannot enforce the National Labor Relations Act. The Board is the only place workers can go if they've been treated unfairly and denied the basic protections that the law provides.

Thus, the Board plays a vital role in vindicating workers' rights. In the past 10 years—I say 10 years, and that transcends both Republican and Democratic administrations—the NLRB has secured opportunities for reinstatement for 22,544 employees who were un-

justly fired. It has also recovered more than \$1 billion on behalf of workers whose rights and pay were violated.

The Board doesn't just protect the rights of workers and unions. It also provides relief and remedies to our Nation's employers. The Board is an employer's only recourse if, for example, a union commences a wildcat strike or refuses to bargain in good faith during negotiations. The NLRB also helps numerous businesses resolve disputes efficiently. By preventing labor disputes that could disrupt our economy, the work that the Board does is vital to every worker and every business across the Nation.

Confirming these nominees is vitally important because in the absence of Senate action, the Board will lose a quorum in August and will be effectively forced to shut down. That's more than an administrative headache. It's a tragedy that denies justice to working men and women across the country.

It affects workers like Dave Preast, a union coal miner in West Virginia who was refused a job when a new company purchased the mine where he had previously been working. The NLRB, with panels including both Democrats and Republicans, has ruled twice that the new company's refusal to hire Dave and 84 of his fellow union supporters was illegal and violated their rights under the National Labor Relations Act.

But Dave and his colleagues have been waiting over 8 years for justice. Three of his co-workers, sadly, have passed away during this period. Dave has a 16-year-old son who has needed several surgeries for a life-threatening heart condition. His son's healthcare costs would have bankrupted the family if the surgeries hadn't been covered through the State's CHIP program and Medicaid.

Dave is currently doing odd jobs to make ends meet and take care of his family. Keep in mind, twice the Board said that he had been unjustly denied a job. However, without the enforcement of his reinstatement remedy from the Board, he'll be forced to live on \$500 a month when he retires. Like many other miners, Dave just wants to go back to work. He has attempted to find other mining jobs, but when he interviews and the company finds out how much union time he had accumulated, that pretty much ends his chance of a job.

And let's be clear about why Dave and the other coal miners were not hired. They were not hired because of their previous union activities. That's against the law. It's not fair, it's not right, and it's illegal. That's why we need a strong NLRB.

Today's nominees will help us restore the Board to its full strength and capacity. They both come from diverse backgrounds and are deeply steeped in labor and employment law. Their rich experiences will serve them well at the Board, and they deserve to be confirmed with strong bipartisan support.

I look forward to hearing their testimony today and to moving them expeditiously through this committee. And I might say that under our agreement, the committee will meet in executive session tomorrow to vote on these nominees.

With that, I'll turn to our Ranking Member, Senator Alexander.

## OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks, Mr. Chairman, and welcome to the two nominees.

Thank you for being here, Mr. Hirozawa and Ms. Schiffer.

The hearing is about nominees whose job it is to be judges, not advocates. That's what the Board members of the National Labor Relations Board are supposed to do. The National Labor Relations Act talks about the job of the Board being to prescribe the legitimate rights of both employees and employers and their relations affecting commerce, which suggests a high level of impartiality.

Former Senator Baker used to tell the story of the mountain judge in Tennessee who, when the lawyers appeared before him one morning, said, "Boys, just give me a little bit on the law. I had a phone call last night, and I pretty well know the facts." That was the kind of impartiality they had in that county in Tennessee at the time.

That's what we hope we don't have at the National Labor Relations Board. We want you and the other three nominees, if you're confirmed—we want people to be able to approach you in a way that causes them actually to know and believe that you haven't decided the case before they come, and I know you know that. But I think that's what, for me, this hearing is about. I want to make sure the Board's mission is carried out without any private agenda, such as increasing unionization rates without regard for employees' freedom to choose whether or not to form a union.

We've got plenty of information about you. We have the committee application, which all Senators received yesterday. That includes both public and private financial information. Last week, we distributed to all Senators biographical and other information about your writings. Today, we have the opportunity to ask questions. Today, we also received the government's ethics information, so all Senators have that.

We will have a chance not only to discuss today, but to vote tomorrow, and then I'm sure there will be written questions that will come to you from Senators. I would hope that you'll be mindful of the fact that we hope to proceed to an up or down vote sometime next week. We want to make sure that all Senators have a chance to see what the result of this hearing is, what the result of the markup is, and what your responses are to any questions that might come. So the more rapidly you can get those in, the better.

If you're approved tomorrow, I don't expect there would be a vote in the Senate, in any event, before next week. So Senators would have that time to make their decisions.

Senator Harkin referred to the fact that this proceeding is a little unusual because it comes as a result of an agreement. It's an agreement about the President's ability to use recess appointments. We now have three Federal courts that have found that the President violated the Constitution by making recess appointments to the NLRB when the Senate wasn't in recess.

One was the *Noel Canning* case in January 2013. One, more recently, was a Fourth Circuit case just last week, on basically the same issue, and then a related case in May of this year in the Third Circuit Court of Appeals. So that's 3 to 0.

I don't intend here to re-litigate the whole issue. We've had plenty of debates about it both here in the committee and on the floor. But it's a very important issue. Under our constitutional separation of powers and checks and balances, the President has the right to nominate, and the Senate has the power to advise and consent. The founders did not want an imperial presidency, and they created a check on the presidency, and that's one of the most important and certainly the best known check that we have.

I would think after these three Federal courts' decisions and after the Senate's rejection of the nomination of two nominees—or the President's withdrawal, I should say, at the request of the Senate because of the recess appointment question, I think it's fair to say that any president in the future would not use his or her recess appointment power at a time when the Senate was not in recess, and that the Senate, not the President, would decide when it was in recess.

Hopefully, as a result of this discussion, that issue is settled. And I think that's an important issue.

The actions the unconstitutionally appointed NLRB members have taken have left quite a mess for citizens who rely on this agency. There were more than 1,000 cases decided when there was not a valid quorum according to the law as decided by those three appellate courts. That leaves thousands of employees, unions, and employers in limbo wondering whether they should comply with a particular decision.

By moving ahead on these nominations, hopefully, we will have a vote on the Senate floor shortly. And that may result in an ability to put a stop to that uncertainty and a misuse of taxpayer resources.

The most important characteristic, as I mentioned, and what I will be looking for in this discussion is impartiality. In recent years, I'm afraid the NLRB has been moving away from that level playing field or that impartiality. The number of policy changes and reversals that have come out of the NLRB under this administration have caused, in my judgment, great confusion. One labor law professor at a major university recently said that she can't even use the most recent textbook. She has to resort to handing out NLRB decisions instead. They're coming out so rapidly.

The NLRB has ventured into new territory with two efforts at rulemaking, both of which have been stalled by the Federal courts. They've gone into the legal obligation of employers to withhold dues from employees' paychecks even when there is no valid collective bargaining agreement in place. The validity of arbitration provisions in employment contracts, the legality of numerous well-intentioned employee handbook provisions, the rules governing employee discipline when there is no valid collective bargaining agreement in place—these are things the NLRB has sought to change, as well as other precedents and rules.

The intent of all of this seems to me to tilt the playing field in favor of organized labor, which is not the directive of the statute, and which is not my definition of impartiality. So fairness and impartiality is what I think we should all be looking for in any NLRB nominee.



I look forward to today's questioning, and I thank you both for your willingness to serve.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Alexander.

We'll proceed to our testimonies. Both of your written testimonies will be made a part of the record in their entirety. I read them over last evening. They're excellent statements. We'll start with Mr. Hirozawa and then Ms. Schiffer. We'll ask you to proceed. Take 5 to 7 minutes and then we'll get into our questions.

Mr. Kent Hirozawa has served as Chief Counsel to the National Labor Relations Board Chairman Mark Pearce since 2010. Before joining the NLRB, Mr. Hirozawa was a partner in the New York law firm, Gladstein, Reif and Meginniss, where he advised clients on a variety of labor and employment law matters. Mr. Hirozawa also served as a field attorney for the NLRB from 1984 to 1986. He received his B.A. from Yale University and a Juris Doctor from New York University School of Law.

Nancy Schiffer was associate general counsel to the AFL-CIO from 2000 to 2012. Prior to that, she was deputy general counsel to the United Auto Workers. Earlier in her career, Ms. Schiffer was a staff attorney in the Detroit Regional Office of the NLRB. Ms. Schiffer received her B.A. from Michigan State University and her Juris Doctorate from the University of Michigan Law School.

My congratulations to both of you. You have sterling records and careers, and we, I think, are just fortunate to have you willing to serve on the NLRB.

We'll start with you, Mr. Hirozawa. Please take 5 to 7 minutes. Next we'll go to Ms. Schiffer, and then we'll open it up for questions.

Welcome.

**STATEMENT OF KENT YOSHIHO HIROZAWA, B.A., J.D.,  
HASTINGS-ON-HUDSON, NY**

Mr. HIROZAWA. Chairman Harkin, Ranking Member Alexander, and members of the committee, thank you for the opportunity to appear before you today. I am honored and humbled to be considered for a position as a member of the National Labor Relations Board. This is something that I could not have imagined as a young field attorney with the Board nearly 30 years ago.

It has also been pointed out to me that if I am confirmed, I would be the first Asian-American member of the Board. That, of course, would be a great honor. And it is a tremendous honor to be introduced by Chairman Harkin, one of the greatest champions of the American worker in the history of the U.S. Senate.

Mr. Chairman, thank you for your kind remarks.

If I may, I would like to start by telling you a little bit about where I come from. My father was born and raised on a sugar cane plantation on the Island of Kauai in what was then the Territory of Hawaii. He and most of his brothers enlisted in the U.S. Army during World War II and went to school on the GI bill.

My mother grew up on the other side of the tracks. Her father and grandfather were surgeons who came to Hawaii from Japan and helped to found the Japanese Charity Hospital in Honolulu. My parents met at the University of Hawaii, got married, and went

to grad school at Minnesota and Wisconsin. My father then took a job as a research chemist with the Wyandotte Chemical Company in Wyandotte, MI. He had a long and fulfilling career there with many scientific papers and hundreds of patents to his credit.

One of the distinct memories I have of my father's time with the company, however, has nothing to do with science. Every once in a long while, he would pack a suitcase with enough clothes for a couple of weeks and take it to work. The reason was that there might be a strike that night. As a salaried employee, he would be responsible for helping to keep the plants running for as long as the strike lasted.

Naturally, this was very interesting to us kids. But he did not imbue it with any drama. It was just part of the job.

My mother also had a long and fulfilling career as a teacher and beloved member of the community at the Roeper School in Bloomfield Hills, MI. They are both retired now and are unable to be here today, but it is because of their examples of decency and generosity, and their respect for the values of hard work and playing by the rules that they passed on to their children, that I have been able to achieve what I have. So thanks, Mom and Dad.

I was born in Wyandotte and grew up in southeastern Michigan. I went away to college at Yale and later to law school at NYU. At NYU, in addition to getting a terrific legal education, I met Lynn Kelly, a lovely young woman from Minnesota. We have been married for over 25 years, and she is here today with our two wonderful children, Nora and Miles.

After a judicial clerkship, I started my career as a field attorney with the Board's Manhattan regional office. After a few years, I left to go into private practice, but not before gaining a deep appreciation for the importance of the agency's work, and a deep respect for the quality and dedication of the agency's employees.

After over 20 years as a partner with a New York City labor and employment law firm, I decided to return to the agency when Mark Pearce asked me to serve as his chief counsel. The 3-years that I have spent at headquarters have been a tremendous learning experience and have given me even deeper appreciation for the staff's talents, professionalism, and commitment to fairness and to the goals of the National Labor Relations Act.

If I am given the opportunity to serve as a Board member, I think that my decades of practice as a labor lawyer, both within and before the agency, will serve me well. And I think I would also be helped by the perspectives gained from my 20 years as a co-owner of a small business. With my partners, I had to deal with the challenges of making payroll, paying the rent, providing health insurance for our employees, and staying competitive in our market. I have had to discharge employees, and I know that it is always difficult and never taken lightly.

I believe that these experiences will help me to see all sides of the workplace disputes that come before the Board. Back when I was a Board agent in Region 2, I once heard another employee described as "pro-Act," not pro-union or pro-management, but pro-Act, dedicated solely to advancing the policies and purposes of the National Labor Relations Act without regard to the identities or alignments of the parties.

That has always struck me as an apt term of praise for an employee of the Board, and that is what I will aspire to if I am confirmed as a member of the Board. I pledge to dedicate myself to the fair and even-handed enforcement of the commands of the Act, consistent with the Act's purpose of maintaining industrial peace.

Thank you for the opportunity to appear before you today, and I look forward to your questions.

[The prepared statement of Mr. Hirozawa follows:]

PREPARED STATEMENT OF KENT YOSHIHO HIROZAWA, B.A., J.D.

Chairman Harkin, Ranking Member Alexander, and members of the committee, thank you for the opportunity to appear before you today. I am honored and humbled to be considered for a position as a member of the National Labor Relations Board. This is something that I could not have imagined as a young field attorney with the Board nearly 30 years ago. It has also been pointed out to me that if I am confirmed, I would be the first Asian-American member of the Board. That, of course, would be a great honor.

I would like to start by telling you a little about where I come from. My father was born and raised on a sugar cane plantation on the island of Kauai, in what was then the Territory of Hawaii. His father had come from Japan as a contract laborer around the turn of the century, and his mother as a picture bride some years later. He and most of his brothers made it off the plantation and got through college and grad school as a result of World War II. They enlisted in the U.S. Army, came back after the war, and went to school on the GI bill.

My mother grew up on the other side of the tracks. Her father and grandfather were surgeons who came to Hawaii from Japan and helped to found the Japanese Charity Hospital in Honolulu.

My parents met at the University of Hawaii, got married, and went to grad school at Minnesota and Wisconsin. My father then took a job as a research chemist at the Wyandotte Chemical Company, later the BASF Wyandotte Corporation, in Wyandotte, MI. He had a long and fulfilling career there, with many scientific papers and hundreds of patents to his credit.

One of the distinct memories I have of my father's time at the company, however, has nothing to do with science. Every once in a long while, he would pack a suitcase with enough clothes for a couple of weeks and take it to work. The reason was that there might be a strike that night. As a salaried employee, he would be one of those responsible for keeping the plants running, behind the locked gates, for as long as the strike lasted. Naturally, this was very interesting to us kids, but he did not imbue it with any drama; it was just part of the job.

My mother also had a long and fulfilling career, as a teacher and beloved member of the community at the Roper School in Bloomfield Hills, MI. They are both retired now and are unable to be here today, but it is because of their examples of decency and generosity, and their respect for the values of hard work and playing by the rules that they passed on to their children, that I have been able to achieve what I have. So thanks, Mom and Dad.

I was born in Wyandotte and grew up in southeastern Michigan. I went away to college at Yale and then, after a few years in the real world, I went to law school at NYU. At NYU, in addition to getting a terrific legal education, I met a lovely young woman from Minnesota, Lynn Kelly. Lynn is now the executive director of the City Bar Justice Center, where she coordinates the *pro bono* programs of the New York City Bar Association. We have been married for over 25 years, and she is here today with our two wonderful children, Nora and Miles.

After a judicial clerkship, I started my career as a labor lawyer as a field attorney with the Board's Manhattan regional office. After a few years, I left to go into private practice, but not before gaining a deep appreciation for the importance of the agency's work, and a deep respect for the quality and dedication of the agency's employees. So after over 20 years as a partner with a New York City labor and employment law firm, I decided to return to the agency when Mark Pearce asked me to serve as his chief counsel. The 3-years that I have spent at headquarters have been a tremendous learning experience and have given me even deeper appreciation for the staff's talents, professionalism, and commitment to fairness and to the goals of the National Labor Relations Act.

