

**NOMINATION OF LAUREN McFERRAN TO SERVE
AS A MEMBER OF THE NATIONAL LABOR
RELATIONS BOARD**

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

SECOND SESSION

ON

NOMINATION OF LAUREN McFERRAN TO SERVE AS A MEMBER OF THE
NATIONAL LABOR RELATIONS BOARD

NOVEMBER 20, 2014

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**NOMINATION OF LAUREN McFERRAN TO
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THURSDAY, NOVEMBER 20, 2014

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

The committee met, pursuant to notice, at 10:03 a.m. in room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Alexander, Mikulski, Murray, Casey, Franken, Warren, and Burr.

OPENING STATEMENT OF SENATOR HARKIN

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

We have convened this hearing to consider the President's nomination of Lauren McFerran to fill an impending vacancy on the National Labor Relations Board. Ms. McFerran is well known to most of us as a senior staffer on this committee, and I look forward to her speedy confirmation. She has been nominated to fill a vacancy that will result from the departure next month of a current Board member, Ms. Nancy Schiffer. And I would like to take this opportunity to thank Ms. Schiffer for her dedicated service on the Board. She has been a highly respected Board member, and I wish her every success in her future endeavors.

The National Labor Relations Board 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. The Act sets forth a national policy to encourage collective bargaining. A lot of people do not know that. The Act sets forth a national policy to encourage collective bargaining. And specifically the National Labor Relations Act states,

“It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for

the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

For 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 and benefits and for safe working conditions. These rights ensure that the people who do the real work in this country have a shot at receiving a fair share of the benefits when our economy grows, and with rising income inequality in our country, these rights are more important than ever.

The NLRB is the guardian of these fundamental rights. Workers themselves cannot enforce the National Labor Relations Act, but they can turn to the Board if they have been denied the basic protections provided under the law. In short, the Board plays a vital role in vindicating workers’ rights. In the past 10 years, the NLRB has secured opportunities for reinstatement for 22,544 employees who were unjustly fired. And it has recovered more than \$1 billion on behalf of workers whose rights were violated.

But the Board also provides relief and remedies to our Nation’s employers. For example, employers can turn to the Board for relief if a union commences a wildcat strike or refuses to bargain in good faith during negotiations. The NLRB has a long history of helping businesses resolve disputes efficiently. By preventing or resolving labor disputes that could disrupt our economy, the work that the Board does is vital to every worker and every business across the Nation.

That is why it is so important that we maintain a fully functional, five-member NLRB. I am proud of the fact that just a little over a year ago we were able to confirm members to completely fill the Board for the first time in over a decade. Now we need to fill a soon-to-be-open seat so that the Board can continue to function effectively.

Ms. McFerran is not the first nominee for this seat. In September, this committee approved the nomination of a dedicated public servant, Sharon Block. We, both Republicans and Democrats, agreed on Ms. Block’s reputation and qualifications, but her nomination was withdrawn in the face of circumstances totally beyond her control. As a result, Ms. Block will not have the opportunity to serve on the Board. Ms. Block is a tremendous public servant whose qualifications are unaffected and undiminished by the present circumstances, and I look forward to Ms. Block’s future service to our country.

I am heartened, however, by the President’s decision to nominate Lauren McFerran. Ms. McFerran currently serves as Chief Labor Counsel and Deputy Staff Director of this committee, the Senate Health, Education, Labor, and Pensions Committee. I am proud to have her as a member of our staff. She has served this committee with excellence and great professionalism since 2005. And I know firsthand the President could not have found a more able successor to Ms. Schiffer. Ms. McFerran is an incredibly talented lawyer with deep knowledge of labor law. She is a person of sterling integrity and strong character, and she will be a great asset to this Board.

It is my hope that by promptly confirming Ms. McFerran’s nomination to fill this pending vacancy, we can continue the progress

that has been made recently and begin a new era where orderly transitions on the NLRB are the norm. We should set a new precedent of confirming nominees, Democratic and Republican alike, in a timely manner.

I have no doubt that Ms. McFerran will do an excellent job in this important position. I look forward to her testimony today and to moving her nomination expeditiously through this committee and hopefully through the Senate floor.

I will turn to Senator Alexander for his opening statement.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you, Mr. Chairman. Welcome, Ms. McFerran.

I am glad the President withdrew his controversial nomination, and I hope his gesture of respect to the Senate is a new beginning. Ms. Block, about whom Senator Harkin talked, and her fellow appointee, Richard Griffin, were appointed unconstitutionally in January 2012. They chose to stay in their office and decide hundreds of cases after courts ruled their appointments were not legitimate. This created a great deal of confusion for the workers and employers who count on the Board to fairly and properly adjudicate their disputes. The 436 decisions issued between January 2012 and July 2013 were made invalid by the U.S. Supreme Court's unanimous ruling last summer that they were unconstitutionally appointed. Today there are 62 of those decisions still pending at the Board.

As Senator Harkin said, Ms. McFerran serves as Chief Labor Counsel and Deputy Staff Director for this committee. Chairman Harkin and I have some ideological differences, but no Senate committee has produced more legislation than ours has because we work together to get a result.

It is no secret that one of my biggest concerns about the National Labor Relations Board has been growing partisanship at the NLRB.

Mr. Chairman, rather than make an extensive statement, I would ask consent to put my complete remarks in the record.

Just to summarize my thoughts, as I look at Ms. McFerran, my hope will be that she will strive to be an impartial decisionmaker, which is what Board members are called upon to be. NLRB was, as the chairman said, created more than 75 years ago to be an impartial umpire in labor disputes that threaten the free flow of commerce and its decisions affect millions of private sector workers. Of course, too often it tilts toward the political leanings of the President who appointed the members. That is true with Democratic appointees; it is true with Republican appointees. But the trend has grown more pronounced recently.

I would like to see more stability at NLRB, and for that reason, Senator McConnell and I have introduced legislation that would turn the Board from an advocate for one side to an umpire, as it ought to be. It would help deal with the problem of partisan advocacy. It would deal with the problem of a free-wheeling general counsel. It would deal with the problem of a Board that has been too slow to resolve disputes. Last year, 109 cases—that is 30 percent of the Board's caseload—were pending for more than a year.

The way it would do that is to have a six-member board, three Republicans, three Democrats. Four would make a decision. It would rein in the general counsel by allowing businesses and unions to challenge complaints filed by the general counsel in Federal court. It would encourage timely decisions by saying that either party to a case may appeal to a Federal court of appeals if the Board fails to act within a year.

Our bill would offer these solutions without taking away any rights or remedies for any employee, business, or union. It is something I look forward to working on here in the next Congress. That is how important I believe the Board is.

