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NOMINATION OF SHARON BLOCK TO SERVE AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

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SECOND SESSION

ON

NOMINATION OF SHARON BLOCK TO SERVE AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

SEPTEMBER 9, 2014

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C O N T E N T S

STATEMENTS

TUESDAY, SEPTEMBER 9, 2014

NOMINATION OF SHARON BLOCK TO SERVE AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

TUESDAY, SEPTEMBER 9, 2014

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

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

Present: Senators Harkin, Alexander, Casey, Whitehouse, Murphy, Warren, Isakson, Hatch, and Scott.

OPENING STATEMENT OF SENATOR HARKIN

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

We are holding this hearing today because at the end of the year, there will be a vacancy at the National Labor Relations Board resulting from the departure of Member Nancy Schiffer. I would like to take a moment first to thank Ms. Schiffer for her service. The President has nominated an exceptionally well qualified and dedicated public servant, Ms. Sharon Block, to fill the opening, and I look forward to her speedy confirmation.

A little over a year ago, for the first time in over a decade, we were able to confirm a fully functional five-member NLRB. It is my hope that by promptly confirming Ms. Block's nomination to fill the looming vacancy we can continue the progress that has been made and begin a new era where orderly transitions are the norm, not the exception.

The NLRB is an agency that is absolutely critical to our country, to our economy, and to 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 bargain for a better life. For both union and non-union workers alike, the Act provides essential protections. It 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 NLRA. The Board is the only place workers can go if they have been treated unfairly or denied the basic protections that the law provides.

In the past 10 years, the NLRB has secured opportunities for reinstatement for 22,544 employees who were unjustly fired. It has also recovered more than $1 billion on behalf of workers whose rights 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.

During our last NLRB hearing, one of the nominees described himself as being not pro-worker or pro-union or pro-employer, but instead he said he was pro-Act, pro-NLRA. I believe any nominee that comes before this committee should be pro-Act, and I am confident that Ms. Block, with her labor and employment law expertise, her expertise of having worked on this committee and on the Board, will be such a person. Two of the qualities that have always impressed me about Ms. Block are her commitment to public service and her ability and willingness to work with Democrats, Republicans, or whomever as long as they are committed to upholding and enforcing our Nation's labor and employment laws.

Much has been made by some of my colleagues about Ms. Block's previous service at the Board as a recess appointee. During that period, I watched as she courageously fulfilled the duties she had sworn to carry out as a member of the Board, even in the face of constant political interference and even some personal attacks. Those criticisms and attacks were unfair then and they are unfair now.

Ms. Block conducted herself appropriately at all times during her previous service and instead of attacks, she deserves our appreciation because without her service, the Board would have lacked a functioning quorum and would have had to shut down. We would be hard pressed to find a more qualified nominee than Sharon Block.

Keeping the NLRB fully staffed and able to do its work will send a strong message to the American people that yes, Washington can work, and our government can function. It will give certainty to businesses and assure workers that someone is looking out for their rights and ready and able to enforce our Nation's labor laws. I look forward to hearing Ms. Block's testimony today and to moving her nomination expeditiously through this committee and through the Senate.

I'll turn now to Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks, Senator Harkin.

Ms. Block, welcome. It's good to see you.

As we meet here today, the National Labor Relations Board has hundreds of decisions that it must re-decide, 436 decisions made between January 2012 and July 2013 that were made invalid by the U.S. Supreme Court's unanimous ruling this summer. This

enormous load of cases to re-decide is no surprise to me, and it shouldn't be a surprise to anybody.

In December 2011, 47 Republican Senators sent a letter to the President urging him not to go around Congress with his appointments to the NLRB. The President ignored our request and appointed Ms. Block along with two other individuals to the NLRB in January 2012. He wasn't just ignoring our opinion. The President ignored the Constitution. He used the recess appointment power at a time when the Senate wasn't in recess. That's not just my opinion. It's a fact.

The D.C. Circuit said the appointments, including Ms. Block's, were unconstitutional. The Fourth Circuit Court of Appeals weighed in and said the recess appointment of Ms. Block violated the Constitution. This summer, the Supreme Court unanimously said it was unconstitutional. The only people who seem not to realize that were the President and the nominees themselves, including Ms. Block. Her appointment, along with Richard Griffin, is why the NLRB has before it today 436 decisions that must be re-decided.

This has created a lot of wasted time and money, a great deal of extra work, confusion for workers, confusion for employers, who count on the Board to properly and fairly adjudicate their disputes. The Board's own website says it has a, "daily impact on the way America's companies, industries, and unions conduct business."

The process for re-deciding the cases will extend the legal expenses and uncertainty for hundreds of employees, employers, and unions who are party to the case. Instead of being able to focus on strengthening and growing a business, these folks are trapped in NLRB limbo.

Ms. Block is here today to be considered to serve on the Board, this time proposed in the constitutional way. She has been nominated for a term that would begin in December, a little over 3 months from now. The President has submitted her nomination with adequate opportunity for Congress to consider that nomination. That's a good start. But I'm concerned that the American businesses and workers who count on the NLRB for stability are being asked to rely on the judgment of someone who chose instead to create confusion and instability.

Ms. Block served on this Board under an unconstitutional recess appointment. She stayed in that position 18 months. She participated in hundreds of decisions. I said then that her actions revealed a troubling lack of respect for the Constitution's separation of powers and the Senate's constitutional role to advise and consent.

Putting that aside, I am concerned, too, that in her time on the Board, Ms. Block has demonstrated a willingness to tilt the playing field toward organized labor. I'll have some questions about that when my time comes. This nominee would not be the first to tilt the playing field of the NLRB one way or the other. The NLRB has, in my opinion, become more partisan in recent decades. Policy reversals and dramatic shifts are becoming regular expectations with each new administration.

So I intend, with Senator McConnell of Kentucky, next week to introduce legislation to restore the National Labor Relations Board to its intended role of acting as an umpire and applying the law

fairly and impartially instead of acting as an advocate for one side over the other. That's how important I think the Board is and how important I think it is that it be a stabilizing force.

Ms. Block, I thank you for being here. I look forward to hearing your thoughts and having a chance to ask some questions.

The CHAIRMAN. Thank you, Senator Alexander.

We welcome you, Ms. Block, and for purposes of introduction, I'll yield to Senator Murphy.

Senator MURPHY. Thank you, Mr. Chairman, and thank you, Senator Alexander, for holding this hearing. I'm proud to be back again to introduce a dedicated public servant from Westport, CT, whose parents made the trip down from Connecticut to see their daughter's nomination considered by this committee.

I've had the pleasure of getting to know Ms. Block during her previous confirmation process but also through her work as a senior counselor to Secretary Perez at the Department of Labor where she worked very hard on getting long-term unemployed Americans back to work and helping at-risk youth develop the job skills necessary to succeed in today's economy. We thank her for her great work there.

Many on this committee, of course, will remember Ms. Block from her time as the senior labor and employment counsel for this committee under Chairman Kennedy. She did a lot of good work there, but, most notably, helped pass a crucial piece of legislation that will ensure fairness in the workplace and pay equity for women, the Lilly Ledbetter Fair Pay Act.

As you know, Mr. Chairman, the NLRB is the most important safeguard for both employees and employers that we have today. I'm glad that we're considering such a fair and diligent member to serve on the NLRB. Ms. Block has served with integrity as a Board member since January 2012, where at her last confirmation hearing, even many of my Republican colleagues who opposed her nomination noted her long career in public service and her stellar qualifications to be an NLRB Board member.

We welcome you back to the committee and look forward to your testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murphy.

Welcome again, Ms. Block, back to the place where you—I think you almost started here, if I'm not mistaken, on this committee. Your statement will be made a part of the record in its entirety. Please proceed as you so desire.

STATEMENT OF SHARON BLOCK, NOMINEE FOR MEMBER, NATIONAL LABOR RELATIONS BOARD, WASHINGTON, DC

Ms. BLOCK. Thank you so much, Chairman Harkin, Senator Alexander, Senator Murphy, members of the committee. I am honored and humbled to appear before you again as a nominee for the National Labor Relations Board.

The Board, for the first time in a decade, is operating under regular order with five confirmed members and only one vacancy on the horizon. As a result, the Board has a chance to undergo an orderly transition from one Board to the next, without the uncertainty and disruption that comes with multiple Board member va-

cancies that in the recent past have extended for long periods of time and threatened the existence of a quorum. This allows the Board members and their staffs to concentrate on doing the public's work.