If I am given the opportunity to serve as a Board member, I think that my decades of practice as a labor lawyer, both within and before the agency, will serve me well. And I think I would also be helped by the perspectives gained from my time

in the world of business and work. In addition to my work as a lawyer, I have worked in a chemical plant and a printing plant, I have cleaned offices and pumped gas, I have been a busboy, a bartender and an unemployment claims examiner. I was also, for 20 years, a co-owner of a small business. With my partners, I had to deal with the challenges of making payroll, paying the rent, providing health insurance for our employees, and staying competitive in our market. I was the partner responsible for associate recruitment, hiring, compensation and evaluation, and the main trustee of the firm's retirement plan. I have had to discharge employees, and I know that it is always difficult and never taken lightly. I believe that all of these experiences will help me to see all sides of the workplace disputes that come before the Board.

Back when I was a Board agent in Region 2, I once heard another employee described as "pro-Act." Not pro-union or pro-management, but pro-Act, dedicated solely to advancing the policies and purposes of the National Labor Relations Act without regard to the identities or alignments of the parties. That has always struck me as an apt term of praise for an employee of the Board. And that is what I will aspire to if I am confirmed as a member of the Board: I pledge to dedicate myself to the fair and even-handed enforcement of the commands of the Act, consistent with the Act's purpose of maintaining industrial peace.

Thank you for the opportunity to appear before you today and I look forward to your questions.

The CHAIRMAN. Thank you very much, Mr. Hirozawa. I knew you were a smart guy, but I didn't realize how smart you were to marry a woman from Minnesota. My wife is from Minnesota. That's why I say that.

Mr. HIROZAWA. Best thing I ever did.

The CHAIRMAN. There you go. Same for me.

Ms. Schiffer, welcome and please proceed.

#### **STATEMENT OF NANCY JEAN SCHIFFER, B.A., J.D., ANNAPOLIS, MD**

Ms. SCHIFFER. Thank you, Chairman Harkin, Ranking Member Alexander, and members of the committee. I am honored beyond words to be here before you today as a nominee to be a member of the National Labor Relations Board.

First, I would like to introduce my husband, Goldwin Smith, who is here today and without whose support I would not be. We will celebrate 32 years of marriage next month. Our daughter, Amelia Howerton, and her husband, Grant, could not be here today because they both just started new jobs in California. And our son, Michael, I know, is here with us in spirit.

I grew up in a small town in southwestern Michigan of about 3,500 people. My mother was a home economics teacher, and my father was a pilot. He taught people how to fly. That was his passion. They were both raised on dairy farms in central Michigan.

My grandparents' farm was designated a centennial farm, owned and farmed for 100 years by the same family, in 1982. My grandparents are in the Michigan Farmers' Hall of Fame. I spent my summers on that farm. I helped with haying, and I showed cows at the county fair in 4-H and once at the Michigan State Fair.

It was my dream to go to law school, and my parents supported that dream at a time when their friends thought it was a waste of money to send their daughters to college at all. When I went to law school, to the University of Michigan, I did not know that I would become a labor lawyer. But while I was there, I represented two women, non-union university workers, in a management review process.

The first described to me how she made less than a male colleague who was doing the same work. I only talked with her on the phone, but I wrote a letter on her behalf, and she got a very sizable salary increase, and I was amazed.

Next, I represented a woman who had worked in her department for 20 years, but was passed over for a supervisory position in favor of a recent graduate who happened to be white and male. She was neither. After a hearing before a faculty committee, she got a promotion, and I had fallen in love with labor law.

After law school, I worked at the Detroit Regional Office of the National Labor Relations Board, Region 7, the busiest regional office at that time. I conducted representation elections for workers and served as a hearing officer in cases involving election issues. I also investigated and prosecuted unfair labor practice cases against both unions and employers. I filed briefs to the Board. I brought picket line injunction actions against unions in Federal court.

While I was there, I received a Certificate of Commendation from then-General Counsel John Irving. Never, for 1 second, during my work at the Detroit Regional office did I think that one day I would have the honor of being considered to serve as a member of the Board.

I loved working for the NLRB, in large part because I had the opportunity to work under the tutelage of Regional Director Bernard Gottfried. He was revered in the region, and there is still a memorial symposium every year in his honor. He had a deep knowledge and understanding of the law and was open to and respectful of all viewpoints and positions presented to him. He made sure he knew every fact and every aspect of a case before he made a decision on whether to issue a complaint.

Most importantly, he cared deeply about the impact his decisions would have on the workplace, on the employer involved, and on the workers. He knew that real people would be affected by what he did, and he worked very hard to make sure his decisions were fair and honest. He was a role model, and I will strive to follow his example should I become a member of the Board.

I also worked at a private law firm in Detroit that represented labor unions and workers and then became a staff lawyer for the International Union, United Auto Workers, in 1982. I served as deputy general counsel at the UAW for 2 years, handling the day-to-day administration of the UAW Legal Department, before coming to Washington, DC, in 2000, to join the General Counsel's Office of the AFL-CIO, where I advocated for their positions, including before Congress.

My work on NLRA issues over the years has given me a deep appreciation for the work that the Board does and how important it is to all involved, workers, employers, labor unions, and their communities, and how much it matters that disputes get resolved fairly and in a timely manner. As a result of my work as a Board attorney and as a litigant, I have been repeatedly impressed with the dedication of the agency's staff, with their sense of pride of purpose and their hard work to make sure the agency fulfills its mission.

I can assure you that I understand the importance of this office and how critical it is that Board members be neutral arbiters of the

law. If I am honored to serve as a member of the National Labor Relations Board, I pledge to live up to the example of my formative mentor, Bernard Gottfried. I will approach every decision with an open mind, give every position very serious consideration, and always be guided by the mission of the agency and the impact a decision will have on those affected.

I look forward to working with my fellow Board members to develop a collegial and productive deliberative process, to learn from their experiences and their points of view, and to fairly and faithfully enforce the law.

Thank you for the opportunity to appear before you today. I look forward to your questions.

[The prepared statement of Ms. Schiffer follows:]

PREPARED STATEMENT OF NANCY JEAN SCHIFFER, B.A., J.D.

Thank you Chairman Harkin, Senator Alexander, and members of the committee. I am honored beyond words to be here before you today as a nominee to be a member of the National Labor Relations Board.

First, I would like to introduce my husband Goldwin Smith, who is here today and has always been my strongest supporter—we will celebrate 32 years of marriage next month. Our daughter Amelia Howerton and her husband Grant could not be here today as they both just started new jobs in California. Our son Michael, I know, is here with us in spirit.

I grew up in a small town in southwestern Michigan—3,500 people. My mother was a home economics teacher and my father was a pilot—he taught people how to fly. They were both raised on dairy farms in central Michigan. My grandparents' farm was designated a centennial farm—owned and farmed for 100 years by the same family—in 1982. My grandparents are in the Michigan Farmers' Hall of Fame. I spent my summers on that farm. I helped with haying and I showed cows at the county fair in 4-H—and once at the Michigan State Fair.

It was my dream to go to law school and my parents supported that dream at a time when their friends thought it was a waste of money to send their daughters to college at all. When I went to law school, to the University of Michigan, I did not know that I would become a labor lawyer.

But while I was there, I represented two women—non-union university workers—in a management review process. The first described how she made less than a male colleague who did the same work. I only talked with her on the phone, but I wrote a letter on her behalf and she got a very sizable salary increase—I was amazed. Next, I represented a woman who had worked in her department for 20 years, but was passed over for a supervisory position in favor of a recent graduate who happened to be white and male—she was neither. After a hearing before a faculty committee, she got a promotion and I had fallen in love with labor law.

After law school, I worked at the Detroit Regional Office of the National Labor Relations Board, Region 7—the busiest regional office at that time. I conducted representation elections for workers and served as a Hearing Officer in cases involving election issues. I also investigated and prosecuted unfair labor practice cases against both employers and unions, filed briefs to the Board, and brought picket line injunction actions against unions in Federal court. While there, I received a Certificate of Commendation from then-General Counsel John Irving. Never, for one second, during my work at the Regional office in Detroit did I ever think that one day I would have the honor of being considered to serve as a Board member.

I loved working for the NLRB, in large part because I had the opportunity to work under the tutelage of Regional Director Bernard Gottfried. He was revered in the region and there is still a memorial symposium every year in his honor. He had a deep knowledge and understanding of the law and was open to and respectful of all viewpoints and positions presented to him. He made sure he knew every fact and every aspect of a case before he made a decision on whether to issue a complaint. Most importantly, he cared deeply about the impact his decisions would have on the workplace, on the employer involved, and on the workers. He knew that real people would be affected by what he did and he worked very hard to make sure his decisions were fair and honest. He was a role model and I will strive to follow his example should I become a member of the Board.

I also worked for a private law firm in Detroit that represented labor unions and workers and then became a staff lawyer for the International Union, UAW, in 1982.

I served as Deputy General Counsel at the UAW for 2 years, handling the day-to-day administration of the UAW Legal Department, before coming to Washington, DC, in 2000, to join the General Counsel's Office of the AFL-CIO, where I advocated for their positions, including before Congress.

My work on NLRA issues over the years has given me a deep appreciation for the work that the Board does and how important it is for all involved—workers, employers and labor unions—and how much it matters that disputes get resolved fairly and in a timely manner. As a result of my work as a Board attorney and as a litigant, I have been repeatedly impressed with the dedication of the Agency's staff, with their sense of pride of purpose and their hard work to make sure the Agency fulfills its mission.

I can assure you that I understand the importance of this office and how critical it is that Board members be neutral arbiters of the law. If I am honored to serve as a member of the National Labor Relations Board, I pledge to live up to the example of my formative mentor, Bernard Gottfried: I will approach every decision with an open mind and give every position serious consideration; and in every decision I will be guided by the mission of the Agency and the impact of a decision on all affected. I look forward to working with my fellow Board members to develop a collegial and productive deliberative process, to learn from their experiences and their points of view, and to fairly and faithfully enforce the law.

Thank you for the opportunity to appear before you today and I look forward to your questions.

The CHAIRMAN. Thank you very much, Ms. Schiffer. We'll start a round of 5-minute questions.

First, I want to note for the record the tremendous background that both of you bring to this, Ms. Schiffer having worked in the regional office so many years ago and Mr. Hirozawa being with Mr. Pearce for all these years as his counsel. I think it's very clear that you both bring a tremendous background and a wealth of information and knowledge to this position on the NLRB.

I have a couple of questions. I'll start with Ms. Schiffer.

As you pointed out, as the counsel for the AFL-CIO, you advocated for their positions. That's what a good lawyer does. That's what a counsel does.

Ms. SCHIFFER. I tried to.

The CHAIRMAN. That's right. So in the past—and I might make it very clear for the record that you and I have worked together on issues in the past in terms of labor laws. Specifically, you had advocated for a bill that I sponsored called the Employee Free Choice Act. This legislation had three major provisions. One, it allowed workers to form a union through the use of signed authorization cards rather than a formal election, what was called card check.

Second, it created a mechanism to ensure that workers who formed a union were able to get a first contract through binding arbitration. And, third, it strengthened the remedies available when there are violations of the National Labor Relations Act.

I've been involved in these issues for most of my adult life, both here in the Senate and in the House before that. I felt strongly about this legislation. Many of my colleagues do. I still would like to make it clear that I'd like to see these reforms enacted. I'm speaking for myself, that I'd like to see these reforms enacted, and I think a lot of my colleagues would like that also. But I want to make some things very clear.

Ms. Schiffer, could the Board, the NLRB, implement any provisions of the Employee Free Choice Act that I just described by using its rulemaking authority?

Ms. SCHIFFER. They could not. It would require congressional action.

The CHAIRMAN. I want to make it very clear for the record. Congress would have to pass a law to make these changes. Is that correct?

Ms. SCHIFFER. Right. The provisions of the Employee Free Choice Act require congressional action.

The CHAIRMAN. Which, of course, I hoped we would do—that issue—and we never really got to the merits of that. But I'm not going to bore the people here and the committee with a rehash of that.

Mr. Hirozawa, the current Board has been criticized by many of my colleagues on the Republican side, I might say, as being excessively partisan or somehow out of step with previous Boards and Board traditions. I know that Chairman Pearce has proactively taken steps to foster more collaboration among the Board's members, and I have met with him periodically about that.

Mr. Hirozawa, how would you respond to that characterization of both the Board—the accusations, but also Chairman Pearce's actions? Have Chairman Pearce's efforts led to more consensus-based decisionmaking?

Mr. HIROZAWA. Yes, I think they have, and he has made tremendous efforts in that direction. It's important to recognize the value of having a diversity of viewpoints on the Board, and that is and has been very valuable. But it takes some work to arrive at a consensus, and he has taken the lead in encouraging discussion among Board members, both formally and informally, both before and after formal votes, in order to try and arrive at a result that everyone can live with.

One of the concrete things that he's done is reinstituting case meetings at which all members of the Board sit down face to face to discuss cases. And that is something which, over the history of the Board, has not been the norm. He has also participated in and encouraged all members to participate in one-on-one discussions with each other of legal issues that they may not at least start out seeing eye-to-eye on.

The CHAIRMAN. Thank you. Some people say the Board only protects the rights of labor unions and union workers. Could you both tell us a little bit about how the Board protects the rights of non-union employees?

Mr. Hirozawa.

Mr. HIROZAWA. The Act, for its entire history, has always protected the rights of employees to work together with each other to address their terms and conditions of employment regardless of whether there is a union involved or not. And this goes back to the early days of the Act.

There's a Supreme Court case from the early 1960s, Washington Aluminum, which made it very clear that employees there in a non-unionized metal shop where there was no question of union representation—they were just getting together to try and address the freezing conditions in the shop. The Board granted them a remedy, and the Supreme Court said that the Board was right. It doesn't matter whether you have a union or not. You are protected by the Act.

The CHAIRMAN. Do you have anything to add to that, Ms. Schiffer?



Ms. SCHIFFER. Sure. Section 7 of the Act also protects workers' rights to engage in activities for their mutual aid and protection, and that's been interpreted for those kinds of activities with or without a union. When I was at the NLRB in the Detroit regional office in the late 1970s, I had a case where a group of workers who worked for a credit card company—at that time, it was Data Entry—and they passed around a piece of paper at their workplace, at their tables, and wrote down a list of grievances, and they wanted to meet with their supervisor about these grievances. They didn't have a union. They didn't want to have a union.

But they wanted to meet with their supervisor about this list of grievances, and they all got fired. So they ended up at the National Labor Relations Board, and there was a case on their behalf. But they were workers who engaged in activities for, "mutual aid and protection," and so their right to do that was protected by the Act.

The CHAIRMAN. Thank you both very much.

Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman.

Welcome again. I appreciate the chairman's question about the Employee Free Choice Act, because I would have asked it myself if he had not, and I appreciate the answer as well. Let me ask a similar question about what we call the right-to-work law, or Section 14(b) of the Taft-Hartley Act.

In our State of Tennessee, we're one of 24 States with a right-to-work law. We strongly support that, and it's been the primary driver of the expansion of our auto industry over the last 30 years. It includes both the General Motors plant, which has a United Auto Workers partnership, and it includes plants like Nissan and Volkswagen, which do not, and hundreds of suppliers. So it's very important to us that the right-to-work law be protected.

To each of you, I'll ask the same sort of question we ask about what we call the card-check law, or what Senator Harkin calls the Employee Free Choice Act, which has to do with the secret ballot. Do you believe that the right-to-work law can be changed, that the freedoms granted to workers under the right-to-work law can be changed by members of the National Labor Relations Board, or does that require an act of the Congress?

Ms. Schiffer.

Ms. SCHIFFER. What you're describing is in section 14(b), as you mentioned, of the National Labor Relations Act. It's statutory. It cannot be changed by the members of the National Labor Relations Board. It would require congressional action to make changes in that area. It's fairly straightforward in the Act.

Senator ALEXANDER. Mr. Hirozawa.

Mr. HIROZAWA. Yes, that's absolutely clear. The right-to-work is a matter for Congress and the States to decide. The Board has nothing to say about it.