Ms. McFerran, I look forward to hearing from you your thoughts on whether the Nation's workers and employers deserve stability from this important agency and why you are the best person to provide it.

Thank you, Mr. Chairman.

[The prepared statement of Senator Alexander follows:]

PREPARED STATEMENT OF SENATOR ALEXANDER

Thank you Mr. Chairman for holding this hearing on the nomination of Lauren McFerran to serve on the National Labor Relations Board (NLRB).

Ms. McFerran's nomination comes after the President last week withdrew his nomination of Sharon Block for the NLRB—for the second time. I'm glad the President withdrew that controversial nomination and I hope his gesture of respect to the Senate is part of a new beginning. I opposed Sharon Block's nomination twice before this committee. Sharon Block accepted an unconstitutional recess appointment. She was appointed by the President at a time the Senate was not in recess. This was not a matter of perspective, but of fact.

The D.C. Circuit case said the appointments were unconstitutional in January 2013. July 2013, the 4th Circuit Court of Appeals weighed in—also finding that the recess appointment of Ms. Block violated the constitution. This summer, the Supreme Court, in a resounding unanimous decision, found that the appointments were unconstitutional. Sharon Block and her fellow-appointee Richard Griffin stayed in office for 18 months and decided hundreds of cases long after it was clear that the appointments were likely illegitimate.

I believe this displayed a troubling lack of respect for the constitution, the separation of powers, and the Senate's constitutional role to advice and consent. It also created a great deal of confusion for the workers and employers who count on the Board to properly and fairly adjudicate their disputes.

The NLRB had hundreds of decisions to re-decide—436 decisions issued between January 2012 and July 2013 were made invalid by the U.S. Supreme Court's unanimous ruling last summer. Today, 62 of these decisions are still pending at the Board. So some of the mess left by the actions of Sharon Block and Richard Griffin remains—and it is something today's nominee will be sorting out, should she be confirmed.

Ms. McFerran currently serves as the chairman's Chief Labor Counsel and Deputy Staff Director. While Chairman Harkin and I

have some ideological differences, no Senate committee has produced more legislation than ours in the 113th Congress. So, Ms. McFerran, I have a great respect for your boss as we work together to get a result, despite some areas where we don't necessarily agree.

It's no secret that one of my biggest areas of concern has been the growing partisanship at the NLRB.

When looking at the nomination of an individual to serve as a member of the NLRB, I am interested primarily in whether they will serve as an impartial umpire, which is what they are called to be. The NLRB was created 79 years ago to act as an impartial umpire in labor disputes that threaten the free flow of commerce, and its decisions affect millions of private-sector workers.

However, the current NLRB has demonstrated a willingness to tilt the playing field toward organized labor, showing little interest in the rights of employers or individual employees who want to exercise their right to not join a union. The NLRB has become more and more partisan in recent decades. Policy reversals and dramatic shifts are becoming a regular expectation with each new administration.

We need to reverse this trend and move toward providing stability to our Nation's workplaces.

I am looking forward to hearing from you today whether you think the Board is an umpire or an advocate, and whether you think the proper role of a Board member is to serve as an impartial decisionmaker.

This is such a priority that in September Leader McConnell and I introduced legislation called the NLRB Reform Act to turn the Board from an advocate for one side or the other to the umpire it ought to be.

There are three significant problems the Board faces today:

1. This is the biggest problem: Partisan advocacy. Today, the majority of the five-member Board is made up of appointees who follow the President's political leanings. President Obama has appointed 3 labor union lawyers to the Board.

2. It has a freewheeling advocate for a general counsel. The Board's most recent general counsels have been exceeding their statutory authority and bringing questionable cases that threaten American jobs.

3. It's too slow to resolve disputes. Last year, 109 cases—that's 30 percent of the Board's caseload—were pending for more than a year.

Our bill provides three fixes:

1. It ends partisan advocacy. A six-member Board of 3 Republicans and 3 Democrats and a majority of 4 will require both sides to find a middle ground.

2. It reins in the general counsel. Businesses and unions would be able to challenge complaints filed by the general counsel in Federal district court, and they will have greater transparency about the basis and legal reasoning of charges brought by the general counsel.

3. It encourages timely decisions. First, either party in a case before the Board may appeal to a Federal Court of Appeals if the Board fails to reach a decision in their case within 1 year. Second, funding for the entire NLRB would be reduced by 20 percent if the Board is not able to decide 90 percent of its cases within 1 year over the first 2-year period post-reform.

Problems and Solutions

With each new administration, the pendulum has swung farther from the middle. The result is labor policy that whipsaws back and forth, taking employers and employees on a wild ride.

Problem: Under the partisan advocacy of today's Board:

Small factions of employees within single stores have a path to forming their own unions: In 2011, the Board suddenly adopted a new way to define what makes a local union bargaining unit. The Board changed the law so that any group of employees with an overwhelming community of interests could become a bargaining unit, and therefore a union.

At the same time, the Board is moving a regulation to limit the employer's ability to question which employees should be in a bargaining unit. This allows a union to cherry-pick employees who will be most likely to support forming a union.

How has this worked in the real world? The Board recently approved a bargaining unit of cosmetic and fragrance employees in a Macy's department store. Not the shoe salespeople, not the ladies fashion employees, not the juniors department—just cosmetic and fragrance.

Imagine if every department of the Macy's decided to form a union. The employer would have dozens of different groups to negotiate with, and the different unions would be fighting each other over who got the better raises, break rooms and terms of employment.

During this Administration, the NLRB has ruled that common employment policies are unfair labor practices, such as:

- Requiring employees to be courteous to customers and fellow employees.
- Prohibiting employees from making negative comments about the business that employs them on social media.
- Selecting arbitration for employment disputes.

Our Solution: This bill will solve this by requiring a six-member board of 3 Republicans and 3 Democrats. Like the Federal Election Commission, a majority of 4 will require both sides to find a middle ground.

Problem: The Board's general counsel acting like a freewheeling advocate, stretching Federal labor law to its limits, and sometimes beyond its limits. For example, the general counsel is allowing complaints about conduct of restaurant franchisee owners to be filed against the brand company.

For 30 years, under its joint-employer standard, the NLRB has taken the position that one business cannot be held liable for the employment-related matters of another business unless that business had direct control over the employees in question.

Now the general counsel and the Board appear to be preparing to change that standard in what can only be an effort to help labor unions add more members.

Imagine being an owner of a local franchise business and being told that all the employees that you recruit, hire, train, pay, promote, and work alongside day after day are actually another company's employees, too.

This won't just impact fast food—it will endanger the businesses of thousands of local franchise owners or subcontractors who are building the American dream as small business owners. In Tennessee, that's approximately 21,291 local franchise establishments employing nearly 224,000 workers that would be subject to the general counsel's absurd ruling.