I have spent the largest part of my career as a career civil servant with the Board. I started my career in private practice representing management in employment cases at Steptoe and Johnson, but I came to the Board when my career was still in its formative stage. I had the privilege to serve Boards in both Democratic and Republican administrations.

My service as a career attorney culminated with my position on the staff of former Republican Chairman Bob Battista. When I served as senior counsel to Chairman Battista, I always appreciated the frank case discussions and respect he showed the dedicated career attorneys on his staff. As a former career attorney, I would never underestimate the value of the expertise of the Agency's exceptional career staff.

As Senator Harkin suggested, since the last time I appeared before you, the Supreme Court has issued its decision in *Noel Canning*. Although my expertise is in labor law, not constitutional law, as a lawyer, I assure you I have an unwavering respect for our judicial process in resolving difficult legal issues like those involved in that case. So I have a keen appreciation of the process that brought us to this point and the utmost gratitude for the opportunity to sit before you again today as a nominee.

I am also grateful to this committee and the Senate for confirming a full Board. As someone who has spent the better part of my career at the Board, I can unreservedly say that it was a good day for the Board when Nancy Schiffer and Kent Hirozawa began the process that culminated in their confirmation with Chairman Pearce and Members Johnson and Miscamarra.

I am especially grateful to Member Schiffer who came out of retirement to answer the call to public service and who has so ably led the staff that I had had the honor to work with. Anyone who cares about the Board and the efficient functioning of government on either the labor or management side of the Board's cases must agree that a fully confirmed, five-member Board is the ideal, as the statute prescribes.

If fortunate enough to be confirmed for a seat on the Board, I would bring with me passion for the kinds of cases that make up the heart of the Board's docket, the cases where the parties have no interest in making law or grabbing headlines. In such cases the Board, as a neutral adjudicator, brings resolution to parties who just want to have their voices heard and their views fairly considered. Throughout my different tenures at the Board, these are the cases that have dominated the Board's docket and which I have found the most rewarding.

The reality of my time on the Board, as with most Board members, is that the majority of cases that I participated in were unanimous decisions that applied longstanding precedent. They are the cases where we make a difference in people's lives by getting them their jobs back after they have been unlawfully discharged or facilitating the bargaining process by allowing companies to move forward running their businesses when a genuine impasse in negotia-

tions has been reached. I remain dedicated to moving these cases as fairly and efficiently as possible.

I would also bring with me lessons learned in this room during my tenure on the committee's staff. When I was here last year, I shared the important lessons that I learned from participating in this committee's work on the MINER Act. This committee continues a strong tradition of working across party lines to pass significant bipartisan legislation. The committee's great accomplishments are examples that I would carry with me to the Board of what good work for the American people can be achieved when we work amicably across the aisle.

In closing, I would like to thank Secretary Perez for having given me the opportunity over the past year to continue to serve the public in this administration. He is a remarkable leader from whom I have learned so much.

And I would like to thank my family that is here with me for all their love and support during the ups and downs since they last sat in those seats. Since I was here last year, my children have graduated from high school. So my son, Eli, who started at Oberlin College just a few weeks ago, is not here today. But my daughter, Charlotte, who will be starting at University of Chicago in a couple of weeks, is here, with my husband, Kevin, my parents, Lois and Joseph Block, my uncle, Michael Fuchs, and my aunt, Froma Sandler.

Thank you for the opportunity to offer these remarks. I welcome your questions.

The CHAIRMAN. Thank you very much. I'm sorry about the sound system. I don't know what's going on here, but I think it's a little bit better now.

First of all, we welcome you and all your family members who are here. Welcome to the Senate and the Senate Committee on Health, Education, Labor, and Pensions.

We'll start a round of 5-minute questions.

First of all, Ms. Block, some of my colleagues, in my opinion, I believe, have unfairly criticized your previous service as a member of the Board. If anything, I believe that they should be praising your commitment to public service.

I know the last few years have been a bit of an ordeal for you and your family with multiple nominations, public criticism, a lot of uncertainty, all of which was due to factors entirely beyond your control. You have done nothing but answer a call to public service and do your best to do your duty, and I commend you for your continued willingness to serve after all that you've been through.

You mentioned your previous service at the Board and the Supreme Court's decision in *Noel Canning* in your opening statement. I'd like to give you the opportunity to share with the committee the thinking that went into your decision to continue to serve when the President's recess appointment authority was challenged in Federal court. I'm also interested in learning more about your decision to continue to issue case decisions at that time. If you could respond to that and tell us about your thinking at that time, I would appreciate it.

Ms. BLOCK. Thank you, Senator. Thank you for the question and I appreciate the opportunity to continue this conversation that we

started last summer on this issue. If I start at the beginning, I was asked whether I was willing to be nominated, and I was honored to be asked, and I made a commitment in accepting the opportunity to be nominated. I made a commitment to serve, and I took that commitment very seriously.

When I got to the Board, I then took an oath to serve to the best of my ability. And, again, I took that oath very seriously. I made my commitment and took that oath in the context of understanding that obligations under the National Labor Relations Act aren't suspended during disputes over composition of the Board.

While I was aware, of course, of the disputes over the Board's composition during my service, I was also aware of the system in place to resolve those kinds of disputes. I have a deep respect for the judiciary and that process by which the Federal courts resolve constitutional questions subject, obviously, ultimately to Supreme Court review.

During my tenure, the Supreme Court had not made that ultimate decision. As you noted, the decision came just this past summer. But the process of review moving toward the Supreme Court's resolution was ongoing. When the D.C. Circuit issued its decision in *Noel Canning*, again, that process continued. The solicitor general filed a Petition for Certiorari. The court granted that petition. So we knew we were moving toward the ultimate resolution of the question. That was true during the entirety of my service.

When I looked at the importance to me of the oath that I had taken to serve and to serve to the best of my ability, the fact that I knew that the process was underway to ultimately resolve the issue, I thought the best way to honor that oath was to continue to serve and to ensure that that process that the Constitution prescribed for resolving constitutional questions was in place and would move toward that resolution.

The CHAIRMAN. And isn't it true at that time that there was a split in the different circuits on this issue?

Ms. BLOCK. In fact, as the D.C. Circuit noted in its decision in *Noel Canning* that there had been, to the extent that the issues raised in that case had been addressed at all by other circuits—that there was a split in the reasoning in those cases.

The CHAIRMAN. So here you are. You're on the Board. The D.C. Circuit issues one opinion. There are opinions in other circuits that contradict that, and, of course, those are the times when, hopefully, the Supreme Court then takes it up and resolves those differences, which it did, but not until this summer.

So let me understand this. While you took an oath of office to serve and to fulfill your oath, your service was not circumvented by just the D.C. Circuit, because you've got to look to another circuit for just the opposite result. Therefore, it seems to me that in those cases, you have an obligation. Any public servant has an obligation to continue to serve and to fulfill their oath of office until such time as this is resolved by the Supreme Court.

That's why I have said that I think it has been unfair for people to say that you should have resigned simply because of one circuit, or you can't issue decisions. The wheels of government and other entities go on regardless of whether one court says this—there's always a final adjudication, whether it's an appeal process in civil or

criminal courts, and until that final adjudication is made, people are not denied their right or their obligation to fulfill their contractual agreements or their, in this case, oaths of office.

That's why I've always felt that it was just not fair to criticize you for fulfilling what was your oath of office in the face of two disparate rulings by circuit courts. Now, today, obviously, that's different because the Supreme Court has made the decision on that.

Thank you, Ms. Block.

Senator Alexander.

Senator ALEXANDER. Ms. Block, during an organizing campaign, the current law requires employers to provide union organizers with a list of employee names and home addresses. This is called the Excelsior List. For example, in Chattanooga, TN, we have an ongoing organizing effort at the Volkswagen plant. In a secret ballot election last February, the majority of employees rejected the United Auto Workers bid to unionize the plant. The vote was 712 to 626.

The NLRB is in the middle of a regulatory effort to expand the requirement that more information about these employees be given to the organizing union. They are proposing including the telephone number of the employee, the email address, the employee's work location, the shifts, the job classifications. It seems like everything but attaching a GPS to the employee.

So my question is if you were one of the 712 Volkswagen employees who voted no, that you didn't want to organize the union at the Chattanooga plant, would you want your boss to hand over to the union your email address to the union organizers?