Senator ALEXANDER. Does that then mean that you would not consider it an unfair labor practice if an employer in a non-right-to-work State sought to expand in a right-to-work State?

Mr. HIROZAWA. I think that as a general matter, that wouldn't make out a violation. But I think that any case that might come before the Board would have to be considered on the facts of the

particular case, and it's very difficult to draw a conclusion from a broad hypothetical.

Senator ALEXANDER. Ms. Schiffer.

Ms. SCHIFFER. That, in and of itself, would not be a basis for a violation. There might be a violation, given additional circumstances and facts that aren't in what you just posed.

Senator ALEXANDER. It wouldn't be a *prima facie* case of a violation.

Ms. SCHIFFER. Not the way that you just said it.

Senator ALEXANDER. It's not a far-fetched example. We just had a pretty big argument about the NLRB's Acting General Counsel's actions with the Boeing case, which sent shudders through employers all over the country. Let me ask you one other question and go back to the impartiality thing.

Ms. Schiffer, you've been one of the senior members of the AFL-CIO at a time when, in 2007, the National Organizing Director, Stewart Acuff, said the Labor Board should be closed for renovations until a new Board could be appointed by a new president, and the director of the Voice@Work Campaign said it's time to shut the Board down and close it for renovation. You've testified for what we call the card-check legislation. You've been a very prominent and effective advocate.

Mr. Hirozawa, you wrote a 2008 article in the AFL-CIO Lawyers Coordinating Committee newsletter referring to the union movement as, "our movement."

You've made some statements to reassure employers of your impartiality. But what can you say to assure employers who will come before a Board that might include you, that you will move from the position of advocate—which you've been a pretty fierce one—on behalf of labor to an impartial judge? How could you assure an employer that when they come before the Board, if you're on it, that you'll do that?

Ms. SCHIFFER. It's an interesting way that you've posed the question, because it reminded me that when I went from the NLRB as a field attorney for the NLRB to private practice, clients that would come before us, when I was assigned their case, I knew were thinking and would sometimes say, "How do I know that you're going to be an advocate for me? You just came from the National Labor Relations Board."

So I appreciate that these are two different roles, advocate and neutral arbiter. But I believe in the Act, and I want all litigants who come before the Board to feel that they have been dealt with fairly and honestly. You mentioned that in your statement, and I'm committed to that. I think it's important that that happen, and that's what I will do.

I have no pre-conceived agenda. I will approach the cases that come before me with an open mind. I will carefully consider all the facts, the positions of the parties. I'll have the opportunity to engage with the experience and background of the other members, the other nominees for the National Labor Relations Board—we have some diverse backgrounds—and an opportunity to take advantage of the experience and the knowledge of the career staff people. I want to make sure that decisions that I reach are done in a fair manner and an honest manner.

Senator ALEXANDER. Thank you, Ms. Schiffer.

Mr. Chairman, my time is up. I don't know if Mr. Hirozawa may want to give a short answer.

Would you like to make a short answer to that?

Mr. HIROZAWA. Yes, if I might. I just want to assure you, Senator, that I have a very clear understanding of the difference between someone who is an advocate and someone who is an impartial adjudicator, and I've had experience in both roles. I think that I've been able to act appropriately in both roles, and I promise to you and all of the other members of the committee that I will do my absolute best to look at every case that comes before the Board impartially and fairly and without regard to who the parties might be.

Senator ALEXANDER. Thanks, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Alexander.

In order of appearance, we'll have the following: Senator Warren, Isakson, Murphy, Hatch, Bennet, Scott, Baldwin, Casey, and Franken, in that order.

Senator Warren.

#### STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you very much, Mr. Chairman.

Welcome to Mr. Hirozawa and to Ms. Kelly, to Miles and to Nora. I'm glad you're all here today. You must be very proud.

I also want to say welcome to Ms. Schiffer and to your husband, Mr. Smith. It's good to see you all here.

The NLRB has a double set of duties, to resolve workplace disputes and to monitor union elections. Both Republicans and Democrats sit on the NLRB Board, and it is my understanding that the overwhelming majority of your decisions are, in fact, unanimous, that you achieve unanimous decisions, notwithstanding the fact that there are certainly some times that there are disagreements.

But the Nation respects the rule of law and due process, and the NLRB gives an opportunity to employers and employees to get their disputes resolved and to make sure that elections are free and fair for unions. And I want to say I'm delighted to see two very highly qualified nominees here. I think this is great.

Mr. Hirozawa, I wanted to start by saying that as I looked through your resume, I was very impressed by the wide range of experience you have, starting with being a clerk on the Second Circuit, your extensive experience in the private sector, a wealth of experience working directly for the NLRB, in addition to your role as chief counsel. You also served as a field attorney, dating back to the 1980s.

What I wanted to ask you to do is take a minute or two and describe how your experiences in these different roles, both as a junior and a senior attorney at the NLRB, as a private attorney, as a law clerk, will affect your performance as a member of the Board.

Mr. HIROZAWA. Thank you, Senator Warren. I think that there are a lot of ways in which those experiences will be helpful. In addition to what I described in my opening statement, from my experience as a field attorney, not only am I familiar with the quality and dedication of the employees that we have in the field, but I know from personal experience the reality on the ground. I know

how cases are investigated, how most of them are settled before any kind of formal proceeding. I have been a hearing officer in representation cases, so I have a practical understanding of how that process works.

In my work as an attorney in private practice, I'm familiar with what lawyers and parties appearing before the National Labor Relations Board have to contend with and what makes their jobs easier and more difficult. And I've tried, since I've been here at headquarters, to do things that would make it easier for them.

Senator WARREN. I appreciate it. Go ahead, but I need to make it short so I can ask Ms. Schiffer a question, too.

Mr. HIROZAWA. OK. Also, in private practice and at the Board, I had an opportunity to work with a lot of management attorneys who were very professional, and I've always had good relationships with them.

Senator WARREN. Thank you so much. I very much appreciate it. Thank you.

Ms. Schiffer, it seems a little shocking to me that in 2013 we are still talking about equal pay for equal work. But according to the Department of Labor, women earn 77 cents on the dollar earned by men. Pay equity is an important issue for American women, and Congress has taken good steps in the right direction by passing the Lilly Ledbetter Fair Pay Act. I am also proud to have co-sponsored the Paycheck Fairness Act, which would move us further still.

But no matter what Congress does, the reality is that a fully functioning NLRB is an essential tool to promoting pay equity. Now, the NLRB is essential to protecting gains that workers have achieved through collective bargaining, and that's becoming increasingly important, because now union membership is 45 percent women and on target for women to make up a majority by 2020. So could you discuss very briefly how the NLRB helps women workers who are pursuing equal pay for equal work?

Ms. SCHIFFER. The NLRB has no specific jurisdiction over pay equity or equal pay claims. But the NLRA does protect workers' rights to be able to talk about these issues, to be protected if they want to reach out to other workers to be able to engage in any discussion or collective action about these kinds of issues, and is able to provide that level of protection for workers so that they can learn about what's going on with themselves and their co-workers and be knowledgeable until they can, if they decide to do so, take collective action about those issues.

Senator WARREN. Thank you very much, Ms. Schiffer. I see that I am out of time. I want to apologize. I'm going to have to leave. We have a Banking hearing running simultaneously. But, again, thank you both for your willingness to serve.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Senator Isakson.

#### STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

Mr. Hirozawa, I want to comment that you're about to go up for confirmation in a position that takes the role of a judge. You have

the voice of a judge—very melodic, and I just wanted to make that comment.

Mr. HIROZAWA. Thank you.

Senator ISAKSON. You are also chief counsel to Mr. Pearce. Is that correct?

Mr. HIROZAWA. That's right.

Senator ISAKSON. During the time that the Specialty Healthcare decision was made? Is that correct?

Mr. HIROZAWA. That's correct.

Senator ISAKSON. Could you explain to the committee why the chairman decided to undo decades of precedent in the Specialty Healthcare case?

Mr. HIROZAWA. Senator Isakson, thank you for bringing this subject up, because it's an important issue and it's been, with good reason, the subject of a lot of discussion. It's been my privilege to serve as Chairman Pearce's chief counsel at the Board for the past several years, including when he was a member on the Specialty Healthcare decision.

My service is governed by the ethical standards that govern attorney-client relationships. So I'm really not in a position to be able to discuss his particular views on that, other than what has been expressed in detail in the decision. And I'm constrained to let that speak for itself.

Senator ISAKSON. Well, in light of that answer, let me ask your opinion on a question that doesn't involve Mr. Pearce's opinion. In your opinion, do you agree with the Board's decision to apply a decision concerning an acute nursing facility to all matter of industries, including those having nothing to do with medical health, like Bergdorf Goodman or Macy's? In your opinion, not his.

Mr. HIROZAWA. Yes, I understand the distinction. The trouble is that in my capacity as counsel to the chairman—at the time of that decision, he wasn't the chairman. He was a member. But my duty is to advise him. I tell him what I think, we discuss it, and I really can't go into what my personal views at the time may or may not have been. And, of course, I can't be in the position of prejudging any case that might come before the Board in the future.

I think what I can say is that Specialty Healthcare is the controlling decision of the Board right now. And my view of how Board members should do the job is to show great respect for precedent and to depart from it only on very rare occasions.

Senator ISAKSON. Excuse me for interrupting, but I want to make sure my time doesn't run out. Since you can't give me a statement on your opinion in those two cases, let me ask you about your testimony. You talked about your father packing a bag for 2 weeks and going to the workplace because he anticipated a strike and a disruption of the operation of the business. Is that correct?

Mr. HIROZAWA. That's right.

Senator ISAKSON. If a company had 35 departments within their facility, like a hardware store or a lumber yard or a manufacturing company or an automobile manufacturing company—they had 35 different departments, a shoe department, a paint department, whatever it might be, can you imagine how disruptive it would be if all 35 were individually organized as a union?

Mr. HIROZAWA. That would make labor relations much more complicated, absolutely.

Senator ISAKSON. That's what the Specialty Healthcare decision did, because it effectively opened the opportunity for fragmented representation within the same entity, which, as you stated in your own testimony of your father's experience, would be terribly, terribly disruptive. I've got enough time for one other quick question.

Assuming that you're confirmed, there are any number, over 1,000, I think, decisions made by the previous Board that have been rendered invalid because of their appointment during the recess in the circuit court decision. Do you think it would be appropriate for you to ratify those decisions retroactively before the U.S. Supreme Court decides on the circuit court case?

Mr. HIROZAWA. That's a question that the Board may have to decide.

Senator ISAKSON. And you would be one of those Board members.

Mr. HIROZAWA. That's right. And it's something that I would have to consider carefully. I haven't given a great deal of thought to it at this point, and if I were to become a member, it's something that I would need to discuss with my colleagues and try and arrive at a sensible conclusion.

Senator ISAKSON. Well, I'm a little over, but since the chairman is not listening, I'm going to take liberty.

[Laughter.]

In the interest of equal opportunity, can you answer that question, Ms. Schiffer?

Ms. SCHIFFER. I agree with Kent that this is a question that very likely will come to the new Board. And because, as I've stated, I do not want to become a Board member with any preconceived agenda, I wouldn't be in a position to indicate a position on that now, and I don't have a position on that now. I haven't been privy to all of the circumstances, the number of cases, where they are in the process, and I just wouldn't be in a position to answer at this point.

Senator ISAKSON. Thank you very much.

The CHAIRMAN. Thank you, Senator Isakson.

Senator Baldwin.

#### STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. Thank you, Mr. Chairman and Ranking Member Alexander and today's nominees. It's a pleasure to have you here. I want to say how heartened I am that we are here today and seeing this confirmation process moving forward. Our country needs a well-functioning National Labor Relations Board with a full slate of members, and this need is, I think, particularly acute in my own home State of Wisconsin.

Wisconsin is, at its very core, a manufacturing State. And during the great recession, and I would say even in the years and perhaps decades prior to that, our manufacturing sector in Wisconsin and certainly throughout big portions of the country have taken a real hit. And when companies sought to close or cut jobs or have employees take concessions, the NLRB helped to enforce employers' duties, to bargain with organized employees, and to try to achieve

the best possible outcomes. As a result, workers' rights were realized.

I think about the impact it would have if the NLRB were to lose its enforcement authority. The duty to bargain would lack teeth, and many middle class families in my State and across the country would be harmed. I have a very broad question, sort of looking at the Board at 50,000 feet, if you will. I'd like each of you to comment on the role that you see the Board playing in both vindicating the rights of working families and their employers, and also the role in strengthening an economy that has gone through a lot in recent years.

I'll start with you, Mr. Hirozawa.

Mr. HIROZAWA. As Chairman Harkin pointed out in his introductory remarks, the Board has a unique role in giving American workers a place to come in order to make sure that their ability to have something to say about the conditions that they work under is protected. That's something that is crucial to having a well-functioning economy, and it's something that I think has proved its value over the 75-plus years of the Board's existence and continues to be crucially important.

Senator BALDWIN. Thank you.

Ms. Schiffer.

Ms. SCHIFFER. The Act itself indicates that it was designed to help promote industrial peace. And I believe that when it works in a way that is fair, people view it as a neutral, and when it is able to function in an efficient manner and be able to expeditiously resolve labor disputes for the parties, and when people can have clear rules about what they're supposed to do—by rules, I mean rules of law—guidelines, and have some certainty with that, that promotes industrial stability, and that does help our economy.

Senator BALDWIN. I know that the Board looks at individual disputes and also oversees elections. But given this broad look at the situation and the reference to industrial peace, what do you think the greatest challenges are to that—what are the biggest challenges facing businesses and workers in the 21st century? And how are you qualified to help us address those challenges?

Ms. SCHIFFER. As a member of the Board, in the capacity of enforcing the mission of the Act, that would be what I could do. But I know that the challenges are great in trying to work in a global economy, trying to work to keep up with technological changes and the advances there, and trying to keep up with the workforce challenges and workforce demands. All of these are very difficult problems, and there's certainly lots more that I could mention.

But as a member of the Board, my role would be to sort of effectuate the purposes of the Act and, to the extent that that then helps allow people the space for resolution of labor disputes so that they can resolve and compete and meet these other challenges, that would be the role.

Mr. HIROZAWA. The challenges are great, and the fact is that the Board's role is actually pretty narrow. The Act is very specific in the rights that it confers and in the powers that it gives the Board. So there's a tremendous amount to be done. The Board's role covers what, in some ways, I think, is a very small slice of that. All I can

say is that we all have to do our part, and I'm committed, if I'm confirmed, to doing the part that's been assigned to the Board.

Senator BALDWIN. Thank you both for stepping forward to meet those challenges.

The CHAIRMAN. Thank you, Senator Baldwin.

Now we'll go to Senator Hatch.

#### STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

I welcome both of you to the committee. We appreciate your willingness to serve. I remember many years ago, Irving Brown came to me, who was the international vice president of the AFL-CIO. He had gone into Paris before the end of the second World War in the underground and helped to win the war. And, of course, afterwards, the Soviets had a phony trade union that they were going to impose all over Europe, and Irving Brown took them on and beat them, beat them at the French docks.

He was one of the people I most admired in all of my service in the Senate. He got me involved in free trade unions from all around the world and solidarity. It was a privilege for me to go and meet with Lech Walesa and others in Gdansk. We helped get them the materials that they needed to be able to keep up their effort. It was all due to Irving Brown—helped to formulate the National Endowment for Democracy, which is very, very important to him and to us.

I remember one time he was over at the ILO, the International Labor Organization, the largest U.N. affiliated organization, and he called me, and he said, "We need you to come over here." He said, "They've got a resolution against Israel, and if it passes, we have to pull out of the ILO, which would be catastrophic for the world."

So at his request, I flew over there, and he took me to all the non-aligned delegations. And I left before the vote, but they had a secret ballot vote, and we won. I admired him as much as anybody I've met in politics.