Another example: In 2011, the general counsel moved to stop Boeing from building new airplanes at a non-union plant in South Carolina.

The general counsel jeopardized a \$1 billion factory and hundreds of jobs with this move, but even worse he tried to make the case that a unionized American company cannot expand its operations into one of the 24 States with right-to-work laws, which protect a worker's right to join or not join a union.

The general counsel withdrew the outrageous complaint against Boeing, but if it had set a precedent, jobs would have fled overseas as manufacturers looked for a competitive environment in which to make and sell cars around the world.

Our Solution: Our bill will allow employers and unions to challenge complaints filed against them in Federal court and give them new rights to learn the basis and legal reasoning of charges filed against them.

Problem: The NLRB is taking too long to resolve cases. For example, the NLRB recently issued a decision in a case involving whether CNN subcontractors were employees that had been pending for 11 years. (CNN vs. TVS)

Another case has been pending at the Board for more than 7 years. The case involves the question of whether an employer has to allow labor union organizers access to private property. (*Roundy's, Inc. vs. Milwaukee Building and Construction Trades Council, AFL-CIO*)

Our Solution: We encourage a timely resolution of cases—first by allowing either party to appeal to a Federal court of appeals for a de novo, or fresh, review if the Board fails to reach a decision on their case within a year.

Our bill, the *NLRB Reform Act* will:

- end partisan advocacy,
- rein in the general counsel, and
- encourage timely decisions.

And our bill would offer these solutions without taking away rights or remedies for any employee, business, or union.

This bill is something I look forward to working on here in the committee next year.

That's how important I think the Board is, and that's how important I think it is that the Board be a stabilizing force in our Nation's workplaces, rather than a destabilizing force.

Ms. McFerran, I look forward to hearing your thoughts on whether this Nation's workers and employers deserve stability from this important agency, and why you believe you are the best person to provide it.

The CHAIRMAN. Thank you, Senator Alexander.

Now I have the privilege of formally introducing Lauren McFerran today. It is rather odd. I am usually turning to her here to ask what I should be doing next.

[Laughter.]

And now to have you at the table.

As has been said, Ms. McFerran is presently the Deputy Staff Director and Chief Labor Counsel to this committee, which she has done for 9 years since 2005.

Prior to joining this committee, she was an associate at the law firm of Bredhoff & Kaiser for 3 years, was a law clerk for Chief Judge Carolyn Dineen King of the Court of Appeals for the Fifth Circuit.

She has her bachelor's degree from Rice University in Texas and her J.D. from Yale University.

Let me just add that I have known Ms. McFerran now, obviously, for 9 years working on this committee. She is everything you could want in a public servant: a keen mind, a legendary work ethic, and a very strong sense of justice and fairness. I know she will be an excellent addition to the NLRB. Lauren, thank you very much for being here and for taking on this task. I know you are going to do an excellent job there.

Your statement will be made a part of the record in its entirety, and if you could sum it up in 5 minutes, as you know we do around here, I would sure appreciate it. The floor is yours.

STATEMENT OF LAUREN McFERRAN, WASHINGTON, DC

Ms. McFERRAN. Chairman Harkin, Ranking Member Alexander, and members of the committee, I thank you for the opportunity to appear before you today as a nominee to serve on the National Labor Relations Board. For someone in my field, both appearing before this committee and being considered for a position on the Board are the highest of honors. I am deeply grateful and I am humbled to be here.

I would like to take a moment to introduce and thank my family. My husband Sam is here with me today, as well as my parents, Tom and Cathy McGarity. I am grateful today, as always, for their steadfast love and support. I have spared the committee the presence of my children, Brendan and Ryan, who are 4 years old and 5 months old, respectively. They are lovely children, but sitting quietly is not one of their strong suits. I am glad they are at daycare today and I thank the wonderful women at their daycare, without whom I certainly would not be sitting here today.

Finally, I realize that this is probably the last time that my boss, Chairman Harkin, will hold the gavel for this committee. So I hope that members of the committee will permit me a moment to speak on behalf of his HELP Committee staff. Everyone who knows Chairman Harkin knows that he is a tremendous leader, but only those of us who have been lucky enough to serve on his staff know what a tremendous boss he is. He wears his heart on his sleeve for

the issues that he cares about, and I can assure you he wears his heart on his sleeve for the people who work for him as well.

I have been blessed to work for two legendary Senators in my time on the HELP Committee. I never got the chance to thank Chairman Kennedy for all that he did for me. So I am glad to have that opportunity now with Chairman Harkin. It has been an honor and a privilege to work for you, and I thank you for giving me the opportunity to serve.

It is a bit surreal to be sitting here in this chair in the committee room after spending almost a decade sitting in the staff chairs behind you. But while the view is different from this angle, this room still feels like home to me. I have learned so much sitting in this room, and I think that those are lessons that will serve me well if I am confirmed to the National Labor Relations Board.

Perhaps the most important lesson that I have learned is that even people who have very different viewpoints can agree more often than you would think, and even when we disagree on some things, we can find common ground on others. Both of the chairmen that I have worked for and both of the ranking members that they have worked with have shared this philosophy. I believe it was Senator Enzi that referred to it as the 80–20 rule. We focus on the 80 percent that we can agree on and not the 20 percent that we do not. As Deputy Staff Director of the committee, I am deeply proud to have played even a small role in helping this committee to shepherd—in my written remarks, it says 20 but with the passage of CCDBG, it is now 21 pieces of bipartisan legislation to the President’s desk this Congress. We do not always agree on everything, but we can still get a lot of important work done.

I think what we often forget about the Board is that they operate largely on the same principle. The vast majority of the cases that come before the Board are decided unanimously by consensus. While there certainly are difficult issues where interpretations of the law will differ, those cases are the exception, not the norm. The bulk of the cases before the Board are not precedent-setting or groundbreaking, but they are critically important to the parties involved. And the Board’s role is to provide an efficient and fair resolution of the dispute so that everyone involved can continue working and doing business as usual. If confirmed, I would very much look forward to working on these cases with my colleagues on the Board. These cases are at the core of the important service that the Board provides for our country and for our economy.

A second important lesson I have learned in my time on the Hill is about the importance of listening. Some of the most significant meetings that I take as a staffer are with constituents or other stakeholders who disagree with what my boss is doing or who have concerns about a piece of legislation he supports. I always learn from these meetings and even when we do not come to a place where we eventually see eye to eye, my work and the legislation that I am working on usually improve as a result of these conversations.