Ms. BLOCK. Senator, thank you for the question. I think what you are alluding to is the proposed rule that's currently pending with the Board that does address this issue over information that needs to be provided. As you mentioned, it's now currently——

Senator ALEXANDER. No. What I'm asking is if you were one of those who voted no, you didn't want the union to organize, would you want the NLRB to order your email address turned over to the union organizers?

Ms. BLOCK. My understanding of the way that the process works is that, as you pointed out, the information now, which is name and home address, is turned over prior to the election when, presumably, employees are in the position of making a decision about how they want to vote in the election.

Senator ALEXANDER. And the proposal is to expand that, but I'm asking would you want your work location, your shift, your job classification, all that information to be turned over to the union organizers prior to the election?

Ms. BLOCK. My understanding is that that is part of the proposal that's currently pending before the Board, a proposal that was made after I left the Board. I don't think it's appropriate for me to voice an opinion on what the law should be or whether that particular provision should be——

Senator ALEXANDER. I'm not asking what the law should be. I'm just asking whether you think, if you were an employee, you would like to have all that information turned over.

Ms. BLOCK. I think a lot of people know that information about employees. I'm trying to be appropriate about the kinds of positions

when there's been issue—the answer to that question necessarily implicates an issue that there is a possibility if I'm fortunate enough to be confirmed that I would have to consider. I do understand, although I wasn't on the Board when the latest proposed rule was——

Senator ALEXANDER. So you don't want to say whether you would like to have all that information turned over to the union organizer if you were an employee.

Ms. BLOCK. I just think it's more appropriate to be sure that were I to return to the Board that I have the benefit of an open mind in deliberations with my colleagues about that.

Senator ALEXANDER. Would you at least insist that if this rule goes forward that employees have an opportunity to opt out of this? If an employee says, "Look, I want some privacy. I don't want to be bothered at home. They already have my name and home address, but I don't want them to have my telephone number, my email, my work location, my shift, my job classification. I'd like to opt out of that," do you think that would be a reasonable right for an employee to have?

Ms. BLOCK. Although I haven't been privy to the comments that have been submitted pursuant to the current proposal, I would imagine that issue is addressed in the comments. And if I have the opportunity to be at the Board and be in a position to consider that issue and consider comments raised, I can assure you I would take those comments very seriously as part of the deliberative process, consider the reasons why a commenter made that argument, and deliberate with my colleagues about the best way to address the concerns raised or the suggestions made in the comments.

Senator ALEXANDER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. In order, I have Senator Murphy, Senator Hatch, Senator Casey, Senator Scott, Senator Isakson.

Senator Murphy.

STATEMENT OF SENATOR MURPHY

Senator MURPHY. Thank you very much.

Good to see you again, Ms. Block.

Thank you, Mr. Chairman, for having this hearing.

One thing I always struggle to understand are two very different numbers that exist in the workforce today. Polls consistently show that about 53 percent of workers want to be part of a union to be able to negotiate for better working conditions, and yet only 7 percent of workers are represented.

Maybe part of the explanation for that is that there's at least one study out there that shows that amongst workers who have openly advocated for a union during an election campaign, over a period of time after they advocated for the union, one out of five of those workers ended up getting fired. Another is that the process of going through the election has gotten longer and longer in part because of litigation that gets introduced and disputes that get sent to the NLRB in the middle of the election process.

I wanted to ask a question about the NLRB regulations that have started to make a little bit more sense of the election process. They've been criticized as requiring quickie elections where—and, as I understand it, this is really about saying to both employers

and employees that if you have disputes, let's litigate those after the elections rather than hold up the process.

I wanted to just ask you a very general question about how you see the implementation of that new set of rules going and then whether you think that there are additional steps that need to be taken in order to make sure that that election happens in a timeframe that is fair, not advantageous to employers or employees, but that gets the job done with enough time in order for both sides to make their case, but not so much time that it becomes a barrier to the majority of workers who, I would argue, are interested in having a discussion about organization.

Ms. BLOCK. Thank you for the question, Senator. I have to start at the same place where I left off with Senator Alexander. To the extent that the proposal is still pending before the Board—and, again, it was a proposal that was promulgated after I left the Board—if I was fortunate enough to come back, I would certainly take very seriously the opportunity to review the record, and to the extent that there are comments in the record that present that point of view or the point of view that Senator Alexander offered, I would take those comments very seriously, but also to deliberate with my colleagues who were on the Board at the time that the proposal was made to understand the thinking behind the proposal and to hear all of the Board members' views on what they believe the objective of the rulemaking was and participate in that deliberative process to come to a conclusion.

Senator MURPHY. Thank you. I'm going to have mercy, given the state of your microphone.

Mr. Chairman, I would add that the oath that we all take to serve is a very serious one, and Ms. Block took that oath. Notwithstanding the controversy in the courts, she was still bound by the oath that she took to carry out her duties as a member of the NLRB and to carry out the administration of the laws of the United States. I'm glad that she took that oath seriously enough to make sure that she served her country, as she has during her entire career, even while there was a legitimate controversy pending before our Federal court system.

I thank you again, Ms. Block, for your perseverance in pursuit of justice for employers and employees and your willingness to come back and serve again despite often the personal nature of this controversy over the last several years, and I look forward to supporting your nomination.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murphy.

Senator Hatch.

STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

Ms. Block, welcome to the committee that you know well. As you know, there are scores of NLRB decisions that have to be reconsidered after the Supreme Court's decision in *Noel Canning*, including many decisions in which you've participated. Obviously, there is some question as to your ability to be impartial as the Board reconsiders these cases. That being the case, would you be willing to

recuse yourself from participating again in those same cases where you participated before that the court has found improper?

Ms. BLOCK. Thank you for the question, Senator. I can assure you that if I was fortunate enough to come back to the Board and a party was to make a request that I recuse myself from a case, I would, of course, take that request very seriously, whether the basis of it was my prior service on the Board in a case impacted by *Noel Canning* or for any other reason. And I would certainly consult with the agency's ethics officials to determine—to look at those arguments made and to determine whether recusal was necessary or not. I can assure you that I would do that.

More generally, though, in thinking about approaching cases that could come back that I had acted on before in my prior service, I can certainly pledge that if a recusal motion was not made, I think even in that respect, I have an obligation to assure the committee and my colleagues that I would keep an open mind regarding the decision.

One big factor that would be different in looking at a case that came back to the Board than the first time is the deliberations with my colleagues, which I did find during my prior service to be a very important part of the process of making a decision. And, obviously, I would have different colleagues at the Board today, and I happen to have the privilege of knowing all four continuing Board members, some of them because I served with them, like Chairman Pearce, and some I don't know as well. But I know all of them well enough to know that I have a great deal of respect for their experience, and I would have a great deal of respect for their opinions in that deliberative.

Senator HATCH. Ms. Block, I want to ask you about a particular case you decided when you were on the Board the first time, which was held in abeyance by the D.C. Circuit pending the Supreme Court's decision in *Noel Canning*. The decision I'm referring to was in the Fresenius case.

To refresh your memory, that case involved allegations of sexual harassment where a pro-union employee scrawled sexually obscene, threatening, and harassing statements on union literature left in a common area in the workplace directed at women whom he believed might vote to decertify the union. Naturally, the women employees felt threatened, and they asked their employer to undertake a sexual harassment investigation, as the employer was required to do under Title VII of the Civil Rights Act.

When the culprit was questioned by management, he lied and denied any involvement. However, later he called a number which he believed belonged to his union business agent and blurted out a confession that he was responsible. The only problem was that he had mistakenly called the company's human resources department. And when they identified that they were not the union but the employer's HR department, the culprit denied his own identity. He was subsequently terminated for lying.

The NLRB, however, ruled that since his conduct occurred during the union decertification program or campaign, he was engaging in protected concerted activity and that his termination violated Section (8)(a)(3) of the National Labor Relations Act and that he should be reinstated. To me, the reasoning behind this decision

is mind boggling. It puts the employer in a dilemma of having to choose between violating Section 8 of the NLRA as you saw it and Title VII of the Civil Rights Act regarding prompt investigation of sexual harassment allegations where EEOC guidelines require truthfulness in the investigation and prompt remedial action.

In your opinion, in these types of situations, which law should the employer be required to obey, the NLRA under the Board's reasoning in Fresenius or Title VII under the Civil Rights Act? Which law better protects employees?