Lane Kirkland, the former head of the AFL-CIO, said to me one day, "Senator, if only you were as good in domestic policy as you are in foreign policy," and I said, "Lane, I was thinking precisely the same thing about you." And he went, "Oh, oh," and then caught on to it and actually laughed about it.

But I have a lot of respect for what you're trying to do. We all are worried about whether either of you or both will be partisan in this job, and it's a natural concern.

Ms. Schiffer, with all of the controversy surrounding the NLRB in recent years, I believe that it is vital that we have qualified and objective members appointed to the Board. And given your credentials, it's obvious that you are a talented lawyer.

I can say the same thing about you, Mr. Hirozawa. In terms of your resume, I don't doubt that you're qualified to serve on the Board.

However, I have serious concerns about your ability to be objective, because it's really important that you are and that you will be. I won't name names, but in recent years, we've had former union lawyers nominated to the Board who came before this committee and promised that they would be objective, that they



wouldn't let their former employment cloud their judgment when it comes to resolving disputes between labor and management. Needless to say, I don't think those promises they made here were kept.

It seems like we're in a similar position with your nomination. You spent the vast majority of your career working directly for unions, and you've spoken and written extensively in favor of the unions' positions with regard to public policy. On top of that, we read all the news reports prior to the announcement of your nomination that President Obama was actually consulting with the AFL-CIO about who he should nominate to the Board.

Given all this, how can you assure us that once you are on the Board you will remain objective? How can we be sure that you won't become yet another union partisan on the NLRB and that you will treat all people who come before the Board fairly and objectively?

Ms. SCHIFFER. Thank you for your question, and I appreciate the concern—that you would have that concern. As I said, I started at the Detroit regional office. I had an exemplary role model there. And while I was there, I was, as Mr. Hirozawa said, a pro-Act field attorney, and my job was to fulfill the mission of the Act, and that's exactly what I did. And then I became an advocate, and I understand that this position is different.

I think it is also important in thinking about this that we will have, hopefully, the benefit of a full Board, and we will have varying backgrounds there. I had the opportunity, for example, to work with Phil Miscimarra, who is another nominee to the Board, within the last couple of years on an ABA project. We did a webinar together. It was a webinar to explain the election rules.

When we approached this, I knew that he has on occasion advocated on behalf of the Chamber of Commerce. I think I had made the suggestion that we really need to do this sort of straight up. We need to do it not with ideological rhetoric in it. We just really need to do it straight up, and that's exactly what we did.

My point is that I developed a lot of respect for him. He was very knowledgeable about the law, and that's how we did the presentation. So I'm looking forward to be able to have this kind of engagement at the Board and develop a very collegial and productive relationship with the other nominees.

Senator HATCH. I'll take your word on that.

Mr. Chairman, might I have the liberty of asking a question of Mr. Hirozawa?

The CHAIRMAN. I'm sorry. I didn't hear that, Orrin.

Senator HATCH. May I have the liberty of just asking one question of Mr. Hirozawa?

The CHAIRMAN. Sure. Go ahead.

Senator HATCH. Thank you so much.

Mr. Hirozawa, I'm impressed with both of you, and I'm hopeful that you'll be great members of the Board. Mr. Hirozawa, prior to 2011, the NLRB had engaged in rulemaking on one occasion. Yet in 2011, the Board finalized two rules, both of which were extremely controversial.

The first was the notice posting rule requiring all employers to display a poster informing employees of their rights to join a union,

or form a union, rather. The second was what some have called the ambush elections rule, which would have greatly accelerated the pace of union certification elections. Both of these rules have been invalidated by the Federal courts as of today.

Now, I have three questions. First, as chief counsel to the NLRB Chairman Pearce, what role did you have in developing the substance of these two failed rules? Second, do you believe that these rules represent good policy? And, finally, do you believe that the Board's limited history with successful rulemaking should give Board members pause when considering whether to engage in rulemaking in the future?

Mr. HIROZAWA. Thank you, Senator Hatch. I understand that the rules have been the subject of a great deal of attention. And I think that from that experience, both of the rulemaking and the litigation following the issuance of the rules, there are lessons for the new Board to learn.

Because I was Chairman Pearce's chief counsel, naturally, I spent a great deal of time discussing the substance of those rules with him. But for the same reason, I'm just not at liberty to say anything about the substance of those discussions or my role as counsel with respect to the rulemaking.

In the employee rights notice rule discussion, or litigation, I should say, I understand that a petition for re-hearing was filed earlier this week. But the new Board will have some serious issues to consider and to decide about what, if anything, to do in the future concerning that rule, concerning the rule about representation in case procedure, and also the remainder of the proposed rule. And that's clearly something that the new Board will have to decide and—

Senator HATCH. I understand. The third part of my question, though, was do you believe that the Board's limited history with successful rulemaking should give Board members pause when considering whether to engage in rulemaking in the future? That's not asking you to make a determination.

Mr. HIROZAWA. I would say, yes, it's something that a reasonable person in that position would have to take a very close look at and consider carefully.

Senator HATCH. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Hatch.

Senator Casey.

#### STATEMENT OF SENATOR CASEY

Senator CASEY. Thank you, Mr. Chairman.

I want to thank both of our nominees for not just your testimonies today, but your willingness to serve and your demonstrated commitment to the goals of the Act. Listening to both of your stories, your life experience as well as your professional experience, it's a remarkable tribute to the American experience. And we tend to see that on a regular basis in this room, but today is especially noteworthy, and you and your families should be proud of your service so far and I hope will be proud as well by your continued service.

Sometimes we get caught up in Washington in the back and forth about politics or also about the National Labor Relations Board. And we need to remind ourselves not just once in a while but on a more frequent basis what undergirds this Act.

I represent Pennsylvania, and we had about as difficult a set of chapters in our history as any State in the Union when it came to labor-management disputes, where violence led to people being killed, literally, because of labor disputes; where industries would grind to a halt because we had no way of resolving differences. So that was one of the historical antecedents to the National Labor Relations Act in the 1930s.

And, unfortunately, we still need the Act. I wish things were otherwise, and we wouldn't need the Act and wouldn't need a Board, that these disputes could be settled in another way. But I think it's important to remind ourselves what the Act says. Throughout the findings of Congress when they passed the Act, it talks about the free flow of commerce, and making sure that we take steps to safeguard commerce from injury, impairment, or interruption—that's on the negative side—and on the positive side, to promote the free flow of commerce.

But then at the very end of this five-paragraph section in the first section of the Act, it says,

“It is declared to be policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining.”

It's very important that we have each of you in place, that we have a functioning Board. Your willingness to serve and this confirmation process will ensure that we have a functioning Board for all the reasons and many more set forth in the Act. So it's vitally important that we get this done.

I wanted to ask in the short time that I have, about 2 minutes, if you could focus—and I know there are a number of aspects of your record and your work and your life history that you could point to—but if you could focus on one or two life experiences or political and governmental experiences you've had that would particularly focus on your ability to be objective and balanced.

We don't ask you to come before us as if you were a machine, to achieve scientific certainty that you will be balanced. You're both human beings. All of us are. No one of us can achieve perfect balance, but to the extent that you can, focus on life experiences that will give us a clue as to how you're going to be balanced in this role.

Ms. Schiffer, if you could start.

Ms. SCHIFFER. Life experiences. When I worked at the National Labor Relations Board in Detroit as a representative of the agency's regional office, one of the things I did was conduct secret ballot elections. I would typically go into a workplace—that's where most of them were conducted—and I would pass out the ballots, and people would mark the ballots, and we would count them at the workplace.

There would be the workers and the company representatives, and we would announce the results. It was an amazing demonstra-

tion of democracy in the workplace, that workers had the opportunity to do that.

Also when I was at the Board and after, I was involved in collective bargaining situations where we really had to try to work out what would be best. One of my practice areas was retiree health insurance, situations where the union believed it had negotiated continuing benefits for retirees, and then the company, for various reasons, changed or terminated those benefits.

When that happened, we represented those retirees. We needed to be able to reach across the table and to reach an agreement about what would happen to their healthcare, so that the issue could be resolved in a way that the company would be able to provide those benefits, financially, and that the retirees would have some measure of continuance and coverage in their retirement.

Another experience—and Senator Baldwin mentioned this with respect to manufacturing. In the early 1980s, there was a difficult economic period. I remember once going up to a city in the upper peninsula of Michigan that was a one-horse town, and the one horse was leaving.

I went up there on behalf of the UAW represented membership there to try to reach a shut-down agreement with the company. We worked very hard to reach an agreement so that the employer could have an orderly and efficient shut-down, and so that the workers would be able to regroup and retrain or find new jobs or whatever they needed to do, because all of a sudden their whole life was being changed as well. And we did that, and we really accomplished a very satisfying, I think, on both sides, shut-down agreement.

So those, I think, are the kinds of experiences that I've had that will help me as a member of the Board if I'm confirmed.

Senator CASEY. Mr. Hirozawa.

Mr. HIROZAWA. Hearing that makes me wish I had worked in the Detroit regional office. I have to say that one of the best kinds of experiences that I've had during my many years in private practice was as union co-counsel to jointly trustee employee benefit funds.

And there, on several different funds, I had the opportunity to work very closely with my management co-counsel, who was also generally the representative of the employer or the employer association, in collective bargaining matters and with the union and employer trustees in solving problems, which really were common problems. For the health funds, it was typically what to do about the rising cost of healthcare. And with the retirement funds, it was how to handle the investments in order to try and maximize the benefit that you can provide for the covered employees.

What I learned from that experience is that most employers and most employer representatives want the best for their employees in terms of wages and benefits. But the environment can be very challenging sometimes, and nothing beats cooperation, working together and trying to achieve those goals.

Senator CASEY. Thank you.

The CHAIRMAN. Thank you, Senator Casey.

Senator Scott.

## STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, Mr. Chairman.

Senator Casey, I actually enjoyed listening to your comments about how it would be nice to achieve the scientific certainty that our folks here may have a balanced approach. I would settle for just an ounce of optimism toward that.

We've heard very consistently questions around finding a way to be objective in this process. And, certainly, with you two, we are looking for those answers, because it's an important part of the equation. One thing that I think is noteworthy is that the NLRB is not designed to be an extension of the President's team.

We've had a lot of conversation of late of creating teams, of letting the President finish his team, and, ultimately, your nominations have been stuck in the quagmire pit of the President's team. And I hope that we all realize that the NLRB should not be a part of the President's team, but that the goal of the NLRB should be to become neutral arbiters. And I say "become" because the activities of late of the NLRB have been anything but neutral.

I hope your roles, if you are confirmed, will include perhaps a paradigm shift from your experience in the workforce, it seems to me, to one that allows you to take a look at things from a neutral perspective.

I think, Ms. Schiffer, as I look at your experience, certainly, you've had lots of experience on the labor side that gives me a reason to pause and be concerned. And I would love to hear your answer at the end of my comments as it relates to how we could have greater confidence in your ability, as well as yours, sir, to be objective.

As I looked through the experience in your history on the side of labor, I noted that for the last 12 years, you've been the assistant general counsel for the AFL-CIO. And we just heard you talk about card check. You've testified twice before Congress on card check, in a position where you don't necessarily like the secret ballot concepts, or the 18 years that you spent working at the AFL-CIO's department of the United Auto Workers in Detroit, or as recently as 2004, when you were a member of the UAW 1981.

Those are some of the reasons that I find myself concerned in looking for not scientific certainty, but just an ounce of hope; that would be fantastic from my perspective. You said today that you believe in the Act, the NLRA. In 2007, you said that the NLRA, the Act itself, was being used as a sword by employers to frustrate employees' freedom of choice. And you also said that the Act no longer protects workers' rights to form a union. Further, comments that you've made about employers have ranged from they spy, harass, threaten, intimidate, bribe, and suppress.

It seems to me that there is a perspective that may have been tainted on one side or the other. And in 2010, you commented that we really need to streamline the election process and eliminate so much delay that is now built into the National Labor Relations Act process.

I'm not sure if you realize that the Acting General Counsel's fiscal year 2011 summary of operations set a target of about 42 days for a union to be formed, and the fact is that we are below target,

around 38 days. But it seems to indicate a strong position for what we call the ambush election process, which only takes about 10 days.

One of my favorites, of course, is your attack on the House Republicans in 2012 that I was a part of when you made your comments. You attacked, I think, my bill, specifically, H.R. 2587, that prohibited the NLRB from destroying jobs created in one State in order to move them to another State.

Your comments,

“Passing legislation in the House to deny the NLRB authority to remedy illegal conduct when a company eliminates or transfers work in order to deny workers their rights,”

I take great exception to.

First, there’s no question that—as you are, I’m sure, well aware of—the NLRB has a number of weapons in their arsenal. The one that H.R. 2587 eliminated, had it passed both chambers, and the President signed it, which was obviously not going to happen—had it happened, however, it would have eliminated the opportunity for the NLRB to transfer jobs from South Carolina back to Washington.

The premise of your comments was, in fact, that somehow, some way, there was an elimination of jobs in Puget Sound, WA, when, in fact, there were 2,000 jobs added to Puget Sound while we were adding 5,000 jobs in South Carolina.

So my real question really is the same question we’ve heard asked a number of times: How can we have a high level of confidence of objectivity or impartiality or what we used to call the neutral arbiter, the NLRB?

Ms. SCHIFFER. As I stated, I started my career as a lawyer. I’ve been primarily involved in traditional NLRA issues for 37 years. But I started at the National Labor Relations Board, and I started in the capacity of being a neutral Board agent. And, as I said, I received a commendation from John Irving for that.

But my point is that I take what I do very seriously, and I understand the importance of doing the job in the appropriate way. And I did that when I was at the National Labor Relations Board, and I hoped that I did that when I worked for the United Auto Workers and in private practice and for the AFL-CIO.

I spoke when I testified from my own personal experiences. I saw workers who had been spied on. I saw workers who had been followed into the bathroom while they were at work so that their supervisors could hear who they talked to and what they talked about. So I tried to bring those experiences—

Senator SCOTT. I certainly see your point. I was just saying that the generic classification of employers, generically speaking, as spies, harassing, and threatening creates an environment or a culture that seems to be inconsistent with most of the employers that I have had the opportunity to converse with and pay attention to. But I would just love to have some sense that there is the ability to be unbiased in the job that you are nominated for.

Ms. SCHIFFER. I appreciate that, and I want the Act to succeed. I’m committed to the Act. I want this, now that we have this opportunity, possibly, for a full National Labor Relations Board with con-

firmed members, that it can be viewed as a fair and honest broker in these cases.

And I'm committed to working with the Board staff to develop good relationships—I indicated that I have some experience with that already with Phil Miscimarra—and to develop that with the other Board members so that we can be productive and take advantage of each other's differing backgrounds and experiences, and be able to reach fair, reasoned decisions that are viewed that way so that people will have confidence in the Board. That will be my role if I'm confirmed as a member of the Board.

Senator SCOTT. Thank you, ma'am.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Franken.

#### STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

I want to thank both of you for agreeing to serve on the NLRB. The NLRB was created to protect Americans' rights under the National Labor Relations Act. However, Board vacancies are threatening the NLRB's ability to operate, which has had a real impact on the lives of workers and employers.

I asked previous nominees before this committee about the case of Susie Stetler, a school bus driver from Elk River, MN. Ten months ago, the Board issued a decision, but her case has been in legal limbo as a result of the D.C. Circuit's *Noel Canning* decision. Ms. Stetler still has not been rehired, and she's still waiting for \$40,000 in back pay.

Mr. Hirozawa, I'm sure you're aware of many similar cases. In a world in which the Senate confirms NLRB nominees in a timely manner, what should the process have been for someone like Ms. Stetler compared to how it actually played out for her?

Mr. HIROZAWA. The Board should have been able to obtain reasonably prompt enforcement of the order granting the remedy and I think would have if it didn't have to contend with the quorum issues in litigation.