If confirmed to the Board, I look forward to the opportunity to spend a lot of time listening, listening to my experienced colleagues on the Board, listening to the many stakeholders who care about the Board’s work, and especially listening to the amazing and dedi-

cated career staff at the Board across the country. The NLRB attracts some of the best and brightest staff of any agency I have ever worked with. These are immensely talented people who dedicate their lives to working at the Board because they believe in the importance of its mission. I welcome the opportunity to work with them and to learn from them, if confirmed.

Finally, I have learned in my time on this committee the critical difference between what you all do sitting up in those chairs and what I would do if confirmed to the Board. Your job is to advocate for changes in the law that you think will make people's lives better. It has been exciting and fulfilling to participate in that process for so much of my career. But I fully understand that, if confirmed, my job would change dramatically. The job of the Board is to interpret and implement the law as fairly and efficiently as possible. My role model in this work would not be the many talented legislators that I have worked with over the years, but instead the judge that I was privileged to work for during my time as a clerk on the Fifth Circuit Court of Appeals. Judge King—or Chief Judge King at the time—she would not want me to leave that out. She was a rule of law judge, first, last, and always. She never wanted a particular outcome in a case that was before her. What she wanted us to do as clerks was to help her get the answer right. That is the attitude and the approach that I would take if confirmed to the Board.

Again, I thank you for the opportunity to be considered for this critically important position, and I welcome any questions that you might have.

The CHAIRMAN. Thank you, Lauren. Ms. McFerran, thank you, and thanks for your kind words in my behalf. And let me reciprocate by saying that I am personally going to miss working with you. But I know you are going to be a great Board member at the NLRB.

We will start 5-minute rounds of questions here.

Lauren, one of the previous NLRB nominees we had before this committee some time ago described himself as not being pro-worker or pro-union or pro-employer, but rather being pro-Act. Do you consider yourself to be pro-Act? And if so, what does that mean?

Ms. MCFERRAN. Thank you for that question.

I absolutely do consider myself to be pro-Act. Any Board member's job is to approach the case before them impartially and objectively to resolve the dispute that is before them. It is not about who wins or who loses. It is about how that dispute should be resolved consistent with the language, the goals, and the purposes of the Act. So one's foremost consideration as a Board member should always be the Act and what it says and what its purposes and goals are.

The CHAIRMAN. A common misconception is that the National Labor Relations Act and the Board exist only to protect the rights of labor unions and union workers. Can you tell us a little bit more about how the Board protects the rights of non-union employees and how about employers? Why is a fully functioning Board critical for employers as well?

Ms. MCFERRAN. The Board is critical for employers because of its primary purpose, which is to provide stability in labor relations in this country. And an employer benefits just as much as workers do

from having a Board that is going to work efficiently and effectively to resolve disputes so that everyone can go about their business. When an employer has a contract with a group of employees and there is a dispute about how to interpret that contract, the Board plays a vital role in letting everyone say their position, get a decision, and move on with their business and with their lives. And the Board's role in that respect is absolutely vital to employers as well as to workers.

The CHAIRMAN. So you see as a critical role for you and for other Board members to work with employers and employees before the crisis becomes unmanageable, before it results in strikes and other types of things like that. And you see that as a proper function and role for the Board.

Ms. MCFERRAN. Absolutely. And in the statute, one of the purposes of the Act is, as I mentioned, to promote stability in labor relations. Contracts can provide that kind of stability, and when there is a dispute under the contract, the Board is there to help things continue to run smoothly.

The CHAIRMAN. I appreciate that because even recently we have had some cases of national prominence come up before the Board. There was a lot of political fire power on both sides of that for a period of time. But you ask people what happened today, and they do not really know whatever happened to that. Well, what happened is the NLRB sat down with the employers and the employees and the unions and got it all worked out and everything went ahead. So I think a lot of times people do not realize that this is a very powerful and important function of the NLRB. I thank you for your comments on that.

With that, I will now turn to Senator Alexander for the questioning.

Senator ALEXANDER. Thank you, Ms. McFerran.

Mr. Chairman, I spoke with Ms. McFerran ahead of time and from that end, she said the lights were very bright. That might be something she had not noticed when she was back here.

[Laughter.]

Ms. McFerran, Senator Harkin read from the Act. You talked about the Act. You talked about Judge King, I believe it was, who liked to read the Act and come to the right result. That is very encouraging to me.

The Act says,

“employees shall have the right to join unions,” but it also says, “they shall have the right to refrain from forming, joining, or assisting labor organizations to bargain collectively, or for any of those activities.”

And 24 States, including my own State, have what is called a right to work law which says if you work at the Saturn plant, which is a UAW partnership, you do not have to belong to the UAW to do that, although you may want to. Or if you work at the Nissan plant, you do not have to form a union or join a union.

This Board's general counsel sent a chill through our State when he ruled, in effect, that expanding Boeing's manufacturing work into South Carolina from Washington might be prima facie evidence of an unfair labor practice. That seemed to many of us undermining the right to work laws in our State.

Would you in your decision making uphold the right of employees in Tennessee and 24 States to refrain from joining the union as the law provides as well as the right to join a union?

Ms. MCFERRAN. As that right is articulated in section 7, absolutely.

Senator ALEXANDER. Senator Burr and I were student athletes. He was better than I was. He had a scholarship to Wake Forest. I was on the track team at Vanderbilt. But we both had that experience. And we went to the Senate floor pretty quickly after a decision was made March 26th by the NLRB Chicago regional director ruling that Northwestern University football players can unionize under the NLRB Act. That raised the prospect of Northwestern or Vanderbilt or Wake Forest recruiting a \$500,000 quarterback or a \$400,000 defensive end. It would destroy the concept of student athlete.

I was a member of the Knight Commission in 1991 when I was president of the University of Tennessee. This is a group of university presidents, Father Hesburgh, the head of North Carolina system, and many others. We said this: We reject the argument that the only realistic solution to the problems of intercollegiate athletics is to drop the student athlete concept, put athletes on the payroll, or reduce or even eliminate their responsibilities as students. 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.

Do you believe that a scholarship athlete at Vanderbilt or Wake Forest is an employee of the university?

Ms. MCFERRAN. Thank you for that question, Senator Alexander.

With respect, because that is an issue that is likely to come before me if I were confirmed to the National Labor Relations Board, it would be inappropriate for me to prejudge the resolution of that particular case. I will freely admit that I know very little about college athletics, and I would look forward to the opportunity to learn. I would talk to my colleagues on the Board. I would read the briefs. I would read the law, and I would learn as much as I could before rendering any decisions.

Senator ALEXANDER. I understand your answer, but I would hope you would talk to student athletes whether they have been scholarship athletes or non-scholarship athletes and who realize that if you are, say, at Vanderbilt University, it may be worth \$75,000 a year if you are a low-income student. About 40 percent of the students also have a Pell grant to help pay for their expenses. In addition to that, many of the athletic conferences are moving to change things so that student athletes have more coverage for expenses.