Ms. BLOCK. Thank you for the question, Senator. Again, I want to be careful because, as you noted, the cases that I participated in before could come back to the Board if I'm fortunate enough to be confirmed, and I would have to look at them again, and I would want to keep the pledge that I just made, keeping an open mind. So discussing these issues outside of the particulars of Fresenius—because I do think, one, that decision speaks for itself certainly better than I can relate my reasoning to you sitting here now a year or so later.

But, I think that what you touched on is a case of—it involves competing interests, the employer's legitimate interest in investigating what they perceive as misconduct in the workplace and the Board's obligation to protect employees who engage in concerted activities. So, again, without addressing the particulars in Fresenius, things that the Board will traditionally look at to balance those interests are whether the employer has tolerated that kind of behavior in the past, and the Board, on the particular issue of employees not being truthful about their protected activity—that's a Board doctrine that had existed for a long time, and the Board has found ways to balance those interests with employers' perception of their responsibilities under Title VII.

These cases bring to the Board a need to look at the particular facts and circumstances, what's the history of how the employer has dealt with similar situations in the past, and to figure out how to make those two interests balance.

Senator HATCH. Mr. Chairman, my time is up.

The CHAIRMAN. Thank you, Senator Hatch.

Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Mr. Chairman, thank you very much.

Ms. Block, we're grateful you're here and grateful for your service. Just by way of a brief statement on the question of your remaining in the aftermath of a circuit court decision, I would argue that there are at least four reasons, either individually or conjunctively, that would warrant you staying.

First, there was an outstanding matter that had not been resolved by the Supreme Court. Second, you did take an oath of office which is a grave, serious decision. Third, if you resigned and Mr. Griffin did as well, there would be no functioning quorum. And, fourth, there is precedent for a member remaining in the aftermath of an adverse circuit court decision. I would argue for all those reasons that your decision was appropriate.

I wanted to talk to you about two issues. One is your previous experience and, two, more generally, public service. I think often

we might need a little reminder around here about the origins of the National Labor Relations Act, the findings that undergirded the statute. I was reading from the findings today, and I'll read in pertinent part, because I think it bears repeating.

One of the findings says as follows,

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest."

Then it goes on to say a similar thing that relates to labor practices that would hurt the free flow of commerce.

So you have the Act, the statute, focused on the question of the free flow of commerce and also the constitutional right to associate. That's what we're talking about here in terms of the Act that we're debating. I think sometimes the unfortunate reality is that some people in Washington don't agree with the Act. They might disagree with the interpretation of the Act or recent decisions, but some of them seem to have a real problem with the National Labor Relations Act itself. At least, that's my reading of some of the reaction.

But I wanted to raise something with you. You said in your testimony—and I'm quoting it from the last page of the testimony—talking about, "the important lessons I learned from participating in this committee's work on the MINER Act." And then you go on and talk about working across the aisle.

I had a hearing as the chairman of a subcommittee, Employment and Workplace Safety, about the problem we're having with getting miners their benefits in a timely fashion. It's the ultimate manifestation of justice delayed is justice denied. So we had an important hearing here, one of the few hearings involving miners in a long, long time. But I wanted to ask you about your experience working on the committee in the context not just of that Act, but working across the aisle.

Ms. BLOCK. Thank you, Senator, for the question. It is a fond memory that I have of working on this committee, generally, for Senator Kennedy but also, in particular, having had the privilege to work with the committee on the MINER Act. I think it was an example of what this committee does best in terms of that great tradition of moving important bipartisan legislation.

There are a few sort of big lessons that I learned. The first is the value of considering the perspectives of all stakeholders. In the mining community, mining issues, as you all know, are interesting in that there are very defined stakeholders, and you just can't get anywhere not listening to all of the stakeholders and only engaging with one side, and I thought that was something that the committee did very well and together.

Also, the necessity of finding practical solutions. To have big grand ideas about things might sort of be fun, but when you're talking about what goes on in a mine, you have to be very practical. You have to really think it through. Is the solution that you're coming up with something that's actually going to work for those people who are going to be affected by what you do. That was a big part of what we struggled with, again, together to figure out

whether these new requirements are going to make sense underground in a mine.

And, finally, and I think maybe especially for my service on the Board, the most important lesson I learned was the virtue of principles compromise, which I think was a lesson that Senator Kennedy taught particularly well. But as I talked about when I was here last summer, I know from being privy to the negotiations that went on that neither side got everything they wanted in that bill.

But it was important in light of the context in which the impetus for negotiating the bill—a terrible tragedy that revealed the fact that things needed to be better. It was just vitally important, and Senator Enzi, Senator Isakson, Senator Murray, and Senator Kennedy told us to get something done. And, again, it just would have been a tragedy to hold out for everything and not take the opportunity to get something done. So I think that virtue of principle compromise was really the most important lesson that I've learned and I've tried to take with me.

Senator CASEY. Thanks very much. Thanks for your commitment to public service.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Casey.

Senator Scott.

STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, Mr. Chairman.

Ms. Block, thank you for being here with us this morning, and we've heard—not well, because we can't hardly hear you, but I'm sitting in a position where I can, at least, and I also know that you and I will probably, hopefully respectfully, disagree on a number of issues as we have in the past, and I have a feeling that we'll continue to disagree on those issues in the future.

But I don't believe that it's the Act that we do not like. It's the lack of common sense that really seems to be a challenge from my perspective in looking for, as you said, the very practical solutions to some of the challenges that we face and seeing the NLRB as an arbiter, an unbiased, impartial arbiter.

In reading your statement, one of the quotes I like is,

> "Although my expertise is in labor law, not constitutional law, as a lawyer, I have an unwavering respect for our judicial process in resolving difficult legal issues," like those involved in the case that you are referring to.

And, certainly, we both know that the five-member Board is supposed to be a Board that is fair and unbiased. It seems to me that over the last several years, and certainly during the time that you were on the Board, it seems to have tilted in the direction of just being more of a pro-union Board as opposed to a fair, unbiased Board.

I highlight the comments—referring to another case—made by U.S. District Judge Arthur Schwab in speaking about the NLRB subpoenas and the UPMC documents. He said,

> "The court has never seen a document request or subpoena of such a massive nature. The requests seek highly confidential and proprietary information that has little to do with the un-

> derlying labor dispute" and "arguably moves the NLRB from its investigatory function and enforcer of Federal labor law to serving as the litigation arm of the union and a co-participant in the ongoing organization effort of the union."

It appears to me that the sense that I've read from the judge is consistent with the direction in which I have great concerns about the NLRB heading. I'd love to hear your comments on how that will be different this time around if you're on the Board. And I will note just one example that really causes me to scratch my head—and I would pull my hair out, but as you can see, I've already done that serving in Congress—and that is the Karl Knauz Motors BMW case from 2012 where you all struck down a courtesy rule.

Let me read that rule, because if we're looking for a very practical, common sense courtesy rule, here it is. It simply says,

> "Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite, and friendly to our customers, vendors, and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership."

The Board found this rule unlawful. I can't get my arms around that decision.

Ms. BLOCK. Senator, thank you for the question. I appreciate the opportunity to continue this conversation about this issue. I do want to be careful, though, because, as I said previously, to the extent that we discuss cases that I participated in before that could be before the Board again, if I were fortunate enough to be confirmed, I want to be careful not to offer opinions that would suggest that I didn't have an open mind if the parties chose to come back to the Board.

But on this issue, in general, about courtesy rules, I certainly agree, and I hope that most people would agree that employers and employees have an interest in having a courteous, professional workplace with proper decorum. And I think, in general, these cases can be very fact specific, but they do present, again, as most cases that come before the Board do, or often do, competing interests.

Employers certainly have a legitimate interest in being able to maintain that professionalism and decorum in the workplace. Employees have interest in being able to discuss their concerns about the workplace with each other and the public. So these cases, again, come down to trying to see how those competing interests work out. My memory of the Board's cases, though, is that the Board does try to draw a line to the extent that the rule deals strictly with professionalism and decorum, that those rules don't create that conflict.

Senator SCOTT. Let me ask you just a quick question. I know my time is about done. Five minutes isn't what it used to be.

The Board found this rule unlawful, contending that employees would reasonably believe that it prohibited statements of protest or criticism of the employer. My question is: Please help me understand how, pray tell, does that courtesy rule somehow infer that it would be inappropriate for folks to stand in opposition to some-

thing that they didn't believe in while the rule specifically and clearly states the desire for a professional environment where coarse language and respect for others was the only objective.

Ms. BLOCK. Again, I want to be careful about not commenting on the facts of that particular case.