Senator FRANKEN. And that's what's at stake here. I like what you said in your testimony—and it's been referred to—hearing another employee describe this pro-Act, not pro-union or pro-management. We've heard a lot today about potential bias that you might have because you've worked for—Ms. Schiffer for the AFL-CIO—because you worked for the Board of the NLRB or worked for the chair.

In the history of the NLRB, have there been people who have been nominated and confirmed before who have worked for labor? And have there been people before who have worked for management? Has that happened before, ever?

Mr. HIROZAWA. Yes, I think it has been—I think most recent members of the Board have either been management lawyers or have—

Senator FRANKEN. This isn't the first time this has happened.

Ms. SCHIFFER. If I could just say, one of the members of the Board came directly from the Labor Policy Department of the Chamber of Commerce.

Senator FRANKEN. I heard Senator Warren say that an awful lot of the decisions that are made by the NLRB are unanimous. Is that correct?

Mr. HIROZAWA. Yes, that's correct.

Senator FRANKEN. So that would suggest to me that once you're a member of the NLRB, you're able to set aside—or maybe the issues that come before you are clear cut enough, or are such that people who have had a career as pro-labor or pro-management can come together and be pro-Act.

Mr. HIROZAWA. Yes, I think it's a combination of all of those factors.

Senator FRANKEN. I think that has been our experience here.

Mr. Hirozawa, while you worked at the NLRB, the number of Board members serving has ranged from two to five. Meanwhile, the NLRB received over 20,000 unfair labor practice charges last year alone. Tell me about the difference that a full Board makes in terms of handling the case volume before the NLRB.

Mr. HIROZAWA. It makes a huge difference. That was precisely the reason why in the Taft-Hartley Act in 1947 Congress increased the size of the Board from three to five members, so that the Board could process cases more quickly and efficiently. And it does make a tremendous difference to have a full complement of Board members.

It will also make a big difference to have a fully confirmed complement of Board members, because recess appointees are there for a very short period of time. What that means is that you have a lot of turnover, and each time you get a new member, there's a learning curve, and, naturally, that doesn't do anything for the goal of trying to move the cases expeditiously.

Senator FRANKEN. Again, I want to thank you both for offering yourselves or being willing to take this job.

And thank you, Mr. Chairman, for this very important meeting, and I'd like to thank the Ranking Member as well.

The CHAIRMAN. Thank you, Senator Franken.

Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman. I only have a couple of questions, as Senator Franken's questions set me to thinking.

Ms. Schiffer, can you think of anyone other than Craig Becker and yourself who came directly from employment by a union as a lawyer to the NLRB Board? I couldn't.

Ms. SCHIFFER. None come to mind right now.

Senator ALEXANDER. Let me ask about what's called the Excelsior List. The current law requires employers to provide union organizers with a list of employees' names and home addresses. That's called the Excelsior List.

The NLRB is pursuing a regulatory effort to expand that requirement to include cell phone numbers, email addresses, employee work location, shifts, and job classifications. A lot of employees have said that seems to them like an invasion of privacy. They don't want all that personal information shared without their consent.

If you are confirmed, would either of you continue to pursue the portion of the proposed regulation that allows this invasion of employees' privacy?



Ms. SCHIFFER. It's my understanding that there are still portions of the notice of proposed rulemaking previously issued regarding the election procedures—that's still pending. And if that were to come before the Board, then I would be considering it at that point in time, and I wouldn't want to prejudge that.

I appreciate the issues of privacy. I appreciate the current Excelsior List. The rule dated from a Board decision in 1960, 1966. So it's a fairly old rule. There wasn't the technology then. There is now. We communicate differently, I think——

Senator ALEXANDER. Well, we do. But we also have heightened concerns about invasion of privacy.

Ms. SCHIFFER. Yes, right.

Senator ALEXANDER. And I would think as an advocate for employees, one would care about that.

Ms. SCHIFFER. Yes. I think all of those are very legitimate considerations that would have to be reviewed by the Board in the event that there is further consideration of those portions of that outstanding notice of proposed rulemaking. So I couldn't prejudge it now. I don't have an opinion about that now.

Senator ALEXANDER. Would you consider, if it were to come up, at least allowing employees to opt out of such personal information requests? Do you think that's reasonable?

Ms. SCHIFFER. That would certainly be something that would be considered, I assume, at the time and part of the consideration.

Senator ALEXANDER. Mr. Hirozawa.

Mr. HIROZAWA. Thank you, Senator. I agree that the privacy concerns raised by that kind of proposed rule are very substantial and would need to be considered very carefully by the Board in addressing that kind of proposal. Again, it would be inappropriate for me to prejudge any of those issues. We are going to be getting a new complement of members, it appears, and if I end up being one of those members, that's something that I would have to discuss very seriously with my colleagues.

Senator ALEXANDER. Would you also consider the opt-out provision should you go forward with a rule like this?

Mr. HIROZAWA. Yes, I would certainly consider it.

Senator ALEXANDER. The concerns about privacy in an era of social media and the Internet are not an exclusively Republican issue in the U.S. Senate. We hear as much about that from the Democratic side as we do from the Republican side. And I would hope that would be the kind of issue that would be considered.

My last question is this. Ms. Schiffer, in an ABA meeting in 2012, you made a presentation, "Congressional Review of the NLRB: Oversight or Over the Top." You said,

"Congressional efforts to oversee the NLRB through information requests, letters, and hearings was an unfocused or meandering witch hunt."

Does that suggest that you won't be willing to comply with letters or requests that we make of you if you were to be a member of the National Labor Relations Board?

Ms. SCHIFFER. Not at all. And I believe that Congress does have the responsibility and the obligation to provide oversight. I respect the role of Congress. I would cooperate in any efforts in that regard.

Senator ALEXANDER. Thank you.

Mr. Chairman, all I would ask, again, as I did at the beginning, is—we have scheduled a markup tomorrow, which means a vote. My guess would be, while it would be up to the leadership to decide that, that the first time this could be on the floor for consideration, should you be reported to the full Senate, would be next week.

If you, Mr. Hirozawa and Ms. Schiffer, are reported, I would think there would be an up or down vote on your nominations. At least, I think there should be. However, Senators have a right to have answers to their questions and information that you provide. We have now all the information that we normally receive for Presidential nominees, and we've had this hearing.

But I would ask the two of you that if Senators have additional questions—we will urge them to get them to you right away, and I would urge you to respond to them as fully and as completely as you can so that all members of the Senate could have your answers to the questions before the Senate might be asked to vote on your nominations next week.

Thank you, Mr. Chairman.

Ms. SCHIFFER. We certainly want to do that.

Mr. HIROZAWA. We'll do our absolute best.

The CHAIRMAN. I would add that I hope the questions are pertinent to this position, reasonable, rational, and limited. I hope we don't have the kind of questions that were submitted to someone not on this committee—McCarthy, I guess her name was, Ms. McCarthy at the EPA, who had 1,200 questions. It would be impossible, I think, for anyone to respond to 1,200 questions within that period of time we're discussing.

Senators have an absolute right to ask questions and should. For the record, we call them QFRs, questions for the record. But I would hope, again, that they would be reasonable in number so that our proposed nominees can have a decent chance to examine them and respond to them. I hope that people will exercise some restraint in how many they ask without going overboard.

I'd like to read, as I always like to read this from the National Labor Relations Act, Section 1, right in the beginning of the National Labor Relations Act.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging"—mark that word, 'encouraging'—"the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

It is the policy of the United States to encourage the practice and procedure of collective bargaining. That's in the Act. Now, if people don't like that, I suppose they could offer to change the Act, but I haven't heard of any of that yet.

Again, I thank you both. I thank your families for being here. I thank you both for your public service in the past. And I hope with the Ranking Member that we can get to this tomorrow on the vote,

and then I encourage you both to respond to the QFRs, the questions for the record, as rapidly as possible and as thoroughly as you can answer those questions.

On the other hand, I hope, Senators' staffs who are here and Senators listening in, that we not have an unreasonable number of questions that need to be responded to.

If there's nothing more, I thank you both for your willingness to serve on this extremely important Board. As I said in the beginning, this Board really is the Board that helps both businesses and workers move ahead. I am aware of the fact that 91 percent—I believe I'm right on this—91 percent of all the cases that come into regional offices are settled at the regional level, 9 out of 10. So that means the Board is functioning, and it's functioning well.

Every once in a while, a tough case comes up or something happens to get the Board to have to think about the application of the Act to modern circumstances. Perhaps, sometimes, that's when problems arise.

But I have every reason to believe that now, having a full complement of the Board—for the first time in over a decade, we'll have a full Board able to meet, as you said, Mr. Hirozawa, and consult together. The kind of processes that Mr. Pearce has set up in the Board, I think, bode well for the future in terms of people working together and making the Board fully functional once again.

I thank you all, and if there's nothing more to come before the committee, the committee will stand adjourned. Thank you.

[Additional material follows.]

## ADDITIONAL MATERIAL

RESPONSE BY KENT YOSHIHO HIROZAWA TO QUESTIONS OF SENATOR ALEXANDER,  
SENATOR ENZI, SENATOR BURR, SENATOR ISAKSON, SENATOR HATCH, AND SENATOR  
SCOTT

SENATOR ALEXANDER

*Question 1a.* At today's hearing you testified that you spent "a great deal of time working on the NLRB's two regulatory efforts." In August 2011, the Board issued a new rule requiring employers to post a biased employee rights poster in the workplace. Two separate Federal courts have struck the rule down. In December 2011, the Board issued a new rule shortening the time in which a union election is held, otherwise known as the "ambush" or "quickie" elections rule. The D.C. Circuit struck down the rule on the grounds it lacked a quorum.

What percentage of your time was devoted to these regulatory efforts?

Answer 1a. I am not required to maintain the sort of detailed time records that would be necessary for me to accurately determine what percentage of my time was spent on work related to rulemaking. As a general matter, the clear majority of my work time was spent on other matters, primarily case adjudication.

*Question 1b.* If confirmed, will you continue to pursue continued or new regulatory initiatives at the NLRB? Please describe the efforts you would support.

Answer 1b. I support the Board's rulemaking authority, as reflected in Section 6 of the National Labor Relations Act. I believe that the Board should exercise that authority judiciously and consistent with all legal requirements. What, if any, further rulemaking the Board should undertake is an issue which, if confirmed, I would have to carefully consider with all of my colleagues on the Board and with the Board's professional staff.

*Question 1c.* You also testified that there were lessons to be learned from the Board's experience with the two rulemakings. What specifically were those lessons you learned?

Answer 1c. The lessons to be learned from recent rulemaking include the importance of seeking broad public participation in the process, which I believe that the Board successfully achieved by holding public hearings and by accepting public comments electronically, as well as the importance of carefully considering and addressing the public comments received, which I believe that the Board did.

If I become a Board member, I would favor a discussion with all of my colleagues concerning the conclusions to be drawn from the litigation.

*Question 2.* The Board has shown a specific interest in reversing prior precedent regarding whether graduate teaching assistants may organize. In 2004, the Board ruled in *Brown University* that graduate teaching and research assistants are students rather than employees. Last year, the Board took the first step in reversing *Brown* by saying they would review that decision. If the Board decides to reverse the 2004 decision, this would be the third time in 12 years the Board has changed its policy in this area. Besides the practical effect a reversal has on universities, I think there could be a larger effect on the credibility of the Board in the eyes of the courts and the public.

Do you think a reversal will have a detrimental effect on universities' academic relationships with their graduate students?

Does another reversal undermine the concept of impartiality and instead shift to whoever makes up the current majority?

What do you suggest the Board do to stop this negative trend of constant reversals?

Answer 2. Because pending cases before the Board raise the issue addressed in *Brown University*, I do not believe it would be appropriate for me to address the potential effects of any particular outcome. I would approach those cases with an open mind, and, if confirmed, look forward to discussing them with my colleagues.

As a historical matter, reversals of precedent by the Board are relatively rare. In the great majority of cases, the Board follows prior precedent. I believe that norm should continue.

*Question 3a.* In August 2011, the Board issued the *Specialty Healthcare* decision, which dramatically lowered the standard used to determine the size and scope of a bargaining unit. This decision allows unions to essentially gerrymander a bargaining unit among its supporters at a worksite. The result will be to further fracture employees' relationships with the employer, and their fellow employees. A key

component of every secret ballot election, including our own as Senators, is that the majority rules.

Does the decision in *Specialty Healthcare* preserve the notion of “majority rule” in determining whether employees want to join a union?

Answer 3a. Yes. Most Board elections are conducted in the units agreed to by the parties. Where the parties are unable to reach agreement, the appropriate unit is determined by the Board or a Board regional director. The Union is certified only upon winning a majority of the votes cast.

*Question 3b.* Does *Specialty Healthcare* conflict with the congressional intent that the Board not rely on the extent of organizing when determining the appropriate bargaining unit?

Answer 3b. Because the Board’s obligation is to choose an appropriate unit, not the most appropriate unit, it has always begun the appropriate unit inquiry in a particular case by considering the petitioned-for unit. That practice is not in conflict with Section 9(c)(5) of the National Labor Relations Act.

*Question 4a.* On several occasions over the last few years, the Board has taken a case which presents a narrow question of law and used it as a platform to overrule precedent and institute major changes to our understanding of labor law. The *Specialty Healthcare* decision is one example of this trend.

Do you think it is appropriate for the Board to reach out and decide issues and address arguments not raised by the parties?

Answer 4a. As a general rule, it is preferable for the Board not to reach out and decide issues not raised by the parties, unless required to do so. With respect, I do not believe that the Board did so in *Specialty Healthcare*.

*Question 4b.* If so, are you concerned that this practice violates the parties’ due process rights? Please explain.

Answer 4b. Concerns about the parties’ due process rights are one reason why it is generally not advisable for the Board to reach out and decide issues not raised by the parties.

*Question 4c.* During the hearing, you claimed that *Specialty Healthcare*, which overruled decades of precedent, is the law and that the Board should respect it as precedent. Don’t you think the Board in *Specialty Healthcare* should have respected the previous decades of precedent instead of significantly changing the law?

Answer 4c. In deciding *Specialty Healthcare*, the Board expressly adopted the standard enunciated by the U.S. Court of Appeals for the District of Columbia Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421–23 (2008), a case that raised the same issue in a non-healthcare context. That standard was already in use in cases not involving non-acute healthcare facilities, and in *Specialty Healthcare*, the Board explained that it had simply “return[ed] to the application of [its] traditional community of interest approach” in that one set of cases. My ethical obligation to maintain confidentiality concerning advice I gave to then-Member Pearce at the time the Board was considering *Specialty Healthcare* prohibits me from commenting further on the decision. That obligation is discussed in more detail below in my response to question 6.

*Question 5a.* Several of the Board’s recent decisions overruling decades of precedent were not applied to the parties before it. Rather, the Board decided to apply the new rules only prospectively.

In your view, does this approach violate the Administrative Procedure Act inasmuch as the Board has effectively promulgated rules not used to adjudicate the cases before it without following the APA’s notice and comment procedures?

Answer 5a. Where the Board has determined to apply a new legal rule, established in a case adjudication, only prospectively, it has followed longstanding Board precedent on the issue of retroactivity. I am not presently aware of any judicial decision concluding that the Board’s precedent was contrary to the Administrative Procedure Act.

*Question 5b.* If confirmed, would you work to end this practice of exclusive prospective application of Board precedents?

Answer 5b. The Board does not have a “practice of exclusive prospective application of Board precedents.”

*Question 6.* You testified at the hearing that the current Board has made a tremendous effort to build consensus and collaboration Board decisions. You also spoke about the importance of having a diversity of viewpoints.

Did you support the decision to finalize the Representation Case Procedures rule on December 22, 2011, without a written dissent by the minority member?

If confirmed, what will you do to ensure that the minority members will be afforded the opportunity to voice their dissent when a decision or rule is issued?

Answer 6. As I explained at the committee's July 23, 2013 hearing, I believe that it would be inappropriate for me to discuss my views with respect to Board actions or decisions that Chairman Pearce joined during my tenure as his Chief Counsel.