And the other side of the issue is that if you begin to move toward too much cost for student athletes at large universities, you then begin to undermine student athletes at smaller universities who cannot afford that, and you cut out a lot of programs, including women's programs which do not make enough money to pay for themselves and are supported by men's football.

So it is a complicated area. And all I can say to you is when that comes before you, I hope you will think carefully about the fact that "student athlete" is a valuable concept and that the univer-

sities are dealing with it and that the presidents are in charge of that, and that for the NLRB to move into a situation and suddenly destroy that experience for thousands and thousands of students would be a terrible mistake in my judgment.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Alexander. I cannot help just to say how I feel about things like that. I think the Ivies have got it right. The Ivy League schools have got it right. They just do not give sports scholarships. If I had my way, I would do away with all sports scholarships at any college anywhere in the United States.

Senator ALEXANDER. If I could just—

The CHAIRMAN. Sure.

Senator ALEXANDER. If you live in Ames, IA and you are 6 foot 7 and you weigh 260 pounds and you can run 40 yards in 5 seconds, you will get an awfully good academic scholarship to Brown.

[Laughter.]

And Harvard and Yale.

The CHAIRMAN. Academic scholarship. But still, it has to be an academic scholarship, not a sports scholarship. OK, we could get into that.

In order, I have Senator Franken, Senator Burr, Senator Murray, Senator Casey, Senator Mikulski.

Senator MIKULSKI. I think Senator Murray. Franken is not here. It is Murray.

The CHAIRMAN. Senator Murray I guess.

Senator MURRAY. Senator Mikulski has asked if she can go ahead of me.

STATEMENT OF SENATOR MIKULSKI

Senator MIKULSKI. No. I am not going to ask my questions. I am going to yield to Senator Murray. But because of the negotiations going on with appropriations, Mr. Chairman, I wanted to note my presence here and my support for Ms. McFerran's nomination. And I think we need a functioning NLRB.

Thank you very much, and I look forward to working with you on this side of the table when we are all at the table. Thank you very much.

The CHAIRMAN. Thank you, Senator Mikulski.

Senator Murray.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Good morning and thank you, Mr. Chairman. I really appreciate you scheduling this hearing so quickly so that we can process this critical nomination expeditiously.

Ms. McFerran, let me thank you for being here today and for answering the President's request to serve on this really vital Board. As you well know, as you talked about in your opening statement, from your years here in the Senate with Senators Kennedy and Harkin, the National Labor Relations Board is absolutely essential to our Nation, our workers, and our employers, let alone our financial markets and our very economy, all of whom really depend on a full functioning and effective Board.

Mr. Chairman, I also wanted to extend my thanks and respect to Sharon Block. She was a true public servant whom I really hold in the highest regard, and I really appreciated her willingness to serve. I want to express my personal regret publicly for how this entire ordeal unfolded. It has really saddened me and worried me to see this Board demeaned and politicized by some, and I really think she deserved better. And every American who, whether they know it or not, is impacted by this Board, and deserves better too. I just wanted to publicly say that.

But I am very grateful, Ms. McFerran, that someone of your high intellect and strong experience and keen sense of public duty and lifelong dedication to our Nation's labor laws is before us today. It has been good to work with you here with you behind us. I look forward to working with you once again when you join the Board.

Chairman Harkin talked about how this is a Board that is good for business and good for employees. And I appreciated your answer. But I also presume that in order for the NLRB to protect both employees and business, it needs to function properly, no political games being played, and get back to having orderly transitions. Would you agree with that?

Ms. MCFERRAN. Absolutely, Senator, and I thank you for the question.

The importance of orderly transitions for Board members is both symbolic and practical. Too often in the past, the Board has become something of a political football, and there have been long gaps or periods of time where seats have been empty and there has been the need for recess appointments and kerfuffling. We would all rather that not be the case and we would all rather there be an orderly and smooth transition between Board members both because it signifies the importance of what the Board does and the important role that the Board plays in our economy and also because it lets the Board do its job better.

I really appreciate the trouble that everyone has gone to to try to have an orderly transition here. We are entering what I feel like is a new era with the Board with the confirmation of the full five members. And starting a new precedent where transitions happen for Democrats, for Republicans in an orderly manner would be tremendously beneficial to both the Board and the administration of the law.

Senator MURRAY. And to employees and to businesses. We created this Board many years ago long before I was here to make sure that that could have a place that we could resolve issues expeditiously and in the best manner. So I hope we can move this forward quickly.

I did want to ask you if you could just explain how the Board is a voice in the issue of ensuring fair pay for all workers.

Ms. MCFERRAN. Absolutely. One thing that many people do not realize about the National Labor Relations Act is it does not just protect union workers and unions and employers. The Board protects every worker in this country. Section 7 rights, the right to join together collectively to speak up for better wages and working conditions is a right that every American has regardless of whether they are represented by a union or not. So in situations where there has been, for example, unequal pay for women, unequal pay

for people with disabilities, two workers who come together and say we think this is not fair, we think this is not right—they are protected in that activity by the National Labor Relations Act even if they have no idea what a union is and have never signed a union card. It is a critically important function that the Board plays and it is something that I hope every American can be aware of.

Senator MURRAY. Again, thank you for being here. Thank you for accepting this nomination and for your willingness to serve your country. I wish you the very best and I encourage our colleagues to quickly get this confirmation through.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray.

Senator Burr.

STATEMENT OF SENATOR BURR

Senator BURR. Thank you, Mr. Chairman.

Ms. McFerran, I heard what you just said. This is the responsibility of the National Labor Relations Board to protect those workers. Is it the responsibility of the Labor Relations Board to determine who their employer is or is it who pays their salary?

Ms. MCFERRAN. Thank you for that question, Senator.

The issue of how you define who an employer is under the Act is one that is very likely to come before me if I am confirmed as a Board member. So I would not want to prejudge that issue. I would be called on to interpret that definition if I was—

Senator BURR. This is a really, really important thing. And I did not ask you to make a ruling on the joint employment matter. What I asked you was, “is the person that the NLRB is responsible to protect employees from, the company that pays their check.”

Ms. MCFERRAN. Again, the question of who meets the definition of an employer under the Act is actually always a very fact-specific inquiry too. It is going to very much depend on the circumstances on the ground. There is a number of terms and conditions of employment that can implicate that question. So it is a difficult question to answer in the abstract.