Senator SCOTT. How about just the thought process put into making the decision as it relates to why a courtesy rule is somehow not courteous?

Ms. BLOCK. Again, I think what the Board looks at is does the rule extend beyond simply requiring courtesy and professionalism in the workplace and instead extend to behavior that would be perceived by the employees as limiting their ability to speak frankly and honestly about their concerns about their terms and conditions of employment, and that's an area that's protected by the Act.

Senator SCOTT. Let me just close my comments by suggesting that a courtesy rule asking the employees to be responsible with their conversation and respectful to one another and not to use profanity toward one another somehow doesn't seem to fall into the category that we are talking about today. I'll finally say that there are just a number of other indicators that give me reason to pause and be concerned for the lack of an equilibrium on the Board and during the time in which you served on that Board as well. Thank you very much.

The CHAIRMAN. Thank you, Senator Scott.

Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

I appreciate you mentioning the MINER Act because we worked on that together, and I think it's a good example of what's not true right now in terms of the labor management conundrums that we have in Washington. But in the MINER Act, Senator Kennedy and Senator Enzi operated under the 80–20 rule. They didn't rush to judgment, but they tried to find common ground on the problem.

As it turned out, the unions were immediately blaming the management for shortcomings causing the explosion. Management was overly defensive of itself. The committee didn't rush to judgment. And as it turns out, after months of investigation, a lightening strike that hit an underground cable that had been abandoned was the cause of the explosion.

The MINER Act, instead of rushing to judgment, ended up bringing about new standards in terms of re-breathers and equipment that would be available in the mine for the safety of miners, but didn't create an enemy out of management or an enemy out of labor. It approached the situation based on the problem at hand after it had all the facts.

Use that as a preface to my first question, which I'm going to try and ask in a way that you can answer without prejudicing yourself on a future decision. Do you think the general counsel for the Department of Labor should opine on a decision with a similar decision pending before the NLRB, meaning should the general counsel make law themselves while a question before the NLRB is pending and not yet decided?

Ms. BLOCK. I'm sorry. I'm trying to follow that. The general counsel—are you saying at the Department of Labor or at the NLRB?

Senator ISAKSON. At the NLRB.

Ms. BLOCK. Whether the NLRB general counsel should opine on an issue that will ultimately be before the Board?

Senator ISAKSON. There's a similar case pending before the Board, and they go ahead and opine on another case before it gets to the Board, but it's the same question.

Ms. BLOCK. The general counsel, as a party before the Board, will always put forth their theory of the case. So in the way that the Board system works, I think that the general counsel always has to act first. I guess if your question is going more to whether to continue to subsequently pursue the same theory before the Board has had a chance to act on the question, again, that's, I guess, a strategic decision that the general counsel has to make. Until the Board resolves an issue, the general counsel obviously can't know whether those subsequent decisions will stand up or not.

Senator ISAKSON. What I'm referring to, specifically—and I know you probably will take an out on this, and I respect that because of what may or may not happen. But the general counsel opined on a case involving McDonald's that the employees of a franchisee were equal employees of the master franchisor, meaning that a McDonald's franchise employee is also an employee of McDonald's Corporation, which is a joint employer relationship, which is a sea change in terms of the way that we've ever looked at franchise or franchisee and responsibility. At the time they made the McDonald's case ruling, the Browning-Ferris Industries case, a Pennsylvania company, is still before the NLRB on exactly the same question, a question that represents a sea change in the treatment of master franchisors and franchisees and will have a dramatic effect on business.

I traveled the State the month of August going to most every major MSA in my State and a lot of smaller ones as well. In Columbus, GA, I ran into a franchisee of McDonald's Corporation that has 23 franchise stores. This opinion is going to threaten to put him out of business, raise the cost of his business to be a non-competitive environment, and all over a decision that was made by a general counsel in the absence of a final decision by the Board that's pending in another case which is the exact same question.

So my point is when you prefaced your remarks earlier about referring to the MINER Act, if we would blow a time-out at the NLRB and look for the 80 percent common ground and look for all the facts before we do harm, we would be a whole lot better off in those relationships between management and labor.

I think the problem we have in the country right now is a skewed attitude on management and labor. One side favors labor and one side favors management, and it's almost like a contest to see who can play "gotcha" first. So I'm not going to ask you to answer a question because that's a pending decision. But it's a very serious decision for the health and future of the American economy, and I hope that the Board will be very judicious in what they decide to do on that case.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Warren.

STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman.

Welcome, Ms. Block. It's good to have you here. You're being nominated to fill the Board seat that Nancy Schiffer will leave in December.

Before I begin with my questions, I just want to take a minute to acknowledge Ms. Schiffer and thank her for her service. Her intelligence and dedication to the work of the NLRB has served our country well, and we are all grateful. I am pleased now that with Ms. Block, we will have a qualified nominee to take over and to keep up the good work.

Ms. Block, I have heard some of my colleagues across the aisle attack you for accepting a recess appointment. However, over the past 35 years spanning three Democratic Presidents and three Republican Presidents, there have been 29 recess appointments to the NLRB, 16 Republican nominees and 13 Democratic nominees.

The President of the United States asked you to serve your country by joining the NLRB, and your first appointment was consistent with this long, bipartisan tradition of recess appointments. Later, when the D.C. District Court decision came out advancing a split among the courts, you and other members of the Board followed the longstanding NLRB policy and waited for the Supreme Court to resolve the conflict that existed among the courts.

Can you explain why the NLRB has this policy of waiting for the Supreme Court to resolve disputed decisions reached by the circuit courts?

Ms. BLOCK. Thank you, Senator. I think it just comes from an understanding of how our Federal court system works. Again, *Noel Canning* was a constitutional issue, but the context in which I'm more familiar is just when the Board issues decisions, the Board issues those decisions for the country as a whole, not for particular geographic areas.

And it can happen that there are splits in the circuits. The circuit courts sitting in different parts of the country can come to different conclusions. We know that the way our Federal court system works is whether it's an interpretation of the National Labor Relations Act, even more importantly when it's a constitutional question, the Supreme Court is the ultimate arbiter of those questions.

Senator WARREN. So in your particular case—but this is part of longstanding tradition with the NLRB—we waited for the resolution in the dispute among the circuits about what the appropriate rule was in this case on recess appointments, and when the Supreme Court spoke to it, then we knew what the law was. Is that a fair statement?

Ms. BLOCK. Yes, absolutely, and, obviously, I left the Board before the Supreme Court ruled. But, as I mentioned in answer to the first question that Chairman Harkin asked, it was important to me, and I did know that that process was moving forward throughout the entire tenure that I had on the Board, that after the *Noel Canning* decision came out from the D.C. Circuit, the solicitor general filed a petition for certiorari ensuring that the process toward resolution would continue to move in that direction.

Senator WARREN. Good. I just want to say thank you for your willingness to serve and thank you, in particular, for your willingness to serve at the NLRB so that we can have a Board that fairly represents the people of this country.

I have one other question I'd like to ask you about, and that is about scheduling. Unpredictable and last-minute scheduling is a very serious problem for a lot of low-income and part-time workers. Many of these workers want a full time job with stable hours, but many jobs today, particularly in service and retail industries, are part-time, or if they are full time, they're often on shifting schedules.

When work schedules are more stable and more predictable, families experience greater economic security and they're better able to plan for child care and for other family obligations. But I've met with employees who have been retaliated against solely for asking for more stable schedules, not demanding, just asking for some scheduling help to attend a college course or to manage child care obligations.

So I am pleased to have joined Chairman Harkin in introducing the Schedules that Work Act. This is a bill that would guarantee that all employees could request certain scheduling free of retaliation. It would also discourage last-minute scheduling while still giving employers flexibility to make changes based on their business needs.

I understand that it is Congress' job to write the laws, and the NLRB's job to enforce the rules. But with scheduling practices as a growing area of concern, I wanted to ask you if the NLRB has been involved in settling disputes on scheduling issues, and if you might just help inform us a bit about this issue.

Ms. BLOCK. Thank you for the question. The Board has long been involved in these kinds of issues as a result of them being important to employees and employees joining collectively to ask their employers to address the issue.

Clearly, scheduling is a critical aspect of an employee's terms and conditions of employment, and the National Labor Relations Act gives employees the right, either through a collective bargaining representative, if the employees choose that vehicle for expressing their collective action, or just through protected concerted activity to raise concerns about terms and conditions of employment. The Act does, in fact, give a way for employees to express those concerns, share them with employees in a manner that's protected.