In my role as Chief Counsel, I provided legal advice to the Chairman concerning the rulemaking that is the subject of your question and I participated, as a staff member, in the Board's related deliberations. Discussing my views publicly would be inconsistent with the confidential professional relationship that I have had with the Chairman. It would also be contrary to the required confidentiality of the Board's deliberative process. Confidentiality is maintained to promote sound decisionmaking by ensuring the full and free discussion of legal issues.

Section 18020 of the Guide for Staff Counsel of the National Labor Relations Board (Sept. 1994) provides that "[s]taff counsel are confidential employees of the Board Member for whom they work" and that staff counsel are generally prohibited from disclosing information about Board cases, whether before or after a case has been issued.

In addition, such disclosures might in certain circumstances violate both the Standards of Ethical Conduct for Employees of the executive branch and the State ethical rules that apply to attorneys, such as Rule 1.6 of the New York Rules of Professional Conduct (2009).

On March 19, 2012, the Board's Inspector General issued a Report of Investigation (OIG-I-468) with respect to public disclosures of deliberative information by a prior Chief Counsel, who served another Board Member. The Inspector General's report addresses the standards that govern this area, and I am guided by that report.

I do believe that the representation of diverse viewpoints is very beneficial to the deliberative process. If I am confirmed to serve as a Board member, I will strive to allow and encourage all members participating in a case or rule to express their views both in deliberations and in written decisions, concurrences, or dissents.

SENATOR ENZI

#### *Federal Labor Law on Tribal Lands*

*Question 1.* Wyoming is home to the Wind River Reservation where tribal governments and enterprises are recognized to have sovereignty over activities which take place on tribal lands. In a number of cases, the Supreme Court has recognized that Federal law does not infringe on this sovereignty unless Congress expressly says Federal law applies on tribal land. Do you believe that the National Labor Relations Act should override tribal employment codes?

Answer 1. Under existing Board precedent, the National Labor Relations Act may effectively override tribal employment codes, depending on various factors. The leading Board decision in this area is *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004). The U.S. Court of Appeals for the District of Columbia Circuit affirmed the Board's decision, and the Board has followed it subsequently.

*Question 2.* Do you believe Congress intended the National Labor Relations Act to apply to tribal businesses?

Answer 2. The National Labor Relations Act does not contain an express exclusion for tribal businesses, in contrast to certain other entities identified in Section 2(2). In *San Manuel Indian Bingo & Casino*, cited above, the Board concluded that the Act could be applied to tribal businesses, depending on various factors.

#### *Notice Posting Rulemaking*

*Question 3.* The NLRB's 2011 rulemaking that requires employers to post a notice of only certain employee rights was invalidated recently by two Federal courts. This notice rule emphasizes posters advertising an employee's right to unionize and collectively bargain but does not include information about the right for employees to object to the use of their union dues and fees to go toward political purposes. Do you defend the NLRB using a rulemaking to cherry pick what it requires employers to post when at least one study suggests 67 percent of workers are unaware of their right under the NLRA to withhold mandatory union fees for political purposes?

Answer 3. In its preamble to the final rule, published in the Federal Register, the Board addressed the issue that you raise. 76 Fed. Reg. 54023 (Aug. 30, 2011). The Board observed that the rights to which you refer (known as Beck rights)

"apply only to employees who are represented by unions under collective bargaining agreements containing union-security provisions" and that "unions that

seek to obligate employees to pay dues and fees under those provisions are required to inform those employees of their Beck rights” under existing Board precedent.

The Board also stated that it:

“was presented with no evidence during this rulemaking that suggests that unions are not generally complying with their notice obligations.”

In sum, the Board concluded that:

“because Beck does not apply to the overwhelming majority of employees in today’s private sector workplace, and because unions already are obliged to inform the employees to whom it does apply of their Beck rights, the Board is not including Beck notification in the final notice.”

SENATOR BURR

*Question 1.* If you are ever served with a congressional subpoena, will you commit to complying with said subpoena to the satisfaction of the issuing authority?

Answer 1. I will make every effort to comply with a congressional subpoena.

*Question 2.* In your experience as a lawyer, how frequently do you see an agent of a party in ongoing disputes be made a judge in such disputes?

Answer 2. It would be highly unusual for an agent of a party in ongoing litigation to be made a judge in that case. I don’t believe I have ever seen such a case. In addition, the ethical rules applicable to judges require a judge to recuse him or herself from adjudicating a case based on certain prior or ongoing relationships with a party to the case.

I take my ethical obligations very seriously. This includes any obligation that I might have to recuse myself from a specific case. If any case or issue brought before me raised a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board, and, if advisable with the Office of Government Ethics (OGE). It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all applicable ethical guidelines. I pledge that I will fully comply with all of them.

*Question 3.* Chairman Harkin said, based on his reading of an introductory portion of the NLRA that the job of the NLRB is to encourage collective bargaining. Do you share his belief or do you believe a more complete reading of the law says that the NLRB should be a fair arbiter between the parties in dispute and should protect the rights of employees to either choose or reject unions?

Answer 3. The National Labor Relations Act states very clearly that the policy of the United States is to promote the free flow of commerce by encouraging collective bargaining. The NLRB’s statutory duty is to implement and enforce the Act consistent with that policy. The NLRB is charged with protecting all the rights that employees, unions, and employers have under the law, including the right of employees to choose whether or not to be represented by a union. The NLRB is designed to be a neutral arbiter of disputes that arise under the Act.

*Question 4.* Do you believe employers should have a right to legal counsel regarding unionization matters?

Answer 4. The National Labor Relations Act does not require parties coming before the NLRB to retain counsel, but any party who wishes to be represented by counsel in such matters is of course welcome to be so represented.

*Question 5.* Could you provide three instances in your career where you have taken a stance in opposition to a union?

Answer 5. *Local 32B-32J, Service Employees International Union, AFL-CIO (Pritchard Services, Inc.)*, Case No. 2-CB-1513 (charge filed, complaint issued, hearing held 1986). The charge was filed by an individual employee against the union alleging that the union had caused the employer to discriminate against her with respect to bumping rights for reasons other than failure to tender periodic dues and initiation fees. As a Board attorney, I investigated the charge, the regional director issued a complaint against the union, and I litigated the Board General Counsel’s case against the union in a hearing before an administrative law judge and filed a post-hearing brief urging that the judge find a violation by the union.

*Regional Import & Export Trucking Co. and Truck Drivers Local No. 807 a/w International Brotherhood of Teamsters*, 318 NLRB 816 (1995), 323 NLRB 1206 (1997). I litigated the compliance stage of this case on behalf of a group of truck drivers and warehouse workers against a trucking company and a local union. The

two respondents were held jointly and severally liable for back pay and interest totaling over \$1 million.

*Rabbitt v. Gallo*, No. 01–CV–7583 (NG) (E.D.N.Y. 2001). I filed a lawsuit in Federal district court against a union on behalf of several members, seeking an injunction requiring the union to place on the ballot a candidate for union office who had been ruled ineligible to run.

*Question 6.* Public-sector/public safety employees can be prohibited from volunteering due to employment contracts. The AFL–CIO has supported these clauses. Do you believe that such clauses are ever appropriate regardless of whether or not an organization is governed by the National Labor Relations Act?

*Answer 6.* To the best of my understanding, the National Labor Relations Act does not address the issue that you raise, nor am I familiar enough with the issue to have formed an opinion.

*Question 7.* Do you believe threats of physical violence by pro-union supporters is ever acceptable? Do you consider such behavior to be coercive and an unfair labor practice?

*Answer 7.* Under existing case law under the National Labor Relations Act, threats of physical violence by pro-union supporters may be, depending on the circumstances (including the identity of the persons making threats and the credibility of the threats), objectionable conduct requiring a representation election to be set aside and may also be an unfair labor practice. I believe that such behavior can be coercive and an unfair labor practice.

*Question 8.* Do you envision a scenario in which you would support an effort by employees to preserve an open shop?

*Answer 8.* As a Board Member, my responsibility would be to neutrally adjudicate any case that presented the issue you raise, based on the record evidence and applicable law.

#### SENATOR ISAKSON

*Question 1.* In your opinion, do you agree with the Board’s decision to apply a decision concerning an acute nursing facility to all manner of industries, including those having nothing to do with medical or health care? For example, Bergdorf Goodman’s in New York City as well as a Macy’s outside of Boston are both facing serious fragmentations of their workforce because of the application of the *Specialty Healthcare* decision.

*Answer 1.* Governing law in Board representation proceedings typically applies across industry lines. The question addressed in *Specialty Healthcare*—how to determine an appropriate unit where one party contends that the unit sought by another party must include additional employees—was not specific to health care. Moreover, the standard the Board adopted in *Specialty Healthcare* was enunciated by the U.S. Court of Appeals for the District of Columbia Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421–23 (2008), a case involving a unit of stage crew employees for a theatrical show performed in a casino hotel. Thus, the formulation adopted by the Board was one already in use outside the area of non-acute health facilities.

*Question 2.* During the hearing, when you were asked why the NLRB overruled decades of precedent in *Specialty Healthcare*, you stated that due to attorney-client confidentiality, you could not speak as to Chairman Pearce’s views or your personal views at the time the decision was issued. You also stated that you could not pre-judge future questions. But you acknowledged that a department store with 35 different unions representing 35 different departments would be “disruptive” to labor relations. As such, my question is not about the past or the future, but rather about the present and the experience of employers living under the *Specialty Healthcare* decision. What is your personal opinion (not Chairman Pearce’s) of the *Specialty Healthcare* decision at present (not when the decision was issued) in light of the reported fragmentation of bargaining units in several department stores, including Macy’s and Bergdorf Goodman?

*Answer 2.* As I stated in my testimony at the July 23, 2013 hearing, my personal opinion of the Board’s decision in *Specialty Healthcare* is, in a sense, a moot point: *Specialty Healthcare* is now Board law. (It is also the law of the U.S. Court of Appeals for the District of Columbia Circuit. In *Specialty Healthcare*, the Board expressly adopted the D.C. Circuit’s standard enunciated in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421–23 (2008), a case that raised the same issue in a non-healthcare context.) I am therefore obligated to treat it as I would any prior Board precedent.



*Macy's* and *Bergdorf Goodman* are two cases currently pending before the Board. In each case, the employer and the union disagree over the appropriateness of the petitioned-for bargaining unit. It is the Board's obligation to determine whether the petitioned-for units are fragmented, that is, whether they would be appropriate without the inclusion of other employees. With respect, I do not believe that I can address those issues here consistent with my ethical obligations to maintain confidentiality regarding internal deliberations in pending cases.

*Question 3.* There seems to be a very consistent theme of the Board's recent history. When you look at the so-called "ambush" election rulemaking, the courts overturned the decision based on the fact that there wasn't a sufficient quorum. In the poster rule, we now have three courts, one in South Carolina and two in DC, which have deemed the ruling invalid. *Specialty Healthcare* is another case decision that is under review by the courts; and these are just naming a few. I am very concerned that the "independent" NLRB has become one that has had to be kept in check by the judicial branch. How can you assure to us that you will work in the spirit of impartiality that is supposed to be at the core of the Board's mission?

*Answer 3.* As I stated in my testimony before the committee, if confirmed, I pledge to dedicate myself to the fair and even-handed enforcement of the commands of the National Labor Relations Act, consistent with the Act's purpose of maintaining industrial peace. I would carry out my duties fairly and impartially and enforce the Act without bias or agenda.

SENATOR HATCH

*Question.* As a result of the D.C. Circuit's decision in *Noel Canning*, a number of the Board's past decisions will likely be up for reconsideration. As Chief Counsel to NLRB Chairman Pearce, you likely wrote many of the decisions that will likely be reconsidered by the Board.

Given your close connection to these decisions, how can we believe that you will give these decisions a fair and independent review if you are confirmed?

*Answer.* If confirmed, I would take my role as a neutral adjudicator of the law very seriously. I pledge to carry out my duties as a Board member fairly, impartially, and in strict accordance with the law.

It has been my privilege to serve as Chairman Pearce's chief counsel at the Board for the past few years. I will use that experience, along with my experience as a field attorney in the Manhattan regional office of the National Labor Relations Board, and my 20 years of experience working with labor law issues in the private sector to inform my decisions as a Board member. I fully understand, however, that my role as a Board member would be to exercise independent judgment as a neutral adjudicator. I would evaluate each case with an open mind.

SENATOR SCOTT

*Question 1a.* In your testimony, you vowed to dedicate yourself "to the fair and even-handed enforcement of the commands of the Act, consistent with the Act's purpose of maintaining industrial peace." However, the Board has pursued rulemakings that represent a gross overreach of the NLRB's statutory authority under the NLRA. The "Notice Posting Rule" issued in 2011 was struck down by the U.S. Court of Appeals for the Fourth Circuit for this very reason. The Court held that the Board "exceeded its authority in promulgating the challenged rule" and that the NLRA

"only empowers the Board to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request."

Given that support of the "Notice Posting Rule" would contradict a commitment to work within the bounds of the Act in an impartial and reactive manner, as a Board member will you support the rulemaking going forward?

*Answer 1a.* The "Notice Posting Rule" remains the subject of ongoing litigation. The issue of how the Board should proceed with respect to the rule is a pending issue that must be deliberated and decided by the full Board. If confirmed, I would give the issue careful consideration, in consultation with my fellow Board members and the Board's professional staff.

*Question 1b.* Do you think the Board has used its resources efficiently by pursuing unprecedented rulemakings that have been repeatedly challenged and struck down in Federal courts?

*Answer 1b.* Rulemaking by the Board is not unprecedented. The Board has issued procedural rules on dozens of occasions. It has also issued a significant rule, the

Health Care Rule, that was challenged in the Federal courts, but ultimately upheld by the Supreme Court. The litigation involving recent Board rules remains ongoing. I believe that rulemaking is an appropriate exercise of the Board's statutory authority and that the Board has used its resources efficiently in this area.

*Question 1c.* You indicated in your nomination hearing that following the aftermath of the litigation surrounding these rulemakings, "there are lessons to be learned for a new Board." Please elaborate further on what those lessons are in your opinion and how you will incorporate them as a Board member.

*Answer 1c.* The lessons to be learned from recent rulemaking include the importance of seeking broad public participation in the process, which I believe that the Board successfully achieved by holding public hearings and by accepting public comments electronically, as well as the importance of carefully considering and addressing the public comments received, which I believe that the Board did.

If I become a Board member, I would favor a discussion with all of my colleagues concerning the conclusions to be drawn from the litigation.

*Question 2a.* The Board under this Administration has not acted as a neutral arbiter and has pursued numerous decisions that upend decades of precedent. You have indicated on multiple occasions that precedent is imperative for stability and should only be overturned in the rarest of circumstances.

Please identify which of the below Board decisions meet that rare instance in which you believe precedent should be overturned:

- *WKYC-TV, Gannet Co., Inc.* (08-CA-039190)
- *Alan Ritchey, Inc.* (32-CA-018149)
- *IronTiger Logistics, Inc.* (16-CA-027543)
- *Piedmont Gardens* (32-CA-063475)
- *United Nurses & Allied Professionals (Kent Hospital)* (01-CB-011135)
- *Hispanics United of Buffalo* (03-CA-027872)
- *Karl Knauz BMW* (13-CA-046452)
- *Dish Network* (16-CA-062433A)
- *Fresenius USA Manufacturing* (02-CA-039518)

*Answer 2a.* With respect, I do not share your view that the Board has "not acted as a neutral arbiter." I do believe that reversals of precedent should remain relatively rare and should always reflect careful consideration. Examples of cases in which the Board may well be justified in reversing precedent are where existing Board law lacks a clear and coherent rationale and/or where the Board has been directed by a Federal court to reconsider its approach to a particular legal issue.