Senator BURR. Let me tell you why this is important. Senator Alexander is right. I think the NLRB determination as it related to college scholarships is just ludicrous. But if you apply what the general counsel at NLRB is trying to do relative to joint employment, not only would the school be liable but the donors would be liable, the donors who gave to a college fund to fund the scholarships of the athletes. And I might say to Senator Harkin that it would be extremely easy to extrapolate this under that definition to say the academic scholarships that were awarded—those students are protected from the university and the university would also then, under this ruling, I think be extended to the donors to the university who would be potentially liable for the conditions that those students are under. This has incredible, incredible impact.

I have just one question of you. Do you believe there are any limitations to what the NLRB can do to determine how many people who do not actually pay the check are in the chain of liability for an employee?

Ms. MCFERRAN. If the issue were to come before me as a Board member, all I can pledge to you is that I would consider it with a very open mind. I would look at the arguments presented to me in the case. I would review the record. I would consult with my colleagues, and I would review the issue with a completely open mind.

Senator BURR. I appreciate that. Since I have a minute 53 left, I will continue to editorialize a little bit.

We have disagreements with determinations made by not just NLRB but other Government agencies, and when it is a Republican administration, I have just as many problems with some of them as Tom does as a Democrat—we go back and forth.

Where we are headed does not pass the smell test. It is going so far outside of what the public believes to be the responsibility of the NLRB. The claimed responsibility of Government that somebody that is not involved in the management, the contracting of an employment relationship, the payment of a check, the funding of the check is somehow in the chain of liability if in fact their employer makes the wrong decision has implications to economic growth that could be devastating in this country. It could have implications to higher education that means no student—no student—receives a scholarship. It is further than what Senator Alexander raised and that is that if this were to be enacted and student athletes under scholarship could unionize, I can tell you who the loser is. It is female sports. Because the money will flow out of Division 1 football, and it is Division 1 football that pays all of the scholarships for women. It is the only profitable sport out there other than ACC basketball by the way.

[Laughter.]

And I point that out to make the strong point that Senator Alexander and I feel, but also to say for gosh sakes, understand the implications of what you are getting ready to do because when you do this, you will never reverse it fully and the impact across our economy—and the U.S. economy is I think the greatest entrepreneurial, innovative economy in the world. And every day there is somebody coming out with something. Without the capital to create a network of businesses in 50 States, they franchise. And if you now say if you franchise, you are just as liable as the franchisee as the person that franchises from you even though you have no responsibilities to pay their employees, to manage their employees, to make the decisions on their employees, but you are in the chain of responsibility as it relates to the Labor Relations Board, I can tell you what is going to happen. We are going to kill franchise businesses in this country. And that right now is the employment engine of America. I want to rev it up. I do not want to kill it.

I thank you for being here. I thank the chairman.

The CHAIRMAN. Thank you, Senator Burr.

Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Ms. McFerran, good to see you. And I too want to thank you for agreeing to serve on the NLRB, which was created to protect Americans' rights. Over the years, though, vacancies on the Board have threatened the NLRB's ability to operate, which has a real impact on the lives of workers and employers.

Thank you also for your service to this committee. You have significant working experience on Capitol Hill to find consensus on both sides of the aisle. You have experience as a practicing lawyer at a law firm working on labor issues. In your testimony you referenced Senator Enzi's 80/20 rule, which is the idea that when working together, we should focus on the 80 percent we can agree on not the 20 percent we do not. Sometimes I call it the 64 percent rule because I think 80 percent of the time we agree on 80 percent. That was my attempt at a math joke.

[Laughter.]

I think you bring a wonderful perspective to the NLRB.

Could you expand on how your experience working on bipartisan legislation here in the Senate on this committee has prepared you to find common ground with other members of the NLRB?

Ms. MCFERRAN. Absolutely, and thank you for the question.

When I first came here as a staffer in 2005, I was assigned to work on a bill that was kind of midway through the development process called the Genetic Information Nondiscrimination Act. And it was a bipartisan bill and a bipartisan process. I learned a lot as a new staffer from being part of that process. I learned that sometimes when you want to do things in a bipartisan manner, things are going to take a little longer and that it is worth taking that time. I learned that sometimes if you do not have to reach an area of conflict, you do not have to reach an area of conflict and you focus on what you can agree on. I learned that nobody is going to get everything they want in the context of a negotiation. Every side is going to have to give so that we can find common ground and find a product we can all agree on.

I was really excited to be part of what was a pretty groundbreaking piece of legislation at that point and will always be proud that I was able to help get it to the President's desk.

Senator FRANKEN. I have asked previous nominees about the case of Susie Stetler from Elk River, MN who worked as a school bus driver. In 2012, the Board issued a decision, but her case has been in legal limbo as a result of the D.C. Circuit's *Noel Canning* decision. Today Ms. Stetler is still waiting on a decision on her case and for \$40,000 in back pay. I am sure there are many similar cases currently at the Board.

What effect do you think having a fully confirmed NLRB will have for individuals like Ms. Stetler and others with backlogged cases? What do you think will be the consequences for workers and employers if the NLRB does not have a fully confirmed Board?

Ms. MCFERRAN. Thank you for that question.

The importance of orderly transitions on the Board and maintaining a full component of Board members hopefully will help the Board in increasing the speed of its case processing. Nobody likes long delays in case processing. Nobody benefits from that. And that certainly is an issue that if I were lucky enough to be confirmed to the Board, appropriate to my role as a Board member, I would like to take a look at and work on. But certainly having a fully confirmed Board that has orderly transitions between members is a key part of that process.

Senator FRANKEN. Thank you.

The NLRB plays an important role in making sure that workers are able to exercise their collective bargaining rights. And according to the Pew Research Center, 64 percent of Americans agree that labor unions are necessary to protect working people. But in part due to broken election processes, union membership has declined. Today only 7 percent of private sector workers are represented by unions. This is important because being able to exercise collective bargaining rights in the workplace helps support middle-class jobs. According to the Economic Policy Institute, workers covered by a collective bargaining contract earn almost 13 percent more than those not covered, and union workers are more likely to have paid leave and other benefits that help put them on stronger financial footing compared to non-union workers.

Given the challenges that our economy is currently having and has had recovering from the recent recession and the frustratingly stagnant wage growth for middle-class workers, can you talk just a little bit about the role the NLRB plays in our Nation's economy?

Ms. MCFERRAN. Absolutely.

Again, one of the purposes of the National Labor Relations Act is to promote stability in labor relations, and when you have a contract in place and a functional relationship between an employer and workers where they know they can get those disputes resolved, where they all know what the rules of the game are, I think it can promote really good relationships between labor and management and the Board plays a critical role in helping that. And good relationships between labor and management often lead to smooth performance of an economy.

Senator FRANKEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Mr. Chairman, thank you very much. We are grateful that Lauren McFerran is before us today and we are grateful for your service on this committee, I guess under two chairmen. And we are grateful for that.