Senator WARREN. Thank you very much. I understand that securing a predictable work schedule is one of the reasons that workers often decide to unionize. I hope to continue to work with Senator Harkin to advance our bill so that some flexibility and some sensibleness is appropriate and available to all workers in the case of trying to make reasonable schedules.

Thank you very much, Ms. Block. I'm looking forward to seeing you on the NLRB.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Before I yield to Senator Alexander, I want to kind of clear up something that I keep hearing come up, and that is I think there's

a confusion in some minds about the general counsel of NLRB. Usually, when you hear of the general counsel to the Department of Agriculture or the general counsel to Veterans Affairs, you think of them as the advisers to that entity, that that's their lawyer.

But that's not true under the NLRA. People have to understand that when you talk about the general counsel—maybe we have to have a different name for that person. That person is really sort of the prosecutor in some ways, and they take in the information on the cases that come to them, and they present the case to the Board.

The NLRB general counsel is not an adviser to the NLRB. That's not their lawyer. That general counsel has a different obligation. I think there's some confusion about how that works. I heard the question by Senator Isakson and I think some others that indicate to me that the role of the general counsel in the NLRB is different than the role of general counsels to other departments and agencies in the Federal Government, very, very, very different under the law.

With that, I'll yield to Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman. I only have one question.

Ms. Block, do you believe that Congress, when it wrote the National Labor Relations Act, intended that the quarterback at Vanderbilt University or the women's basketball player at Iowa State who is on scholarship be considered an employee of the university?

Ms. BLOCK. Again, Senator, as that is an issue that I think is likely or may already be pending before the Board, I think it would not be appropriate for me at this time to give an opinion. I can assure you, though, that I will look carefully, if I'm fortunate enough to be at the Board, at the arguments made by the parties in addressing that issue.

Senator ALEXANDER. May I offer a statement by the Knight Commission? About 25 years ago, the Knight Commission organized a group of university presidents and others, including the president of the University of Tennessee—and I don't know who that was—but we considered very carefully all the issues of intercollegiate athletics. And the whole point of the recommendation of the Knight Commission was that presidents of the universities should step up and take the responsibility for the problems—and there always are some problems—with intercollegiate athletics.

But this is what these presidents said, and they included some really terrific people—I mean, Father Hesburgh of Notre Dame, Bill Friday of the University of North Carolina—some of the finest leaders in higher education in the country.

> "We reject the argument that the only realistic solution of the problems of intercollegiate athletics—and there always have been some—is to drop the student athlete concept, put athletes on the payroll, and reduce or even eliminate their responsibilities as students."

The Knight Commission went on to say,

> "Such a scheme has nothing to do with education, the purpose for which colleges and universities exist. Scholarship athletes are already paid in the most meaningful way possible

> with a free education. The idea of intercollegiate athletics is that the teams represent their institutions as true members of the student body, not as hired hands. Surely, American higher education has the ability to devise a better solution to the problems of intercollegiate athletics than making professionals out of the players, which is no solution at all, but rather an unacceptable surrender to despair."

That was the Knight Commission on intercollegiate athletics 25 years ago. I would hope very much that should you be a member of the National Labor Relations Board, you will take into account those opinions. Student athletes are not employees of a university. Student athletes—for example, universities are taking steps to deal with the various problems, which include the money that athletes may have to spend. Student athletes, like other students—about half of them if they're low-income—are eligible for a Pell grant in addition to their student scholarship.

I was a student athlete without a scholarship at Vanderbilt University, and there are enormous advantages to the privilege of being a student athlete. So I would hope the NLRB would reject what I consider to be a fairly preposterous claim that Congress, when it talked about employees, had in mind student athletes. And I would respectfully suggest the 2-year deliberations of the Knight Commission to you and anyone else who might be a member of the National Labor Relations Board.

Mr. Chairman, I have no other comments.

The CHAIRMAN. Thank you very much, Senator Alexander.

Ms. Block, thank you again for your appearance and for your forthright answers to our questions.

The record will remain open for 10 days. If there are additional questions or questions by any Senators, I ask that those be submitted by this Friday before close of business here in the Senate.

Again, thank you, Ms. Block. We look forward to getting your nomination before the Senate in due order so that we can continue after December with a full NLRB.

With that, the committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

RESPONSE TO QUESTIONS OF SENATOR ALEXANDER, SENATOR ISAKSON, AND SENATOR SCOTT BY SHARON BLOCK

SENATOR ALEXANDER

Question 1. Do you think NLRB decisions that are *de facto* invalid by the Supreme Court's *Noel Canning* decision should be given priority over the Board's new cases or over finalizing the Board's other business, for example, the proposed representation-case procedures rule?

Answer 1. I am aware that Chairman Pearce issued a statement following the decision affirming the Board's commitment to resolving any cases that may have been impacted by *Noel Canning* as expeditiously as possible. If I am fortunate enough to be confirmed, I would share my colleagues' commitment to resolve these cases as expeditiously as possible. I am not privy to the Board's intended process, so I am unable to comment on the specifics. As a Board member, I would make efficient case processing a priority.

Question 2a. Do you think the Board should notify the parties to cases affected by *Noel Canning* that the Board's decisions have been invalidated? If yes, how would you propose doing so? If no, please explain why.

Answer 2a. I believe that the Agency should be transparent in its operations. I am not privy to the Board's intended process for dealing with cases that may have been impacted by the Supreme Court's *Noel Canning* decision. However, following the Supreme Court decision in *New Process Steel*, I am aware that the Agency included a list of cases impacted by the decision on its public website. I believe that promoted transparency. If I am fortunate enough to be confirmed to the Board, I look forward to discussing with my colleagues additional steps that could be taken to promote transparency.

Question 2b. Do you think those parties should have a time limit on how long they have to ask the Board to reconsider their case? Please explain your answer.

Answer 2b. I am not privy to the Board's intended process. I do believe that some reasonable time limit may be appropriate to ensure that parties involved are assured a final resolution of their dispute.

Question 3. Do you think the Board should inform the public, and in particular those parties impacted, about how it plans to process the cases invalidated by *Noel Canning*? If yes, how would you propose processing the cases? If no, please explain why.

Answer 3. Again, I believe that the Agency should be transparent in its operations. I am not privy to the Board's intended process for dealing with cases that may have been impacted by the Supreme Court's *Noel Canning* decision. If I were fortunate enough to be confirmed to the Board, I would look forward to discussing with my colleagues an efficient, effective, and transparent process.

Question 4. Do you think the Board should allow new briefs to be filed in the invalidated cases that are going to be reconsidered? Please explain why or why not.

Answer 4. I am not privy to the Board's intended process for dealing with cases that may have been impacted by the Supreme Court's *Noel Canning* decision. However, I am aware that following the Supreme Court's decision in *New Process Steel*, the Board did not permit the filing of new briefs as to the matters that had been fully briefed during original consideration, but did permit parties to bring to the Board's attention any relevant new authority that issued since the time of the initial decision. I believe that was an appropriate process.

Question 5. In how many of the 436 decisions that are *de facto* invalid by the Supreme Court's *Noel Canning* ruling did you participate?

Answer 5. I did not keep a log of cases in which I participated, nor do I have the list of 436 decisions to which you refer; therefore, I do not know the number of those cases in which I participated. I would be happy to work with the National Labor Relations Board's Congressional Affairs staff to ensure that you receive this information.

Question 6a. The Board has been criticized for overturning longstanding precedent. What factors would you consider when deciding to follow or overturn a Board precedent?

Answer 6a. I have a great deal of respect for the principle of *stare decisis*. Stability and certainty in the law are important values. But there are times when sta-

bility and certainty are better served by re-examining precedent. I believe that reversal of precedent should remain rare and should always reflect careful consideration. I believe that it is important to consider whether 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.

Question 6b. Do you believe that overturning the Board's longstanding precedent creates uncertainty and confusion for employers and employees?

Answer 6b. I believe that predictability is an important value under the law and that reversals of precedent should remain rare and reflect careful consideration. Reversals of precedent must be understood in the context of the Supreme Court's observation that "[t]o hold that the Board's earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking," which the Court described as "the constant process of trial and error." *NLRB* v. *J. Weingarten, Inc*., 420 U.S. 251, 265–66 (1975).

Question 6c. Do you agree that the purpose of the National Labor Relations Act is to create stability in labor relations?