Of the decisions cited above, *IronTiger Logistics*, *United Nurses and Allied Professionals (Kent Hospital)*, *Hispanics United of Buffalo*, *Karl Knauz BMW*, *Dish Network*, and *Fresenius USA Manufacturing*, did not overturn precedent. *WKYC-TV* overturned a decision issued in 1962, whose rationale (or lack thereof) had been rejected repeatedly by the U.S. Court of Appeals for the Ninth Circuit over more than a decade. *Alan Ritchey, Inc.* overturned a 2002 decision, which lacked rationale. *Piedmont Gardens* overturned a 1978 decision that had created an automatic exemption from disclosure for witness statements, rather than apply the interest-balancing test governing union information requests articulated by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

*Question 2b.* In your nomination hearing, you agreed that micro-unions would make labor relations much more complicated. Can you please describe what you believe is an appropriate bargaining unit?

*Answer 2b.* Section 9(a) of the National Labor Relations Act begins as follows:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for bargaining for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment ..."

Section 9(b) begins as follows:

"The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof ..."

Since the passage of the Act, the Board and the Federal courts have developed an extensive and detailed body of law interpreting those provisions to determine what constitutes an appropriate unit for bargaining. That body of law is best summed up by the term "community of interest." Employees have a community of

interest, such that they constitute an appropriate unit for bargaining, if they have substantial mutual interests in wages, hours, or other conditions of employment.

*Question 3.* Do you agree with the Board's decision in *Specialty Healthcare*? Please answer yes or no.

Answer 3. With respect, I do not believe that I can answer that question consistent with my ethical obligations to maintain confidentiality regarding advice I gave to then-Member Pearce at the time the Board was considering *Specialty Healthcare*. In addition, and as I believe I stated at my confirmation hearing, whether I agree with the Board's decision in *Specialty Healthcare* is, in a sense, a moot point: *Specialty Healthcare* is now Board law. (It is also the law of the U.S. Court of Appeals for the District of Columbia Circuit. In *Specialty Healthcare*, the Board expressly adopted the D.C. Circuit's standard enunciated in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421–23 (2008), a case that raised the same issue in a non-healthcare context.) I am therefore obligated to treat it as I would any prior Board precedent.

RESPONSE BY NANCY JEAN SCHIFFER TO QUESTIONS OF SENATOR ALEXANDER, SENATOR ENZI, SENATOR BURR, SENATOR ISAKSON, SENATOR HATCH, AND SENATOR SCOTT

SENATOR ALEXANDER

*Question 1a.* In 2007, while you were employed as associate general counsel with the AFL–CIO, your employer hosted a rally and march to “close the NLRB.” AFL–CIO national organizing director Stewart Acuff said, “the Labor Board should be closed for renovations until a new governing board could be appointed by a new President,” and the AFL–CIO Director of the Voice at Work Campaign said, “It's time to shut the board down and close it for renovation.” Please answer each question.

As a senior AFL–CIO official at the time, did you agree that the NLRB should be shut down because Republicans were in the majority?

Answer 1a. In 2007, I was working as Associate General Counsel for the AFL–CIO and my role was to advocate for the union and its positions. I recognized then and continue to recognize the vital role the National Labor Relations Board plays in enforcing the rights of employers, unions and employees. Further, I am fully aware of the differences between working as an adjudicator and an advocate. If confirmed, I would take my role as a neutral adjudicator of the law very seriously.

*Question 1b.* Do you believe now or did you believe then that it is the role of the NLRB to reward particular special interests?

Answer 1b. No, I do not believe it is the role of the NLRB to reward special interests.

*Question 1c.* In fact, the NLRB did dwindle to two Board members at the end of 2007 and the Senate did not confirm any new members until June 2010. The Supreme Court ruled that the Board did not have a quorum to issue valid decisions during that time. Was this the outcome the AFL–CIO sought?

Answer 1c. No, it was not the outcome the AFL–CIO sought. When the Supreme Court issued its decision in *New Process Steel*, the AFL–CIO issued a statement expressing disappointment. I believe in the Act and in the mission of the Agency. I believe that a fully functioning Board of five confirmed Members is in the best interests of the Act and its mission. I do not believe that the National Labor Relations Board should be shut down or reward special interests. I do not believe the decision of the Supreme Court referenced in your question was anticipated.

*Question 2a.* At today's hearing, you said that you believe in the National Labor Relations Act and hope to be viewed as “pro-Act.” But in recent past statements, it is clear that you had very strong negative feelings about the ability of the NLRB to carry out its mission, particularly in the conduct of secret ballot elections. You've said, “The union election process is broken, NLRB elections are conducted in an inherently coercive environment—the workplace,” and called it “the delay-ridden, divisive, coercive representation election process.”

Yet, unions have won 63 percent of all secret ballot elections over the last 5 years, reaching historic highs. In fiscal year 2012, 93.9 percent of all initial union elections were held within 56 days of the petition's filing, and in each of the past 3 years (fiscal year 2010–2012), the median time period between petition filing and union election has been 38 days, a timeframe which Acting General Counsel Lafe Solomon touted as “well below our target median of 42 days.”

Have you changed your views?

Answer 2a. I testified as an advocate representing the positions of the AFL-CIO. I fully understand the differences in the role of an advocate and a neutral arbiter of the law. In testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100 vote margin. Yet those workers were not able to be represented or engage in collective bargaining for 6½ years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within the Board's targeted median timeframe that resulted in the selection of union representation did not insure that the election process was not fraught with delays. Whether the election process is fair depends on the circumstances in which the process is conducted.

*Question 2b.* If you still believe the secret ballot election process is broken, do you have plans to try to make changes to the ballot election process if confirmed as a Board member?

Answer 2b. If I am confirmed as a member of the National Labor Relations Board, I will apply the law impartially to all parties that come before the Board and make sure that cases are decided in a fair and expeditious manner. I have no preconceived agenda. If confirmed, I will consider each issue before the Board with an open mind and make my decision based on the facts of the particular case and in consultation with my colleagues and career Board staff and with due consideration to the positions of the parties and the facts of the case.

*Question 3.* You have an extensive history with cases and parties that will be coming before the NLRB during your tenure, if you are confirmed.

Will you recuse yourself from all cases involving your former employer, the AFL-CIO, and their affiliate unions? *Please explain in detail your answer.*

Answer 3. I take my ethical obligations very seriously. This includes any obligation that I may have to recuse myself from a specific case. I will fully comply with the ethics agreement I have entered into with the NLRB and with the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490. If any case brought before me raises a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board. It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all applicable ethical guidelines. I pledge that I will make every effort to fully comply with all of them.

*Question 4.* The National Labor Relations Act states that employees have the right to organize a union and bargain with their employer, and they "also have the right to refrain from any or all such activities," except that they can be forced to pay dues in order to work at a unionized employer in non-Right-to-Work States.

Do you agree that all employees should have a right to refrain from joining or assisting a labor organization?

Answer 4. Section 7 of the National Labor Relations Board provides that

"[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

If confirmed as a Member of the National Labor Relations Board, I will enforce these rights.

*Question 5a.* In August 2011, the Board issued the *Specialty Healthcare* decision, which dramatically lowered the standard used to determine the size and scope of a bargaining unit. This decision allows unions to essentially gerrymander a bargaining unit among its supporters at a worksite. The result will be to further fracture employees' relationships with the employer, and their fellow employees. A key component of every secret ballot election, including our own as Senators, is that the majority rules.

Does the decision in *Specialty Healthcare* preserve the notion of "majority rule" in determining whether employees want to join a union?

Answer 5a. The decision in *Specialty Healthcare* preserves majority rule as, a majority of employees must select or designate the union in order to have union rep-

resentation. It is my understanding that *Specialty Healthcare* adopted a single description for the standard to be applied in cases where an employer challenges a proposed bargaining unit on the particular ground that other employees share such a strong community of interest that they must be included as well, and that the description adopted there was taken from a D.C. Circuit opinion by Judge Douglas Ginsberg, who explained its basis in prior NLRB decisions. If I am confirmed as a member of the National Labor Relations Board, I will consider any such positions and arguments with an open mind and carefully consider the facts of the case, the viewpoints of my colleagues, career Board staff and the parties, and apply the law in a fair and honest manner.

*Question 5b.* Does *Specialty Healthcare* conflict with the congressional intent that the Board not rely on the extent of organizing when determining the appropriate bargaining unit?

Answer 5b. No. The decision in *Specialty Healthcare* does not give any more weight to the extent of organizing than prior decisions and does not conflict with congressional intent.

SENATOR ENZI

#### *Federal Labor Law on Tribal Land*

*Question 1.* Wyoming is home to the Wind River Reservation where tribal governments and enterprises are recognized to have sovereignty over activities which take place on tribal lands. In a number of cases, the Supreme Court has recognized that Federal law does not infringe on this sovereignty unless Congress expressly says Federal law applies on tribal land. Do you believe that the National Labor Relations Act should override tribal employment codes?

Answer 1. I do not have a view on this question. If I am confirmed, I will approach the issue with an open mind, taking into consideration the views of my colleagues, the professional staff of the Agency, and the parties that would be affected, and the specific facts of the case at issue.

*Question 2.* Do you believe Congress intended the National Labor Relations Act to apply to tribal businesses?

Answer 2. The National Labor Relations Act does not contain an express exclusion for tribal businesses, in contrast to certain other entities identified in Section 2(2) of the Act. In *San Manuel Indian Bingo & Casino*, the Board concluded that the Act could be applied to certain tribal businesses.

#### *Congressional Oversight*

*Question 3.* In a 2012 presentation before the American Bar Association you authored a paper in your capacity as Associate General Counsel of the AFL-CIO suggesting that congressional oversight of the National Labor Relations Board (NLRB) was “over the top.” Specifically, you noted that “information requests were rampant” and identified specific bills introduced in the House and Senate which you consider as attacks on the NLRB.

Is it your opinion that Congress does not have an institutional prerogative to conduct oversight over Federal agency activities?

Additionally, is it your opinion that Congress cannot consider legislation amending organic statutes including those which created the NLRB?

Answer 3. The Constitution grants Congress the authority to conduct oversight over Federal agency activities and to amend statutes including the NLRA. My presentation did not state otherwise. I believe Congress has the right to consider such matters.

SENATOR BURR

*Question 1.* If you are ever served with a congressional subpoena, will you commit to complying with said subpoena to the satisfaction of the issuing authority?

Answer 1. I will make every effort to comply with any congressional subpoena.

*Question 2.* Your public financial disclosure form lists pensions with AFL-CIO and UAW that provide you with monthly financial benefits. Do you plan to recuse yourself from all rulemakings and other matters that would have a direct financial impact on the AFL-CIO and UAW?

Answer 2. I take my ethical obligations very seriously. This includes any obligation that I may have to recuse myself from a specific case. I will fully comply with the ethics agreement I have entered into with the NLRB and with the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in

Executive Order No. 13490. If any particular matter brought before me raises a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board. It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all applicable ethical guidelines. I pledge that I will make every effort to fully comply with all of them.

I am receiving retirement benefits from the International Union, UAW and the AFL-CIO. Because I will continue to participate in these defined benefit plans, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the ability or willingness of either entity to provide me with this contractual benefit, unless I first obtain a written waiver under 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption under 18 U.S.C. § 208(b)(2).

*Question 3.* What is your justification for your statement that the AFL-CIO is self-dominant before the Board? The record is replete with organizations under the authority of the AFL-CIO coming before the Board. The NLRB's Web site's Case Search engine calls up over 100 pages of results listing specific parties identifying themselves as AFL-CIO organizations.

*Answer 3.* Various unions that come before the Board are affiliated with the AFL-CIO, but that does not make the AFL-CIO a party to a case. Likewise, the Chamber of Commerce does not become a party by virtue of one of its members coming before the Board.

The reason a search of the NLRB's Web site finds cases listing the AFL-CIO is that affiliated unions and their locals include the name of the AFL-CIO to indicate the affiliation of their national union. There is a well-established body of law, including decades-old Supreme Court precedent, that the voluntary unincorporated association which is the AFL-CIO and those national unions which are its affiliates constitute legally separate and distinct entities.

*Question 4.* In your experience as a lawyer, how frequently do you see an agent of a party in ongoing disputes be made a judge in such disputes?

*Answer 4.* I have not, in my own experience as a lawyer, frequently seen a representative of a party in a particular case be called upon to adjudicate the particular case in which s/he represented one of the parties.

However, I have seen multiple situations where advocates become adjudicators. For example, many NLRB Board Members have come from private practice where they represented employers and the Chamber of Commerce. I do not anticipate that any of my fellow nominees will be biased or unduly influenced by their experiences working for management-side law firms representing employers and the Chamber of Commerce, or that Chairman Pearce would be biased based on his prior work history, my work experience will not inhibit me from being a neutral arbiter of the law.

*Question 5.* Chairman Harkin said, based on his reading of an introductory portion of the NLRA that the job of the NLRB is to encourage collective bargaining. Do you share his belief or do you believe a more complete reading of the law says that the NLRB should be a fair arbitrator between the parties in dispute and should protect the rights of employees to either choose or reject unions?

*Answer 5.* I agree with both articulations and do not think they are inherently in conflict. Chairman Harkin correctly quoted from the preamble to the Act; and the Act, in section 7, protects, *inter alia*, the rights of employees to refrain from engaging in activities articulated therein.

*Question 6.* Do you believe employers should have a right to legal counsel regarding unionization matters?

*Answer 6.* I believe that employers should be free to retain legal counsel to represent them if they so choose.

*Question 7.* Could you provide three instances in your career where you have taken a stance in opposition to a union?

*Answer 7.* While I was employed by the International Union, United Auto Workers and by the AFL-CIO, I occasionally represented both entities in their capacities as employers and advised them on internal grievance matters. During the course of such grievance procedures, I represented my client in positions taken in opposition to the labor unions.

As a Field Attorney of Region 7 of the National Labor Relations Board, I brought picket line injunction cases against unions, I investigated unfair labor charges against unions, and I prosecuted at least one discharge case against a labor union.

Also during my tenure with Region 7, I recall issuing a decision in an NLRB post-election objection case in which I dismissed objections to conduct affecting an election, which had been filed by a union.

*Question 8.* You've stated that you recognize the difference between being an advocate and being an arbitrator. Could you name three policy positions you were required to speak for as an employee of the AFL-CIO which you do not currently hold?

*Answer 8.* The fact that as an employee of the AFL-CIO I advocated specific policy positions does not mean that if I am confirmed as a member of the NLRB that I would not be a neutral arbiter of the law. Regarding specific policy positions for which I advocated as an employee of the AFL-CIO, the advocacy and advice I provided are subject to attorney-client privilege and I cannot elaborate on internal deliberations I engaged in with my client. If I am confirmed as a member of the National Labor Relations Board, I will approach cases with an open mind, carefully consider the specific facts and arguments presented, seek out the experience and expertise of career Board staff, engage in collegial and productive discussions with my colleagues on the Board to have the benefit of their experience and knowledge, and fairly consider the issues presented. I know the difference between advocating on behalf of my client, having personal viewpoints, and fairly applying the law. I am committed to doing the latter if I become a member of the National Labor Relations Board.

*Question 9.* Public-sector/public safety employees can be prohibited from volunteering due to employment contracts. The AFL-CIO has supported these clauses. Do you believe that such clauses are ever appropriate regardless of whether or not an organization is governed by the National Labor Relations Act?

*Answer 9.* The National Labor Relations Act does not apply to public sector/public safety employees and I do not believe that it speaks to this issue which would be governed by State law and the Fair Labor Standards Act.

I am not familiar with this issue and do not believe I have ever taken a position relating to this issue.

*Question 10.* Do you believe threats of physical violence by pro-union supporters is ever acceptable? Do you consider such behavior to be coercive and an unfair labor practice?

*Answer 10.* I believe that threats of violence are not acceptable and are coercive. Whether the threats constitute an unfair labor practice would depend on whether they were made on behalf of an employer or a union and on the objective in making the threat. The unfair labor practices set forth in the National Labor Relations Act apply to conduct by employers and unions. Threats by individuals are a matter for local law enforcement.