I wanted to talk to you a little bit about public service and about how important it is that one have experience in public service and experience working in a bipartisan fashion. I am always reminded, when we have hearings about the NLRB, about the foundational determinations that were made back in the 1930s and thereafter about why we have a National Labor Relations Act and the Board itself. And I may, before we are done, quote from the findings of the original Act about the purpose of the statute, one of them being to promote commerce so that we have labor-management relations or labor-management circumstances that will promote commerce. But we do not have a lot of time for the recitation of the history.

I wanted to ask you how you believe your, what I would argue, substantial and significant public service in the Senate on this committee working on very difficult issues in a status where you were on the minority staff and then you were also in the majority—how that experience will help you on the NLRB to be able to fashion the kind of compromises that are going to be important but also how that experience informs your ability to reach a bipartisan consensus where you can.

Ms. MCFERRAN. Absolutely and again thank you for the question. Two answers to that question actually spring to mind, and I hope I do not sound too self-serving when I say that one of the lessons that I have learned here on the Hill is the importance of good staffing. What I would be very, very fortunate to have at the Board is an amazing career staff of dedicated public servants. And they would be my first and most helpful resource in any question that was presented to me. These are people who, as I mentioned in my opening statement—brilliant people who have dedicated their lives to serving at this agency and to helping make this law function. And I have deep respect for the work that they do, for their service to this country, and I would use them as my primary resource.

Obviously, I would approach questions at the Board with an open mind and not with any prejudgment based on my policy work here on the Hill. Certainly the experiences that I have had on the Hill working collaboratively would illuminate my work there. One thing that I have learned in my role as Deputy Staff Director of the committee is that even when you do not agree on the substance of something necessarily, it is really important to have a visible, functioning, and cooperative process for this committee. And we have always tried, even when we agree and we do not agree, to have all of our practices and procedures of this committee work in a smooth, efficient, and bipartisan manner. And certainly that is something I would bring to the Board. There are going to be cases we disagree on but let us work together. Let us respect the process. Let us follow our own rules and let us do it right.

Senator CASEY. The other question I have for you is the role that the Board plays in two related issues, two very important issues for our country. One is the role that the Board can play in advancing economic growth and the related issue, of course, of strengthening the middle class which has taken a real beating over the last generation. Anything you can say about the impact of Board determinations and decisions on economic growth for the middle class.

Ms. MCFERRAN. Yes, absolutely.

Again, the role that the Board plays for the economy in promoting stable labor relations is absolutely critical. And for workers, the Board is the only recourse that they have to enforce their rights under the National Labor Relations Act. There is no private right of action under the Act. So the Board obviously plays an absolutely essential role in ensuring that workers who have engaged in protected activity under the statute can have their rights vindicated in the same way there are rights for employers under the Act and the Board is their only recourse as well in certain circumstances to, for example, stop a wildcat strike or something like that. So it is the only entity that both sides can sometimes go to to make sure that they are heard and to make sure that their disputes are resolved.

Senator CASEY. Thank you very much.

The CHAIRMAN. Thank you, Senator Casey.

Senator Warren.

STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman, and welcome, Ms. McFerran.

Before I begin my questions, I want to join others to take a moment to acknowledge Sharon Block, the previous nominee for the NLRB, and to thank her for her willingness to serve. Ms. Block has served this country at the Department of Labor, at the EEOC, at the National Endowment for the Humanities, and as senior labor and employment counsel. She is currently the senior counselor to Secretary Perez at the Department of Labor. She is a dedicated public servant, and I am disappointed that her nomination has been blacklisted by the Republicans. She did not get blacklisted because of the quality of her opinions, the quality of her work, but because she once served on the Board as part of a recess appointment that was perfectly legal and supported by decades of precedent and circuit court opinions at the time that it was made.

I understand that the Supreme Court later decided to change the law and invalidate her appointment to the Board, but I have no idea why the Republicans seem to think that this dedicated public servant should be blocked from further service to this country simply because of a technical change in the law that has nothing to do with Ms. Block's experience, her qualifications, or her dedication to this country.

And frankly, I think it is this kind of political nonsense that makes it easy to understand why good people would refuse to serve in any position that requires Senate confirmation, and I hope this is not a sign of how the Republicans intend to treat other qualified nominees in the new Congress. So under these very difficult circumstances, I am very pleased that Ms. McFerran is willing to serve.

The benefit of going last in the questions is that people have already had a chance to ask you many things that are important. The one that I want to give you is the chance to summarize. Ms. McFerran, you served on the HELP Committee for many years, which means you have been on the other side of this. You have vetted many nominees. So let me just ask you about what you think are your best qualifications for serving in this role and what you think you will bring to it.

Ms. MCFERRAN. Thank you very much and thank you for your kind words about Ms. Block.

I have learned so much from the people sitting in this room, from the members that I have been privileged to work for, from the brilliant fellow staffers that I have been absolutely privileged to work with, and from the people who have come to visit me, I think maybe most of all from the people who have come to visit me. A lot of people think that every meeting we take here is with some high-powered lobbyist or some big interest group, and every Iowan and every Massachusetts resident who has walked in my door and shared their problem and their story with me reminds me that when I am going to the Board, I am solving real problems for real people. And it is not about me. It is not about making grandiose policy statements. It is about solving those problems for those people and helping make their lives better. And that is what I would try to bring with me to the Board.

Senator WARREN. Thank you very much. I think that is an eloquent statement for what it is that government should always be about. So thank you very much. I trust that your nomination will

not be controversial, and I hope that we get you quickly confirmed in this spot.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Warren.
Senator Alexander.

Senator ALEXANDER. Ms. McFerran, I wanted to just comment about the joint employer standard a little bit and take this opportunity before you are a member of the NLRB. I will not ask you to comment on a case that might be before you, but I assume you would agree that buying a local franchise of a national brand is one of the main pathways to business ownerships for thousands of Americans.

Ms. MCFERRAN. I actually am not much of an expert on formations of business ownership, but if someone were to present that evidence to me before the Board, I would absolutely consider it.

Senator ALEXANDER. I would suggest that it is. I know in our State, for example, there are 21,291 local franchise establishments employing about 224,000 workers. And for a person without a lot of capital who wants to get started, a chance to be a franchisee is a chance to begin to make your way up the economic ladder and realize the American dream.

For 30 years, the NLRB has taken the position that one business cannot be held liable for the employment-related matters of another one. That is called the "joint employer standard." But on July 29th of this year, the NLRB general counsel authorized complaints against McDonald's USA, a franchisor, to hold it responsible as a joint employer for actions of local franchise business owners.