Answer 6c. I believe that the purpose of the National Labor Relations Act, as declared in the preamble to the Act, is to "eliminate the causes of certain substantial obstruction to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . "

Question 6d. How does overturning Board precedent help create such stability?

Answer 6d. Again, I believe stability and certainty in the law are important values. But, there are times when stability and certainty are better served by re-examining precedent. I believe that reversal of precedent should remain rare and should always reflect careful consideration. I believe that it is important to consider whether 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.

Question 7a. In your opinion, how much weight and deference should be given to congressional intent? Should the Board members consider current policy concerns, or should they solely apply the law as Congress intended when deciding cases?

Answer 7a. Board members should apply existing law, as articulated by Congress, impartially to all parties.

Question 7b. When you previously served on the Board, did you weigh policy concerns when deciding cases, or did you strictly apply the law as Congress intended?

Answer 7b. I took my role as a neutral adjudicator of the law very seriously. I strove to understand all sides of a case, to consider carefully the arguments of every party regarding how the law applies, and to render a fair decision based solely on the record evidence and the applicable legal principles.

Question 8. At what point do you believe that a franchisor should be responsible for unfair labor practices by a franchisee?

Answer 8. Cases involving joint employment are very fact-specific. This is a complicated area of the law and I would approach it with an open mind, and with a focus on the specific facts of the particular case. Because this is an issue that could come before the Board in a future case, it would not be appropriate for me to address this issue in substance.

Question 9. If a franchisor is found to be a joint employer with its franchisees, do you think a union could demand to have collective bargaining agreements with both the franchisee owner, and the corporate franchisor?

Answer 9. Again, if I am fortunate enough to be confirmed, this issue could come before the Board, so it would not be appropriate for me to address it in substance.

Question 10. If the joint employer doctrine under the National Labor Relations Act is going to be changed, do you think it would result in more certainty for interested parties if Congress changed it or if the NLRB changed it?

Answer 10. Because I cannot know the feelings of interested parties, I cannot speculate as to which course of action may result in more certainty for interested parties.

Question 11a. In a book chapter you authored entitled, "Perspectives from a New Member of the NLRB," you opined, "the web of rights that we have afforded workers in the country is not without serious flaws." What are the rights contained in the

"web" you describe? And what specifically do you believe are the serious flaws in that "web?"

Answer 11a. I was referring to the various labor and employment laws Congress has enacted governing our Nation's workplaces. As discussed in the chapter, I believe that the lack of protection against workplace discrimination for members of the LGBT community is a serious flaw. I also mentioned that many of our worker protection statutes are outdated and outmoded.

Question 11b. In the same chapter you asserted, "we should not expect Congress to change or clarify the legal landscape for workers or employers any time too soon." If you do not expect Congress to change the legal landscape, do you believe that is an appropriate role for the NLRB?

Answer 11b. I understand that as a Board member I would be charged with enforcing the law as it currently exists and not enacting changes that can only be accomplished by legislation.

Question 12. Four Federal circuit courts have rejected the NLRB's decision in *D.R. Horton*, which held that class action waivers in an arbitration agreement violate the National Labor Relations Act. In the book chapter referenced above, you wrote, "[i]t remains to be seen how *D.R. Horton* will fare in the courts . . .." Now that it is well-documented that *D.R. Horton* fared poorly in the courts, do you believe it is appropriate for the Board to continue to apply it, especially if the Board does not plan to file cert with the Supreme Court?

Answer 12. Because this is an issue that could likely come before the Board in a future case, it would not be appropriate for me to address this issue.

Question 13. In the book chapter referenced above, you state, "misclassification is one of the most important labor and employment issues of our time," the "Board . . . has a role to play" in resolving this issue and "the debate engaged [about independent contractor status] in *St. Joseph* is an important one for the current Board to continue." If confirmed, do you support the Board changing the factors it considers to determine employee versus independent contractor status?

Answer 13. Because this is an issue that could likely come before the Board in a future case, it would not be appropriate for me to address this issue in substance.

Question 14. In the book chapter referenced above, you appear to disagree with the Supreme Court's opinion in *Hoffman Plastic Compounds*, which, as you stated, "held that the Board had no authority to award backpay to an undocumented worker who—violating immigration law—had presented fraudulent work-authorization documents to get his job." You argue this decision, from a policy perspective, has "serious negative consequences." If confirmed, will you abide by the Supreme Court's precedent in *Hoffman* or look for ways to distinguish it from other cases before the Board that involve awarding undocumented workers backpay?

Answer 14. I have a great deal of respect for the judiciary and understand that the Supreme Court's decision in *Hoffman Plastic Compounds* is the law of the land.

Question 15. During your confirmation hearing, you indicated there was conflicting reasoning in the Federal courts about whether your recess appointment was unconstitutional. Please name what Federal court found President Obama's January 4, 2013, recess appointment of you to the NLRB constitutional.

Answer 15. The D.C. Circuit itself acknowledged in *Noel Canning* that its decision was at odds with the views expressed by the Second, Ninth, and Eleventh Circuit courts. I was referring to the reasoning employed by the courts, which was in conflict, not the ultimate holding of the courts.

Question 16. The NLRB Office of Inspector General and congressional investigations have uncovered inappropriate *ex parte* communications between the Board and the Office of General Counsel in recent years. In your time on the Board, please describe how you took care to follow the Board's *ex parte* rules and how you plan to do so moving forward, especially in light of the fact that your former colleague on the Board, Richard Griffin, is now the General Counsel.

Answer 16. I understand that the NLRB has a unique structure. Agency personnel serve as both prosecutor (the Office of the General Counsel) and adjudicator (the Board and the Division of Judges) of unfair labor practice cases. As a result, due process requires that there be a wall of separation between both sides of the Agency to ensure the separate and independent nature of these functions. I understand that the wall is intended to ensure that Agency employees on the General Counsel's staff who play a role in the investigation and prosecution of unfair labor practice cases do not discuss confidential case-related information with employees

of the Board who are involved in the adjudicatory function. With respect to cases that are pending before the Board, this requirement is codified in Sections 102.126–102.133 of the Board's Rules and Regulations (Subpart P—Ex Parte Communications), which prohibit all parties to a case from engaging in ex parte communications.

I assure you that I fully understand the Agency's rules regarding ex parte communications and did make every effort to adhere to them during my prior service and would make every effort to adhere to the Agency's policies in all of my communications, if I am fortunate enough to be confirmed.

Question 17. If confirmed, will you commit to cooperating with congressional oversight of the NLRB, including document requests, and to work with the NLRB Office of Inspector General and Government Accountability Office in any studies/investigations that they may undertake?

Answer 17. If confirmed, I would make every effort to cooperate with congressional oversight of the NLRB and to work with the NLRB Office of Inspector General and Government Accountability Office in any studies/investigations they may undertake.

Question 18. If confirmed and you are asked to personally meet with Members of Congress or their staff, are you willing to do so?

Answer 18. If confirmed, I would make every effort to, when requested, personally meet with Members of Congress or their staff.

Question 19. Please describe in detail your role in preparing or approving responses to congressional inquiries during your time serving as Senior Counselor to Secretary of Labor, Thomas Perez. Have you ever advised against providing Congress with the information they requested? If yes, please describe the background of such requests and your reasoning for advising the Secretary to withhold the requested information.

Answer 19. The Department of Labor's Office of the Executive Secretariat, in coordination with the Office of Congressional and Intergovernmental Affairs, manages the process of responding to congressional inquiries. As a part of the standard Departmental clearance process, staff from a number of agencies—including the Office of the Secretary—are afforded the opportunity to review correspondence. The clearance process is designed to ensure that information provided to Members of Congress is both accurate and responsive.

SENATOR ISAKSON

Question 1. Recently, the NLRB's General Counsel issued an opinion that McDonalds's Corporation is responsible for the employees of their independently operated franchisees. This opinion changes decades of legal precedence harming the very essence of the American franchise business model—that is the independence of the franchisees to run their own business. I recently heard from my constituent, who owns 23 franchised restaurants. He was petrified of what a joint employer ruling would do to the business he has grown from one store to 23 stores. I have two questions: Do you think the General Counsel should be "making" law on his own prior to the Board decision on the *Browning Ferris* case? Do you understand the effects a joint employer relationship will have on independent franchisees—the loss of their business and any of their established equity? I think it is important to hear from you on what you believe a joint employer relationship is.

Answer 1. Because this is an issue that could likely come before the Board in a future case, it would not be appropriate for me to address this issue in substance. I can say that this is a complicated area of the law and I would approach it with an open mind.