*Question 11.* Do you envision a scenario in which you would support an effort by employees to preserve an open shop?

*Answer 11.* I would neutrally enforce the National Labor Relations Act to protect employees engaged in protected activity without regard to their support for or opposition to union organizing or membership. I would approach any case that raised the issue presented in your question based on the facts of the case and the applicable law.

#### SENATOR ISAKSON

*Question 1.* In 2007, while you were at the AFL-CIO, your organization called for the NLRB to be "shut down" until a Democratic president could appoint a Board more favorable to organized labor. Ironically, in the past year, the same organization whom you used to work for called on the Senate to ensure that NLRB was a fully functioning Board. Should the Board's existence merely be a matter of convenience to the agenda of organized labor?

*Answer 1.* No. I believe in the Act and in the mission of the National Labor Relations Act and I do not think it should be shut down.

*Question 2.* In January 2012, when the Senate was in a *pro forma* session, President Obama "recess"-appointed Sharon Block and Richard Griffin to the NLRB. Since then, three Federal circuit courts have ruled that the President's recess appointments violated the Constitution and the Supreme Court is expected to hear arguments surrounding this issue in the near future. In your opinion, do you believe that the President acted responsibly and appropriately when he chose to appoint Ms. Block and Mr. Griffin during a *pro forma* session of the Senate?

Answer 2. The question of the January 2012 recess appointments is currently pending before the Supreme Court. Only the Supreme Court can answer that question, and it is not within my purview.

*Question 3.* In a case involving Bergdorff Goodman, the Board's regional director used *Specialty Healthcare* as the premise for allowing the Retail, Wholesale, Department Store Union to represent both full-time and regular part-time women's shoes associates on the 2d floor and 5th floor of the store. Wouldn't common sense dictate that creating various, small collective bargaining units within the same workplace lead to increased labor relations costs as well as hostility among employees regarding wages, benefits and pensions? How does that help an employer stay in business? How does that create jobs?

Answer 3. The case involving Bergdorff Goodman is currently pending before the Board. I do not want to prejudge any case that may, if I am confirmed, come before the Board. I need the opportunity to review the record and consider the views of career Board staff, my colleagues, and the parties. I am aware of cases where employers have invoked *Specialty Healthcare* in support of their own positions regarding appropriate bargaining units, so it seems to depend on the specific facts of the case.

*Question 4.* Do you believe that it is within the purview and Constitutional authority of the Congress of the United States to hold hearings, conduct investigations and deliberate matters in the interest of transparency and accountability?

If no, then please explain. If yes, then please explain why at the 2012 American Bar Association Midwinter Meeting you characterized recent efforts by the Congress to conduct its responsibility of providing oversight of the NLRB as an "attack."

Answer 4. I believe in the right and obligation of Congress to engage in oversight. In my presentation, I listed certain rhetoric, some of which was directed personally at the Acting General Counsel and career staff and was not attributed to Members of Congress or linked to any congressional action which, in my opinion, constituted a personal attack and not a congressional inquiry.

SENATOR HATCH

*Question 1.* In early 2012, you gave a presentation for the American Bar Association criticizing Congress's oversight of the NLRB. In that paper, you listed what you called the "Top Ten Attacks on the National Labor Relations Board." Taking the top spot on your list were actions taken by Members of Congress to, among other things, "create a construct to prevent the President from exercising his Constitutional power to make recess appointments." You wrote this less than 2 months after the President unlawfully appointed two nominees to the Board.

It seems evident that you were implying that the President was justified in making these two appointments. That certainly would have been in line with statements made by other officials at the AFL-CIO, your former employer. But, I want to make sure your views are clear on the matter.

In your view, did the "construct" created by Senate Republicans justify the President's decision to make those unconstitutional appointments?

Answer 1. The question of the January 2012 recess appointments is currently pending before the Supreme Court. Only the Supreme Court can answer that question, and it is not within my purview.

*Question 2.* In the same 2012 presentation, you argued that several pieces of legislation constituted "attacks" on the NLRB. Among others, your list included bills that would mandate secret ballot representation elections, create a national right to work, and exercise Congress's prerogatives under the Congressional Review Act to block administrative regulations.

Is it still your opinion that these and other bills amending U.S. labor policy constitute unfair "attacks" on the NLRB?

Answer 2. The Constitution grants Congress the authority to amend statutes including the National Labor Relations Act. My presentation did not state otherwise. I believe Congress has the right to amend statutes.

In my presentation at the Midwinter meeting of the ABA Committee on Practice & Procedure before the National Labor Relations Board, I highlighted actions by Congress which sought to change, influence, and affect the National Labor Relations Act and the National Labor Relations Board, in connection with my role as an advocate on behalf of the AFL-CIO. The purpose of my presentation was to provide a thorough list of congressional actions relating to the National Labor Relations Board since the Agency is the subject matter of the ABA Committee on Practice & Procedure before the National Labor Relations Board and the primary practice area of



its members, including management and union representatives as well as neutrals. I understand that such measures are within the legitimate authority of Congress and respect Congress' right to take such actions.

*Question 3a.* One of the most high-profile actions taken by the Board in recent years was the decision by the Acting General Counsel to file a complaint against Boeing for building a new plant to perform new work in South Carolina, a right-to-work State.

In your 2012 ABA presentation, you publicly criticized Members of Congress who took issue with the Boeing Complaint, saying that, with the complaint, "Republicans had an issue they believed they could ride all the way to the 2012 elections." In addition, leaders at the AFL-CIO, your former employer, cheered the Boeing Complaint and expressed a hope that similar complaints would be filed elsewhere.

What are your personal legal views on the merits of the Boeing Complaint?

*Answer 3a.* I was not privy to the deliberations that led to the issuance of the Boeing Complaint. It is the role of the General Counsel to make determinations regarding charges brought before him and to refer such cases for hearing and adjudication on the merits. The General Counsel's determination is not a final determination on the merits on the case. I have no view on the ultimate merits of the case. Since no hearing was ever completed in connection with the Boeing Complaint, there is no public record of testimony and documents; and no publicly available briefs were filed. It is my understanding that the matter was resolved to the satisfaction of the parties and that the complaint was therefore withdrawn.

*Question 3b.* Is it still your opinion that congressional inquiries into the Acting General Counsel's decisionmaking process with regard to the Boeing Complaint constituted personal and unfair attacks?

*Answer 3b.* I believe in the right and obligation of Congress to engage in oversight. In my ABA presentation, I also listed certain rhetoric, some of which was directed personally at the Acting General Counsel and career staff and was not attributed to Members of Congress or linked to any specific congressional action. If confirmed, I pledge to cooperate with congressional inquiries and oversight.

*Question 4a.* In your 2012 ABA presentation, you also listed 10 hearings in the House of Representatives in 2011 and 2012 examining the NLRB's actions and processes. These hearings were among the "attacks" on the NLRB discussed throughout your presentation.

Is it still your opinion that these oversight hearings constituted unfair attacks on the Board?

*Answer 4a.* The Constitution grants Congress the authority to conduct oversight over Federal agency activities. My presentation did not state otherwise. I believe Congress has the right to consider such matters. Again, if confirmed, I pledge to cooperate with congressional inquiries and oversight.

*Question 4b.* In your view, is Congress entitled to hold hearings to examine activities by the NLRB that it finds questionable?

*Answer 4b.* Congress is entitled to hold oversight hearings regarding the National Labor Relations Board.

*Question 5a.* You have written and spoken very extensively in support of the so-called Employee Free Choice Act. Specifically, you've made a number of public statements praising the "card check" process for unionization and disparaging secret ballot votes in union representation elections.

For example, in congressional testimony you gave in 2004, you said that,

"The NLRB representation process has become really a confrontational mechanism that forces workers through this sort of endurance process in order to be able to form a union," . . . "the process has become so gamed by employers as to create delay."

In 2007, you testified before Congress that the NLRB election process

"has become perverted. It now acts as a sword which is used by employers to frustrate employee freedom of choice and deny them their right to collective bargaining."

You also said that the election process "provides a virtually insurmountable series of practical, procedural, and legal obstacles."

With these and other statements, you seem to be describing a world that doesn't exist in our current reality. The truth is this: the average time between the filing of union petition and a representation election is 38 days. That hardly seems like a system fraught with undue delays. And, over the last 5 years, unions have been

successful in 63 percent of secret ballot representation elections. That hardly sounds like union supporters face insurmountable obstacles.

Given these realities, what is the basis for your outspoken support of the Employee Free Choice Act?

Answer 5a. I testified as an advocate representing the positions of the AFL-CIO. I fully understand the differences in the role of an advocate and a neutral arbiter of the law. In testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100-vote margin. Yet those workers were not able to be represented or engage in collective bargaining for 6½ years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within 38 days (i.e., within the 38 day statistic) that resulted in the selection of union representation (i.e., within the 63 percent statistic) did not insure that the election process was not fraught with delays.

*Question 5b.* Is it still your opinion that the current NLRB election process is inherently unfair?

Answer 5b. Whether the election process is fair depends on the circumstances in which the process is conducted.

*Question 5c.* Can you cite anything beyond anecdotal evidence to support that opinion?

Answer 5c. As discussed in my answer to question three, the specific case I discussed in my 2004 testimony provides an example of election certification delays.

One of the key functions of the NLRB is to oversee the conduct of representation elections and to assure, so far as possible, that employees are able to make a free and un-coerced choice as to whether they want union representation. If I am confirmed as a member of the National Labor Relations Board, I will apply the law impartially to all parties that come before the Board and make sure that cases are decided in a fair and expeditious manner. I have no preconceived agenda to change the election process. If presented with such positions, I will consider them with an open mind and make my decision based on the facts of the particular case and in consultation with my colleagues and career Board staff and with due consideration to the positions of the parties and the facts of the case.

Regarding the Employee Free Choice Act specifically, I believe that the changes it set forth could be achieved only through legislative action by Congress.

*Question 6.* In 2009, you gave a presentation at the Tulane Law School Multistate Labor and Employment Law Seminar about the Employee Rights Act. In that presentation, you wrote that,

“those who decry the loss of secret ballots must recognize that the democracy they advocate is the ‘democracy’ of Saddam Hussein—he had secret ballot elections, but no one thinks of his regime as democratic.”

Does this statement accurately reflect your current views of those who oppose “card check” union certifications and support secret ballot union representation elections?

Answer 6. In my 2009 presentation at the Tulane Law School Multistate Labor and Employment Law Seminar about the Employee Rights Act, the purpose of the statement cited was to illustrate that just because an election process results in the use of secret ballots doesn’t mean that the process is fair. Fairness depends on the facts, circumstances and procedures involved in the election process. When I was a Board agent at the NLRB’s Detroit Regional Office, I conducted secret ballot elections in workplaces and was inspired by the demonstration of workplace democracy I had the opportunity to experience. But I also had experiences where the process was not fair, as determined after adjudication and a decision on the merits. What is essential is that voters be able to exercise their right to vote free from coercion, intimidation or other interference from either the employer or the union. This is true with respect to political elections, here and around the world, and it is also true with respect to the election process of the National Labor Relations Board.

*Question 7.* As was discussed during the hearing, in the history of the NLRB, only two other members were appointed to the Board directly after working in-house for a labor union, but neither was confirmed by the Senate. If confirmed, you would be the first such member. As you may know, the first union lawyer appointed to the Board made numerous commitments to the committee to recuse himself in matters involving his former employer. Yet, during his time on the Board, he never fully recused himself.

What standard will you use in determining whether to recuse yourself in matters before the Board that involve your former employers?

Answer 7. I take my ethical obligations very seriously. This includes any obligation that I may have to recuse myself from a specific case. I will fully comply with the ethics agreement I have entered into with the NLRB and with the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490. If any case brought before me raised a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board. It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all of the applicable ethical guidelines. Further, I pledge that I will make every effort to fully comply with all of them.

SENATOR SCOTT

*Question 1a.* Ms. Schiffer, you asserted in 2010, “We really need to streamline the election process and eliminate so much delay that is now built into the National Labor Relations Act process.”

How can you feel this way, given that the median election time is 38 days, which according to the Acting General Counsel’s fiscal year 2011 Summary of Operations is “below [the] target median election time of 42 days?”

Answer 1a. I testified and made statements about the election rule in my capacity as an advocate for the AFL–CIO. I fully understand the differences in the role of an advocate and a neutral arbiter of the law. In testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100-vote margin. Yet those workers were not able to be represented or engage in collective bargaining for 6½ years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within the Board’s target median election timeframe that resulted in the selection of union representation did not insure that the election process was not fraught with delays. Whether the election process is fair depends on the circumstances in which the process is conducted.

*Question 1b.* Can you please explain how decreasing this critical window down to as few as 10 days would not fundamentally chill the rights of employers to make their case and the rights of employees to make informed decisions?

Answer 1b. As I understand it, the Board’s proposed election rule does not set any minimum or maximum time in which an election must be held. This issue may come before the Board and therefore it is inappropriate for me to prejudge it. I have no preconceived agenda. If presented with such positions, I will consider them with an open mind and make my decision based on the facts of the particular case and in consultation with my colleagues and career Board staff and with due consideration to the positions of the parties and the facts of the case.

*Question 1c.* How can you portray the election process as riddled with intimidation and lacking protections for workers seeking to organize when the facts suggest just the opposite?

- Unions won 66 percent of elections in 2009, up from a 51 percent success rate in 1997.

- However, the NLRB only accepted 44 percent of employee petitions to hold decertification elections in fiscal year 2010, down from 54 percent in fiscal year 2007.

Answer 1c. Again, in testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100 vote margin. Yet those workers were not able to be represented or engage in collective bargaining for 6½ years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within the Board’s target median timeframe that resulted in the selection of union representation (i.e., within the 66 percent statistic) did not insure that the election process was not fraught with delays. Whether the election process is fair depends on the circumstances in which the process is conducted.

It is my understanding that the Board will accept any timely petition to hold a decertification election where there is a sufficient showing of interest.

*Question 1d.* Given your extensive partiality toward unions and your characterization of the NLRA as a “sword which is used by employers to frustrate employee free-

dom of choice” that “no longer protects workers’ rights to form a union,” can you commit to carry out the mission of the Act in a neutral manner?

Answer 1d. If confirmed, I would take my role as a neutral adjudicator of the law very seriously. I pledge that if I was confirmed as Board member, I will apply the law impartially to all parties that come before the Board with no preconceived agenda and make sure that cases are decided in a fair and expeditious manner.

*Question 2.* You extensively rebuked two critical functions of Congress, oversight and legislative, in your “Congressional Review of the National Labor Relations Board: Oversight or Over-the-Top.” By characterizing my House Republican colleagues and me as being on a “meandering witch hunt” against the NLRB, you made a broad presumption that House oversight activities were unfounded. Are you aware that the subpoena for emails of the Office of General Counsel relating to the Boeing case revealed troubling violations of the NLRB’s own *ex parte* rules, the separation principle between the Office of General Counsel and the Board, as well as an extreme lack of professionalism and neutrality?

Answer 2. The Constitution grants Congress the authority to conduct oversight over Federal agency activities and to amend statutes including the NLRA. My presentation did not state otherwise. I believe Congress has the right to consider such matters. If confirmed, I pledge to cooperate with congressional inquiries and oversight.

*Question 3.* Since you have so openly discussed your views on the Boeing case, please confirm whether or not you believe that a company located in a non-Right-to-Work State, in this case Boeing, seeking to expand and create new jobs in a Right-to-Work State should be charged with an unfair labor practice when no jobs were lost.

Answer 3. I do not believe that a company located in a non-Right-to-Work State seeking to expand and create new jobs in a Right-to-Work State should be charged with an unfair labor practice on that basis alone. Whether the company’s actions could be alleged to have violated the National Labor Relations Act would depend on other facts and circumstances.

[Whereupon, at 11:50 a.m., the hearing was adjourned.]