There are about 770,000 small business employers in America that own franchises. And what this could lead to saying by the NLRB is that if there is an unfair labor practice by one of those small business franchisees, that the franchisor, or brand company, would be liable. As Senator Burr indicated, that liability could be so great that it would wipe out the opportunity for a person to be a franchisee and destroy that opportunity for small business.

Tasty Delight is a frozen yogurt business in Franklin, TN. It has 100 local franchise business locations across the country. Let us take an example of a Tasty Delight franchise. At some point, you might have to decide as a member of the NLRB whether the company in Franklin should be responsible for an unfair labor practice by a local franchise business in St. Louis, MO. But to make decisions like that, you would have to begin to consider to what extent the franchisor controls what goes on in St. Louis. Does that have to do with what uniform the employees wear, the prices they charge for yogurt, the advertising they post around town, how long the operating manual is, what level of detail it includes?

I raise this simply to underscore what a breathtakingly important step it would be if the NLRB were suddenly to decide that a franchisor is responsible for the actions of a franchisee when it considers unfair labor practices. And I would hope that if a case like that comes before you, that you would be very careful in considering how these actions by the Board might chill this opportunity for literally hundreds of thousands of Americans to own a small business franchise.

Ms. MCFERRAN. I would.

Senator ALEXANDER. That is all I have, Mr. Chairman.

The CHAIRMAN. I do not mean to get too involved in this, but again it is a question.

I always wondered if you asked someone who worked in a McDonald's serving hamburgers, if you asked that person who do you work for, they would say McDonald's. They would not say Joe Smith or Lamar Alexander or somebody else who might own that franchise. They work for McDonald's.

Plus, there is some evidence—I do not know how much—that in a lot of these franchises that McDonald's actually is involved more heavily than what they say. One person who mops floors and does other maintenance work in Kansas City said the company executives visit as often as six times a year to tell the franchisee how to run their business and what to do and keep the standards up, I guess, so McDonald's looks good.

I do not know. I just do not know what the facts are in the case on this. I was looking at some of the stuff that Senator Burr gave me. It is interesting to note that since November 2012, 181 cases involving McDonald's were filed with the NLRB. 68 were found to have no merit; 43 moved forward. Investigation is still pending on others. So it is obviously not a clear-cut kind of thing. This is something again where it will go through the process.

I think there is always some confusion about how the NLRB operates. I just wrote it down here again for my own knowledge that the general counsel is really not part of the NLRB. He is not on the Board.

Ms. MCFERRAN. That is right.

The CHAIRMAN. The general counsel is sort of like what I think of, Senator, as a prosecutor. Well, the prosecutor has regional directors out there that may make findings, and then the general counsel can then get involved to settle the disputes, to work with the businesses to try to get it solved before it slips out of control. But then, sometimes the general counsel can bring a charge, and that goes to an administrative law judge. The administrative law judge makes the decision. Well, one side or the other, if they do not like it, can appeal it to the NLRB, and that is where the judges of the NLRB look at what the ALJ did. And as I am told, the NLRB can affirm, overturn, or modify whatever the administrative law judge did, and again, either party to that can then take it to the Federal courts. That is just sort of the process.

I think the fact that some were dismissed out of hand and some were pending, 68 were found to have no merit, 43 moved forward, it is, it seems to me, again fact-based. What are the facts of the situation? I can see some franchisees where there is a lot of distance between the franchisor and the franchisee and they are not involved in making sure their name is good and how they act and how they portray themselves to some that are heavily involved. So somewhere in there, there is probably a gray area. I have no idea where that gray area is, but that is why you have judges and that is why you have administrative law judges to make those decisions.

I think that rather than prejudging it, let the system work. It is like that Boeing case that was mentioned earlier. I referred to it. I just did not mention it by name. But that was settled. That was all settled. So the system worked. But, boy, before it was settled,

we had all kinds of political commentaries on it and people doing this political thing and going to do this and going to do that. But the system worked. And that is why I think we should not be prejudging something. Let the judges do their work. Let it go through the system. If at the end of all of this, we do not like what the district court did or the Federal or the Supreme Court did, we can change the law. That is why we have this system set up, and I think so far it seems to have worked pretty darned well for all these years.

That is just my observation. That is all.

Senator ALEXANDER. The only thing I would add to that, if I may, Mr. Chairman, is it is such an important question. I think we ought to be the ones who change it if it is changed. I think it ought to be a matter for Congress. There are 770,000 small business owners who call themselves franchisees in the United States. These are hardworking, independent small business people. And if you take a company—let us say Ruby Tuesday that has 800 or 900 restaurants in the United States. If we meddle around too much and confuse the liability too much, then all the Ruby Tuesday restaurants in the country will be owned by Ruby Tuesday and there will not be that opportunity 800 times over for a franchisee in a small town to own the restaurant. And the same for McDonald's and the same for Burger King and the same for all the others.

So there is a good reason to keep a clear, distinct line between a franchisor and a franchisee. And it is an enormously important engine for economic growth and advancement up the ladder in the United States. So I would prefer that if there is any change, that we make it, not the NLRB.

The CHAIRMAN. Fair enough. Fair enough.

I just remembered a court case we studied in law school—now, for me that has been a long time ago—about piercing the corporate veil, about how companies were hiding behind the corporate veil. And there was a famous Supreme Court case, which I cannot remember. Someone is going to tell me as soon as this hearing is over with. That case said you cannot hide behind this false veil of being a corporate entity. You still are liable.

And it seems to me that franchisees probably have a spectrum, those where the franchisor is very heavily involved in what the franchisee does, on the other hand, probably not involved at all. So somewhere in there, there are these gray areas in there.

I assume that at some point the Congress and the Senate will probably want to address this, depending on how it goes. I do not know. Maybe everybody will be happy with the outcome of this when they finally make their decision and work it out. Maybe everybody will say that is fine. We do not know that yet. I just say let the system work. I do not mean to go on about this.

I just want to say thank you. Thank you so much for your public service. Thank you so much, Lauren, for your work on this committee for all these years. You have just been wonderful. As I said, we are going to miss you, but we know you are going to perform admirably on the National Labor Relations Board.

I might just say for the record I have a picture with Brendan, but I do not with Ryan yet.

[Laughter.]

Ms. MCFERRAN. We will work on that.

The CHAIRMAN. I have to see Ryan before I leave here.

Ms. MCFERRAN. Thank you.

The CHAIRMAN. Thank you very much.

The record will be open for 5 days for comments. And questions for the record are due on Tuesday, November 25th.

I have not checked with Senator Alexander yet. We are going to work out a time to have a markup on this when we come back after Thanksgiving, but sometime shortly after we come back from Thanksgiving.

Thank you very much.

With that, the hearing will stand adjourned.

[Whereupon, at 11:10 a.m., the hearing was adjourned.]