Question 2. In the *Specialty Healthcare* decision, the NLRB reversed the longstanding precedent for establishing a traditional bargaining unit. This board decision now allows for labor organizations to cherry pick certain employees within a workplace in order to gain access to those places of work. This can obviously create conflict within the workplace amongst employees, impossible management hurdles for employers who could potentially have to deal with multiple collective bargaining contracts within the same workplace, and ultimately affect American consumers who benefit from the products and services from so many of these workplaces. Do you support this new "same work, same facility" test despite it not having been developed through any transparent rulemaking process?

Answer 2. Because this is an issue that could likely come before the Board in a future case, it would not be appropriate for me to address this issue in substance.

If I am fortunate enough to be confirmed to the Board, I will examine these issues 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.

SENATOR SCOTT

Question 1a. The Board under the current Administration has embarked on truly unprecedented rulemakings and issued a multitude of decisions that seem to be solutions in search of a problem. In your opinion, has the confluence of the decline of private-sector unionization to 6.7 percent and the defeat of card check prompted the NLRB to serve as the vehicle for mitigating these losses?

Answer 1a. No.

Question 1b. Is there an expectation on behalf of union organizations that the Board, particularly the Democrat members, should act in this way?

Answer 1b. If I am fortunate enough to be confirmed to the Board, I can assure you that I will uphold my oath to administer the National Labor Relations Act in a fair and impartial manner, consistent with the requirements of the Act. I cannot speak to the expectations of others.

Question 2a. Many of the decisions issued during your tenure on the Board noticeably tilt the playing field toward organized labor. Some of these include WKYC–TV, Gannet Co., Inc. (08–CA–039190); Alan Ritchey, Inc. (32–CA–018149); Hispanics United of Buffalo (03–CA–027872); Karl Knauz BMW (13–CA–046452); and Fresenius USA Manufacturing (02–CA–039518).

In the *Knauz* case, the Board found a commonsense courtesy rule to be unlawful. While the decision in this case does not ban courtesy rules, it clearly has far-reaching impacts. Do you stand by your decision in this case?

Answer 2a. The decision in the *Karl Knauz* case speaks for itself. The Board found a handbook statement encouraging "courteous, polite, and friendly" behavior to be lawful. It found a statement that prohibited "disrespectful" conduct and "language which injures the image or reputation" of the employer to be unlawful because employees could reasonably think that those prohibitions would cover activity protected by the National Labor Relations Act.

Question 2b. Please explain how an employee could perceive this courtesy rule as infringing on their rights.

Answer 2b. Again, the *Karl Knauz* decision speaks for itself. The Board found a handbook statement encouraging "courteous, polite, and friendly" behavior to be lawful. It found a statement that prohibited "disrespectful" conduct and "language which injures the image or reputation" of the employer to be unlawful because employees could reasonably think that those prohibitions would cover activity protected by the National Labor Relations Act.

Question 3a. The Board's decision in *Specialty Healthcare*, along with subsequent cases that upend board precedent to allow the gerrymandering of bargaining units, will have major consequences on employees and employers.

Why did the Board expand the *Specialty Healthcare* decision to industries beyond non-acute health facilities?

Answer 3a. I was not on the Board when it issued its decision in Specialty Healthcare. I was not privy to the Board's reasoning other than what is in the decision itself.

Question 3b. Commonsense says that the creation of "micro-unions" could lead to perpetual contract negotiations and strike threats as well as acrimony amongst employees. How is this good for our economy and labor relations?

Answer 3b. The Board's obligation under Section 9 of the Act is to determine whether a petitioned-for unit is an appropriate unit. If I am fortunate enough to be confirmed, I would do my best to carry out this obligation in a fair and unbiased manner.

Question 3c. Do you agree that micro-unions could restrict the cross-training of employees and thus career advancement?

Answer 3c. The Board's obligation under Section 9 of the Act is to determine whether a petitioned-for unit is an appropriate unit. If I am fortunate enough to be confirmed, I would do my best to carry out this obligation in a fair and unbiased manner.

Question 3d. How many decades of precedent were overturned in *Specialty Healthcare*?

Answer 3d. Again, I was not on the Board when it issued its decision in *Specialty Healthcare*. In the *Specialty Healthcare* decision, the Board states that it "return[ed] to the application of our traditional community of interest approach in this [nursing home] context" and overruled *Park Manor Care Center*, a case decided in 1991.

Question 3e. Would you deem as few as two employees as an appropriate bargaining unit in any circumstance? Please provide a yes or no response.

Answer 3e. Yes, if a petitioned-for unit of two employees otherwise met the test for an appropriate bargaining unit, I would find such a unit appropriate, as the Board has throughout its history. See, e.g., *Tennessee Valley Broadcasting Company*, 73 NLRB 1509, 1510 (1947) (units of all regular staff announcers and all radio technicians—each composed of two employees—constitute two separate appropriate units).

Question 4a. In 2012, you said that your driving motivations for being a labor lawyer would inform your thinking about cases and issues before the Board. Do you believe that your past work experiences and motivations will hamper your ability to be an unbiased arbiter should you return to the Board?

Answer 4a. No.

Question 4b. Do you believe that your previous record at the Board reflects that of a neutral arbiter?

Answer 4b. Yes.

Question 4c. U.S. District Judge Arthur Schwab recently remarked that the overly broad scope of requests from the Board in *NLRB* v. *UPMC* "arguably moves the NLRB from its investigatory function and enforcer of Federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union." In light of this assertion and similar findings by other courts, do you agree that the Board must act in a more impartial manner to avoid further damage to its reputation?

Answer 4c. If I am fortunate enough to be confirmed, I would take my role as a neutral arbiter very seriously and would conduct myself in a fair and impartial manner. I believe that the current Board members share this commitment.

Question 5a. For 30 years, under its joint-employer standard, the NLRB has taken the position that one business cannot be held liable for the unfair labor practices of another business unless that business had direct control over the employees in question. However, the NLRB is attempting to alter this long-standing standard, which will create immense uncertainty in the business community and further tilt the playing field in favor of big labor and their organizing efforts.

In light of the General Counsel's recent decision to ignore this established standard and authorize McDonald's USA, LLC to be named as a joint employer, how do you think this classification of a franchisor as a joint employer will affect the economy and the general business environment?

Answer 5a. Because this is an issue that could likely come before the Board in a future case, it would not be appropriate for me to address this issue in substance. I can say that this is a complicated area of the law and I would approach it with an open mind.

Question 5b. Do you believe that this classification would be isolated solely to McDonald's, or would it impact a variety of businesses that use similar models, including real estate agencies, insurance companies, and car dealerships?

Answer 5b. Again, this is an issue that could likely come before the Board in a future case, so it would not be appropriate for me to address this issue in substance.

Question 5c. In your opinion, what impact would this joint employer classification have on union organizing efforts in industries like the fast food sector?

Answer 5c. Again, this is an issue that could likely come before the Board in a future case, so it would not be appropriate for me to address this issue in substance.

Question 5d. In August, the California Supreme Court ruled that Domino's Pizza LLC was not liable for alleged sexual harassment at one of its franchises because the company is not sufficiently involved in the hiring, firing, and supervision of employees to warrant liability. Do you think this decision and others will give the General Counsel's office pause?

Answer 5d. I am not familiar with that decision.

Question 5e. If confirmed and presented with this issue before the Board, would you lend credence to the courts' opinions on the joint employer standard?

Answer 5e. If confirmed, I will take my role as neutral arbiter very seriously. I will work to understand all sides of a case, to consider carefully the arguments of every party, and to render a fair decision based solely on the record evidence and the applicable legal principles.

Question 5f. Knowing that this issue is a priority of Administrator Weil's, do you have any preconceived notions on the joint employer issue due to your work at the Department of Labor?

Answer 5f. I do not have preconceived notions with regards to the joint employment issue. Again, if I am fortunate enough to be confirmed, I will approach each case before me with an open mind.

Question 5g. Have you assisted the Department in developing priorities or policies pertaining to this issue?

Answer 5g. Staff from the Office of the Secretary is afforded the opportunity to review agency priorities and policies on a range of issues. I was one of many individuals at the Department of Labor who reviewed the Wage and Hour Division Administrator's Interpretation (2014-2) and fact sheet to help potential joint employers of home care workers determine their obligations under the Fair Labor Standards Act.

[Whereupon, at 11:15 a.m., the hearing was adjourned.]

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